



Guardianship and Human Rights in Kyrgyzstan

Analysis of Law, Policy
and Practice



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



MDAC advances human rights.

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

Mental Disability Advocacy Center

Guardianship and Human Rights in Kyrgyzstan

Analysis of Law, Policy and Practice
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1. EXECUTIVE SUMMARY

This report is the first work of its kind to look in any depth into laws and practice relating to guardianship in Kyrgyzstan. Although MDAC managed to obtain an understanding of legislation impacting on the guardianship process, the opportunity to gain a comprehensive understanding of actual practice was denied to MDAC: as in most of the countries where MDAC carried out similar research, access to vital sources of information was refused on the grounds of confidentiality. Consequently, this report offers only an insight, albeit an important insight, into how the guardianship process fully works.

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

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

The outcome of this examination indicates that although the Kyrgyz Constitution provides for respect for the human rights of all people, 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 Kyrgyzstan is failing in its obligation to protect the rights of people under guardianship, indicating that reforms are required urgently. The most important of these findings are:

- Adults who are deprived of legal capacity in Kyrgyzstan 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

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.

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.

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

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 Kyrgyzstan. MDAC specifically urges the government to design and implement a National Disability Programme, and encourages the government to carry out its reform process in a way that actively involves and respects people with psycho-social disabilities (mental health problems) and intellectual disabilities, as well as their local and national organisations.

2. RECOMMENDATIONS

This report suggests that Kyrgyz guardianship law and practice fails to meet a number of the basic requirements of the international law of human rights. The lives of those people who are currently under guardianship in Kyrgyzstan could be significantly improved only if the government commits to further reform the legislative landscape and support those involved in implementing those reforms. With this in mind, MDAC makes below a number of recommendations to the Kyrgyz government, which if followed would bring the law and practice in line with basic international standards.

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

1. **Provide alternatives to guardianship:** The Kyrgyz government should require use of least restrictive alternatives that promote the independence as well as protect the adult by:
 - ⇒ Creating supported decision-making services. The establishment of such services can be made in the framework of a 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.
 - ⇒ Providing the right to create legally-binding advance directives (where an adult specifies his or her wishes in the event of future functional incapacity) and powers of attorney (where an adult specifies a person to take decisions in the event of future functional incapacity) (Indicator 26).
 - ⇒ Abolishing plenary guardianship (Indicators 20 and 27).
 - ⇒ Requiring that that guardianship is used only as a last resort (Indicator 26).

2. **Maximise autonomy:** The Kyrgyz government should ensure that adults subject to guardianship retain the right to make decisions in all areas of life in which they have functional capacity by:
 - ⇒ Removing the automatic ban on people under guardianship from exercising fundamental rights as the right to 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 in which an adult subject to guardianship retains his or her capacity to make decisions at all times (Indicator 20).
 - ⇒ Requiring guardians to seek the least restrictive living arrangements for adults. (Indicator 21).

3. **Improve procedures:** The Kyrgyz government should provide sufficient guarantees to ensure the right of adults to meaningful participation throughout the guardianship process from the beginning of the process and for as long as the adult is under guardianship by:
 - ⇒ Ensuring State-funded legal representation during all guardianship procedures, including appeals. Law should provide for a regular legal representation in guardianship cases, of a minimum standard that is provided in other areas of law (such as criminal law and mental health law) (Indicator 4).
 - ⇒ Introducing training to lawyers on the practicalities of the guardianship process and offering specialist training on how to represent clients whose functional capacity may be diminished (Indicator 4).
 - ⇒ Requiring guardians to regularly visit all adults for whom they are guardian, and to discuss all relevant issues with them. In the event of the adult not being able to express his or her wishes the guardian should be obliged to make decisions, and record such decisions, following the adult's previously known wishes and in line with the adult's known belief system and life narrative (Indicator 23).
 - ⇒ Removing the option of detaining adults during the process 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).

4. **Prevent abuse:** The Kyrgyz 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 Kyrgyz guardianship system by strengthening the protection of the human rights and interests of adults subject to guardianship. MDAC looks forward to engaging with the Kyrgyz 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.² The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world. It is widely accepted as a means of protecting individuals who are deemed incapable of managing their personal affairs as a result of a mental health problem (psycho-social disability), intellectual disability, degenerative disease or profound physical or sensory disability.

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

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

² The English language terminology used throughout this report was arrived at after much debate. Presumably, there will be, or already are similar debates in other languages. To help the reader understand the terminology in these reports, a brief glossary of terms can be found in Annex A.

³ Throughout this report, MDAC uses the term ‘legal capacity’, as defined in the Glossary at page 68. Different jurisdictions use different terminology to define the legal inability to act on one’s own behalf, such as, for instance, ‘incapable’ or ‘incompetent’. Some laws provide for a finding of partial or limited legal capacity.

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

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

Equal recognition before the law

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

⁴ Canadian Association for Community Living (CACL) report. Task Force on Alternatives to Guardianship, August 1992, available at: http://www.worldenable.net/rights/adhoc3meet_guardianship.htm.

⁵ See the Glossary at page 68 for a definition of supported decision-making.

bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

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

1.2 Researching Guardianship

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

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

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

1.3 Acknowledgements

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

student who also served as project assistant), Meder Dastanbekov (Kyrgyzstan), Anna Smorgunova (Russia), and Vidan Hadži-Vidanović (Serbia).

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

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

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

Research in Kyrgyzstan was carried out by Meder Dastanbekov who wrote the first draft. István Fenyvesi and Oliver Lewis produced the final report.

1.4 Method

1.4.1 Stage one: Legislative Review

Stage one of the research, the results for Kyrgyzstan of which 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 Kyrgyzstan of which are found in section 3 of this report, focuses on a *de facto*⁶ examination of guardianship practices within each target country by observing court hearings, reviewing court files and, to the extent applicable and possible, observing guardianship agency proceedings and reviewing guardianship agency files.

Because certain information is available only from those who participate in guardianship processes, 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 snap-shot of guardianship practices.

Ethical concerns are raised when conducting research that includes interviews of participants, some of whom have psycho-social (mental health) disabilities or intellectual disabilities. These concerns are about the privacy and the capacity of interviewees to understand the purpose of the research and to give informed consent to participate in it. MDAC has carefully considered the ethical issues that are raised by this aspect of research and has adopted guidance to protect the participants and the data they provide. Each researcher created a numerical system of maintaining information and stored the key and raw data in different locations. The guidance sets out standards for informing research participants about the voluntary nature of participation in the research, the right to refuse participation at any time, and the conditions of confidentiality surrounding the information which they provide.

1.5 Indicators for a Human Rights-Based Assessment of Guardianship

Throughout the project, MDAC has used 29 indicators against which legislation is analysed.⁷ These indicators are based in large part on the key document concerning guardianship and supported decision-making, namely the Council of Europe Committee of Ministers' Recommendation No.R(99)4 'Principles Concerning the Legal Protection of Incapable Adults.' Further indicators were derived from

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

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

the Recommendation's explanatory memorandum,⁸ as well as from a review of guardianship legislation in jurisdictions in Europe, the United States and Canada. MDAC has formulated its indicators bearing in mind that, with the exception of Kyrgyzstan, all countries under review have ratified the European Convention on Human Rights and, as Member States of the Council of Europe, there is an expectation that they will comply with its 'soft law',⁹ such as Recommendation No. R(99)4.

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

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

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

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

2. GUARDIANSHIP LAW AND POLICY IN KYRGYZSTAN

2.1 Introduction

The Kyrgyz Republic is a mountainous country in the heart of Central Asia. The country has borders with Kazakhstan, Uzbekistan, Tajikistan and China. The population of the Kyrgyz Republic as of January 1, 2005 was 5,120,500 people. Major religions include Islam, Christianity, and Buddhism; the majority of the population are Muslim.

The Kyrgyz people received national independence and sovereignty in a peaceful way after the breakup of the Soviet Union. On December 15, 1990 the Declaration of Sovereignty of the Republic was proclaimed, and on August 31, 1991 has been the day of the Declaration of Independence.

According to the Constitution, the Kyrgyz Republic is a sovereign, unitary and democratic republic that is based on the principles of a secular state.

The territory of the Kyrgyz Republic is divided into the following administrative-territorial units: 7 provinces (Batken, Chui, Issyk-kul, Jalalabat, Naryn, Talas, Osh), 40 districts, 22 cities, and 468 municipal administrations.

2.2 Demographic and Social Landscape of Kyrgyzstan

As of January 2005, there were 5,120,500 people living in the Kyrgyz Republic. Of these, 2,530,400 were men and 2,590,100 women. Of the total population, 1,722,091 people were under the age of eighteen.¹⁰

The number of registered people with mental health problems who received treatment or were in hospitals in 2003 was 57,089. Of those, 23,479 lived in cities, and 33,610 in rural areas.¹¹ According to the information provided to the researcher by the Ministry of Health in June 2007, since 2003 the number has increased to 59,010 people.

As of January 1, 2007, the following institutions were under the jurisdiction of the Ministry of Health:¹²

¹⁰ Demographic year-book of the Kyrgyz Republic 2000-2004, National Statistics Committee of the Kyrgyz Republic, Bishkek 2005.

¹¹ *Public Health in the Kyrgyz Republic*, statistical book, Bishkek 2004.

¹² Answer of Ministry of health of Kyrgyz Republic in July, 2007.

Institutions	Number of beds
National center of mental health (NCMH) in Bishkek	660
National psychiatric hospital in Chymkorgon	850
National psychiatric hospital in Kyzyl Jar	505
Osh oblast center of mental health	170
Batken oblast center of mental health	18
Hospitals with psychiatric departments:	
Naryn oblast combined hospital	15
Talas oblast combined hospital	15
Issyk Kul oblast combined hospital	15
Kyzyl Kia city territorial hospital	15
Mailusuu city territorial hospital	15
Leylek district territorial hospital	25

Table 1. Psycho-neurological care homes which are under the jurisdiction of the Ministry of Labour and Social Care (statistical data as of June 1, 2007)¹³

	Care homes	Number of people	Number of available places
1.	Belovodskiy psycho-neurological care home for children	300	255
2.	Jalalabatskiy psycho-neurological care home for children	110	120
3.	Jayilskiy psycho-neurological care home for women	212	260
4.	Ak Suuskiy psycho-neurological care home for women	188	296
5.	Tokmokskiy psycho-neurological care home No. 1 for men	275	300

¹³ Statistical data received from the Organizational Analytical Provision Department of the Ministry of Labour and Social Development.

6.	Tokmokskiy mixed psycho-neurological care home #2	161	180
7.	Kadamjayskiy mixed psycho-neurological care home	220	230

The majority of psychiatric assessments in civil cases are medical assessments on the capacity of adults before they make property transactions. The table below provides the percentage of guardianship cases from the overall number of civil cases:¹⁴

	2004		2005		2006	
	NCMH	Total	NCMH	Total	NCMH	Total
Psychiatric examinations conducted on civil cases	35	53	68	83	73	94
Percentage of these examinations which were guardianship cases	22-69%	27-50%	51-75%	12-14%	49-59%	57-61%

2.3 Kyrgyzstan's Legal System

The legal system of Kyrgyzstan is based on the Roman-German legal system, and is similar to the legal systems of other countries of the former Soviet Union countries. The legal system of the Kyrgyz Republic was shaped and developed as part of the Soviet state law. After gaining independence from the Soviet Union, Kyrgyzstan adopted some features of the French legal system as regards the state structure, as well as from the Russian legal system.

The Kyrgyz judicial system is based on the Constitution and laws, and consists of the Constitutional Court, the Supreme Court, as well as local courts.

Changes in the local self-government system started with the so-called 'perestroika', the transition period that began in April 1985. In 1990, the Law of the USSR on the general principles of local self-government was adopted. An important stage in the development of local self-government in Kyrgyzstan became the adoption of the law

¹⁴ Information provided by the Ministry of Health of Kyrgyz Republic to the MDAC as of July 19, 2007.

‘On local self-government’ on 19 April 1991, and the creation of a legal mechanism for decentralisation of the government. The most recent of these is the Law ‘On local self-government and local state administration’ which was adopted on 12 January 2002. According to this, the system of local self-government consists of local councils (keneshes), their executive-administrative bodies and bodies of territorial public self-government, and also of assemblies and meetings of citizens. Institutions of local self-government function in close interaction with the local state administration.

International treaties and agreements to which the Kyrgyz Republic is party come into force as prescribed by law and became a constituent part of Kyrgyz law. The international laws have a superior authority to domestic law. The Kyrgyz Republic is a party to several United Nations human rights treaties: International Covenant on Civil and Political Rights,¹⁵ International Covenant on Economical Social and Cultural Rights,¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination,¹⁷ Convention on the Elimination of All Forms of Discrimination against Women,¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,¹⁹ and Convention on the Rights of the Child.²⁰

The Ombudsman carries out control of constitutional rights through the powers given to him by the Law ‘On the Ombudsman of the Kyrgyz Republic’ of 31 July 2002. The Ombudsman is elected by the Parliament (Jogorku Kenesh) by ballot for a five-year term.

2.4 Guardianship Law in Kyrgyzstan

Guardianship is regulated by the Civil Code, the Civil Procedure Code and the Law on guardianship and tutorship.

The Civil Code provides the definition of legal capacity and defines when it can be limited or deprived. The Civil Procedure Code regulates the process of depriving an adult of legal capacity, and determines the procedure and order of applying, considering, and assessing the presented evidence, of making decisions and appealing court’s decision. The Law on guardianship and tutorship describes the obligations of the local authority in guardianship related issues.

The law in its modern form dates back to 1949 with the so-called legal instruction of patronage, guardianship and adoption of children left without parents. This law

¹⁵ Ratified on 7 January 1995.

¹⁶ Ratified on 7 January 1995.

¹⁷ Ratified on 5 October 1997.

¹⁸ Ratified on 12 March 1997.

¹⁹ Ratified on 5 October 1997.

²⁰ Ratified on 6 November 1994.

primarily regulated the obligations of the local authority affecting children under guardianship. In June 1974 a guardianship law was adopted which was in force until 8 April 2002, when the government annulled it. No new law was adopted, which created a lacuna in regulation between April 2002 and 1 August 2006, when the new guardianship law came into force. This law will be examined further in this report.

It is essential to note that on 31 July 2007, at the time of finalizing the report, an amendment related to guardianship issues was made to the Civil Code. Namely, a change was made in the area of determining the authority which appoints guardians and controls the decisions/actions of guardians. From now on, the Civil Code specifies a guardianship agency as a Department on family and children support and notes that it is a specialized department on the protection of rights and interests of children, and does not mention the protection of rights and interests of adults.²¹ It is also important to note that agencies with similar name were established in 2004, but in framework of State programme on realization of children rights in Kyrgyzstan entitled ‘New Generation’.

The recently adopted law repeatedly shows the indifferent attitude of the Government to issues related to the guardianship of adults leaving the care of incapacitated adults out of the activity of the newly established Department.

2.5 Kyrgyzstan’s Guardianship/Incapacity Process

Incapacity process consists of two separate steps:

- ⇒ Depriving an adult of legal capacity.
- ⇒ Appointing a guardian.

The first step is regulated by the Civil Procedure Code and carried out by a court. According to the Civil Code, ‘no one’s legal capacity can be limited except in cases prescribed by the law’.²² The first step of depriving an adult of legal capacity takes place when an applicant files an application to the court to deprive an adult of legal capacity.²³ On receiving such an application the court orders a psychiatric assessment. Then the court considers the evidence presented to it and makes a decision. The adult is presumed to have capacity throughout the court proceedings and therefore is, theoretically, entitled to procedural rights enjoyed by any other person. A prosecutor and guardianship officer should be present at the court hearing, even though they

²¹ Civil Code, art. 69 para. 1 (in edition of laws on 31 July, 2007)

²² Civil Code, art. 57.

²³ According to the Kyrgyz legislation, the process of finding an adult incapable can be initiated by family members, close relatives (parents, children, brothers and sisters) regardless of whether they lived together with the adult or not, the guardianship authority, prosecutor or psychiatric institution.

may be applicants in this process.²⁴ The court's role ends when it decides whether or not to deprive the adult of legal capacity.

If the court deprives the adult of legal capacity, the second step involves the appointment of a guardian. This is an administrative procedure conducted by the guardianship office of the local authority (known as the 'guardianship authority'). The guardianship authority has duties in connection with cases involving children and family issues as well as dealing with adult guardianship. Once the guardianship authority appoints a guardian, the authority must supervise the guardianship, which includes overseeing the activities of guardians and resolving disputes.

2.6 Human-Rights Based Assessment of Kyrgyzstan's Legislation

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

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

²⁴ Civil Code, art. 285.

2.6.1 Principles Running Throughout Legal Framework (Indicator 1)

Indicator 1	<i>Legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.</i>
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Conclusion: The Constitution and other laws provide for the equal treatment for all people, but they do not explicitly specify people with mental disabilities.

Analysis: The Kyrgyz Constitution states that ‘the dignity of individuals in the Kyrgyz Republic is absolute and inviolable’ and that ‘every person from birth is entitled to basic human rights and freedoms’. These rights are recognised as absolute, inalienable, and protected by law and the courts from infringement by any other person. The Constitution further states that everyone is ‘equal before the law and courts and no-one shall be subject to any type of discrimination, violation of his rights and freedoms, on the grounds of ethnic origin, sex, race, nationality, language, religious belief, or other conditions or circumstances of a personal or social nature’. Disability as a status is not specified in the Constitution, but it may be considered as falling within the definition of a condition of personal or social nature. There is no statement of purpose in any law relating to guardianship.

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.’²⁵

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.’²⁶ The WHO cites the Polish Mental Health Protection Act preamble as

²⁵ Recommendation R(99)4, Principle 1.

²⁶ 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.

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 [...]'²⁷ 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.'²⁸

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

Analysis: An application to deprive an adult of legal capacity should be lodged with the first instance district court. The law specifies those individuals who are eligible to lodge such an application.²⁹ They are: the adult's family members,³⁰ the adult's close relatives (parents, children, brothers and sisters) regardless of whether they live with the adult, the guardianship authority,³¹ the prosecutor,³² and a psychiatric institution.

The only foundation needed to support an application is that the adult must have a diagnosis of a mental disorder. The application should specify the type of mental

²⁷ 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.

²⁸ 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.

²⁹ Civil Procedure Code, Art. 282.

³⁰ The Civil Procedure Code allows the adult's relatives to initiate an application, but does not define who such relatives can be. According to the Family Code, family members are those who with whom the adult lives, is connected in a relationship with, and with whom the adult keeps a common household and budget.

³¹ Civil Code, Art. 69, para.1.

³² The law provides that the participation of the Prosecutor and Guardianship authority is obligatory in cases seeking to deprive an adult of legal capacity, regardless of whether the Prosecutor filed the application.

disorder, as a result of which the adult is unable to understand the meaning and significance of his or her actions or manage them.

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

‘The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.’³³

The Recommendation calls for ‘fair and efficient procedures for the taking of measures for the protection of incapable adults’.³⁴ Fairness in this context includes the provision of a law that clearly specifies who can submit applications.

The second factor, or specificity requirement – that a guardianship application must have some merit on the face of it – is necessary in order to protect the adult against malicious accusations of incapacity. In the case of *H.F. v. Slovakia*, the European Court of Human Rights examined the procedure leading to the deprivation of an individual’s legal capacity. This procedure was based on an application by the individual’s ex-husband and substantiated by a psychiatric report that at the time of the hearing was more than one year old. The court found a violation of Article 6(1) because, among other procedural defects, the Slovakian Court failed to secure sufficient evidence in light of Principle 12 of Recommendation (99)4 which requires an ‘up-to-date report from at least one suitably qualified expert’.³⁵ 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.

³³ Principle 11(1).

³⁴ Recommendation No. R(99)4, Principle 5(1).

³⁵ *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/>.

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: Law does not provide for the right of the adult to be notified of, and to be present and heard at, court hearings. Nor does law regulate the rights of adults in the procedure of appointing a guardian.

Analysis: The Civil Procedure Code mandates the attendance of the applicant, the prosecutor and the representative of the guardianship authority at legal capacity. The law is silent on whether the adult must be notified or attend.³⁶

In accordance with general legal provisions regulating notification of individuals participating in court cases, an adult participating in legal capacity proceedings should be notified about the place and time of the court hearings. The law states that the court may encourage the adult's attendance at the court hearings unless the adult's state of health prevents it.³⁷ In summary, notice is something that the court can give the adult, but it is not obliged to do so.

Articles that provide for the procedural rights of participating individuals in legal capacity deprivation process do not apply to the process of appointing a guardian, as appointment of guardianship is an administrative procedure. The rights to be notified, to be present, and heard in the process for an appointment of guardian are not provided for.

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.'³⁸ The Explanatory Memorandum to Recommendation No. R(99)4 reiterates the necessity of this procedural safeguard, citing the requirements

³⁶ Individuals, participating in a case – parties, third persons, prosecutor, individuals protecting others' rights or participating in a case for submitting expert reports, filing person and person concerned in special proceedings. Civil Procedure Code, Art.2, para. 6. In deprivation of legal capacity process an adult is person concerned.

³⁷ Civil Procedure Code, Chapter 32, Art. 285(2).

³⁸ 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.³⁹ 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’.⁴⁰

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.’⁴¹ 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 6.⁴²

Indicator 4	<i>An adult has a right to free and effective legal representation throughout guardianship proceedings.</i>
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Conclusion: There is no right to free and effective legal representation throughout guardianship proceedings.

Analysis: The Constitution states that every citizen has the right to qualified legal aid and protection of rights and freedoms. In certain cases specified in law, legal aid is provided for free,⁴³ but not for guardianship cases.

³⁹ 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.

⁴⁰ 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.

⁴¹ Principle 13.

⁴² 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.

⁴³ Constitution of the Kyrgyz Republic, ch. II, art. 40.

An adult, as any other person involved in a court case, has a right to have a representative in the proceedings.⁴⁴ This right is not the same as a state obligation – that is, the adult can pay for a lawyer to represent him or her, but the state does not provide a lawyer if the adult cannot afford one. From the moment the decision on deprivation of legal capacity comes into effect, only the adult’s guardian can represent the adult.⁴⁵

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.’⁴⁶ 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.⁴⁷ As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,⁴⁸ 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.’⁴⁹

Enforcing this requirement by providing effective legal representation is especially crucial when the person is alleged to lack capacity to represent him or herself.⁵⁰ 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:

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

⁴⁴ According to the Kyrgyz legislation, along with licensed lawyers any capable individual can act as a representative in civil cases if he or she has validated his/her authority in a notary office (by proxy). Civil Procedure Code, art. 54.

⁴⁵ Legal representatives of an adult are parents, foster parents and a guardian. Civil Procedure Code, art. 56.

⁴⁶ 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.

⁴⁷ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, para. 51.

⁴⁸ See UN Human Rights Committee, General Comment 13, para. 5.

⁴⁹ Principle 7.

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

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

Indicator 5

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

Conclusion: An adult can, in ‘exceptional’ circumstances, be detained to carry out an incapacity assessment.

Analysis: An adult can be detained in order for an incapacity assessment to be carried out only in exceptional cases.⁵² However, the law does not define what ‘exceptional’ means, a legislative oversight which allows courts to interpret the definition broadly.

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.’⁵³ 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 5.⁵⁴ In other cases, the Court additionally held that forced psychiatric examinations violate Article 6 (right to fair trial)⁵⁵ and Article 8 (right to respect for private and family life, home and correspondence)⁵⁶ 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.

⁵² Civil Procedure Code, Art. 284, para. 2.

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

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

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

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

Indicator 6	<i>An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).</i>
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Conclusion: Law gives adults in legal capacity proceedings the same procedural rights as in any other court case.

Analysis: Adults in legal capacity proceedings are theoretically entitled to all procedural rights specified in the Civil Procedure Code.⁵⁷ An adult has the right to familiarise him/herself with the case materials, to present and challenge evidence, to question witnesses of fact, expert witnesses and specialists, to provide oral and written explanations to the court, to offer own arguments to all issues, to express opinions on arguments presented by other parties, and to appeal court decisions.

Human Rights Standards: Recommendation No. R(99)4 states that ‘[t]here should be fair and efficient procedures for the taking of measures for the protection of incapable adults’.⁵⁸ This principle echoes Article 6(1) of the European Convention on Human Rights, which guarantees a fair hearing in all determinations of civil rights and obligations.⁵⁹ The ability for the parties in the case to challenge evidence with counter evidence and the right to present evidence, including calling witnesses, 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.⁶⁰ 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.

⁵⁷ Civil Procedure Code, art. 35.

⁵⁸ Principle 7(1).

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

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

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: Legislation requires an incapacity assessment before an adult is deprived of legal capacity. This should be conducted by a psychiatrist and need not be done in-person.

Analysis: On receiving an application to deprive an adult of legal capacity, the court is obliged to order an incapacity assessment of the adult. The legislation provides that an incapacity assessment may be conducted only by a psychiatrist.⁶¹ However, it does not say anything on the number of psychiatrist needed to carry out an incapacity assessment. The guidelines on forensic mental examinations state that an expert's conclusion must be based on facts obtained in the process of medical assessment and medical documents on the health history of the adult. Law and guidance do not mandate in-person assessments to be carried out.

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.⁶² 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.⁶³ 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.⁶⁴

⁶¹ Guidelines on forensic mental examination procedure in the Kyrgyz Republic, para. 12.

⁶² See Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

⁶³ Principle 12.

⁶⁴ *H.F. v. Slovakia*, op cit.

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

Indicator 8	<i>A finding of incapacity requires a demonstrable link between the underlying diagnosis and the alleged inability to make independent decisions.</i>
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Conclusion: Legislation does not explicitly require a demonstrable link between the adult's diagnosis and the alleged inability to make decisions.

Analysis: The law does not specify that there should be a link between the mental health diagnosis and the alleged inability to understand the significance of actions and/or control them. Instead, the law provides merely for these two elements (diagnosis plus ability to understand) to coexist. The guidelines on forensic mental examination procedures specifically indicate that the results of a medical assessment shall be based on the facts obtained by the expert in the process of examination of the adult.⁶⁵ The guidelines indicate that one of the objectives is to determine the mental condition of the adult.⁶⁶

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.

⁶⁵ Guidelines on forensic mental examination procedure in the Kyrgyz Republic, ch. 1.6.

⁶⁶ *Ibid*, ch. 1.1.

Indicator 9

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

Conclusion: Law does not specify what evidence the court needs in order to deprive an adult of legal capacity. There is no provision in law for the judge to weigh up whether depriving the adult of legal capacity actually serves the interests of the adult.

Analysis: Although the court is obliged to evaluate all the evidence presented to it during the hearings,⁶⁷ law fails to specify the type and quantity of evidence needed, allowing judges to rely almost exclusively on the incapacity assessment which is written by a psychiatrist.

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

Evidence must meet qualitative standards. Recommendation No. R(99)4 requires that judges should see the adult personally and that an up-to-date report from a qualified expert must be submitted.⁶⁸ 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.⁶⁹ 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’.⁷⁰ 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

⁶⁷ Civil Procedure Code, art. 71.

⁶⁸ Principle 12.

⁶⁹ *H.F. v. Slovakia*, Application No. 54797/00, judgment of November 8, 2005.

⁷⁰ Principle 8(1).

adult.’ For example, as employment is an important source of social interaction and self-esteem, guardianship may not be in the adult’s best interests if, as a result of it, the right to work is restricted. Such aspects should be thoroughly examined during proceedings in order to meet the necessity, subsidiarity, and proportionality requirements prescribed in Principles 5 and 6.

Indicator 10	<i>Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.</i>
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Conclusion: Legislation provides for objective criteria in the guardian selection process, but there is no sufficient regulation on the criteria evaluation. There are no specific regulations according to which the adult’s wishes and feelings need to be taken into account.

Analysis: Guardians should be adults with full legal capacity and parental rights.⁷¹ Selection of a guardian is supposed to be based on the person’s moral and other personal qualities, on the ability to perform the guardian’s duties, and the relationship between the guardian and the adult.⁷² The law, however, lacks specific regulations on how guardianship authorities should evaluate these things, allowing guardianship authorities to ignore them.

The wishes of the adult in the selection of the guardian are taken into consideration ‘if it is possible’,⁷³ but legislation sheds no light on what this means and how it is to be applied.

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’.⁷⁴ It also suggests that States take steps to ensure that qualified guardians are available, such as creating training associations.⁷⁵ 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.⁷⁶

⁷¹ Civil Code, art. 70(2).

⁷² Civil Code, art. 70(3).

⁷³ Civil Code, art. 70(3).

⁷⁴ Principle 8(2).

⁷⁵ Principle 17.

⁷⁶ 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.

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.’⁷⁷ 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.⁷⁸ Finally, Principle 9 of Recommendation No. R(99)4 provides that respect for the past and present wishes and feelings of the adult should be ascertained and given due respect. This principle applies to all stages of establishing and implementing guardianship, but it is particularly important in choosing the guardian.

Indicator 11	<i>The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict.</i>
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Conclusion: The legislation allows guardians to be appointed who have a conflict of interest with the adult.

Analysis: Law does not address conflicts of interest. It is possible, for example, for psychiatric institutions to be appointed as guardians of adults in the institution,⁷⁹ a situation where the guardian cannot exercise independent control and can gain financially from being the adult’s guardian.

Human Rights Standards: Conflicts between an appointed representative and the adult are not directly addressed by Recommendation No. R(99)4. Best practices from other countries includes France, where legislation directly provides that an ‘additional supervisory guardian’ is appointed who, among other duties, is designated to represent the adult when his or her interests are in conflict with the guardian’s interests.⁸⁰ 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

⁷⁷ Recommendation No. R(99)4, Principle 9(2).

⁷⁸ Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

⁷⁹ *Ibid*, art. 70, para. 4.

⁸⁰ 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.

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.⁸¹

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’.⁸² 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	<i>An adult has the right to appeal a finding of incapacity and/or the appointment of a guardian.</i>
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Conclusion: An adult has the right to appeal a finding of incapacity and the appointment of a guardian, because all such requests must be authorised by the guardian.

Analysis: An adult has a right to appeal the decision on deprivation of legal capacity, even if he or she did not participated in the proceedings. The adult may appeal the court’s decision within 30 days of the announcement of the decision. After the decision comes into effect after 30 days, the adult is officially deprived of legal capacity, and thus can only appeal the decision if the guardian agrees to do this.⁸³

An adult can – technically – appeal the appointment of a guardian.⁸⁴ However, the appeal must be made through the guardian, making this ‘right’ an absurdity.

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’.⁸⁵ 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

⁸¹ 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.

⁸² *Ibid*, Standard 16.

⁸³ Civil Procedure Code, art. 136.

⁸⁴ Civil Code, art. 70.

⁸⁵ UN Declaration of the Rights of Mentally Retarded Persons, Proclaimed by General Assembly resolution 2856 (XXVI) of 20 December 1971.

is at issue, by their personal representative or other individuals.⁸⁶ 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	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise political rights.</i>
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Conclusion: Adults under guardianship are deprived of the right to exercise significant political rights such as the right to vote.

Analysis: Law deprives people deprived of legal capacity of their rights to public service,⁸⁷ of the right to vote,⁸⁸ to be a member of a political party,⁸⁹ and to be elected.⁹⁰ The right to file petitions, that is, the right to appeal to a public institution, is regulated in the Law on Guarantees and Freedom of Access to Information,⁹¹ and until May 2007 in the Law on Procedure of Considering Proposals, Statements and Appeals of Citizens. Although earlier these laws did not specify any restriction to be applied to people deprived of legal capacity in enjoyment of the right to petition, in May 2007 the Kyrgyz Parliament amended the Law on Procedure of Considering Citizens' applications, Article 4 of which now states that appeals in the interest of and on behalf of people deprived of legal capacity can be submitted by legal representatives of adults (parents or foster parents for children, and guardians for adults) as well as guardianship authorities.

⁸⁶ 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).

⁸⁷ The Law on Public Service, art. 3.

⁸⁸ The Law on Referendum in the Kyrgyz Republic, Art. 3, and the Code on Elections, art. 3.

⁸⁹ The Law on Political Parties, art. 6.

⁹⁰ The Code on Elections, art. 3.

⁹¹ Law on Guarantees and Freedom of Access to Information, arts. 3 and 5.

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’.⁹² 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’.⁹³

Indicator 14	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.</i>
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Conclusion: An adult, incapacitated by the court, is automatically deprived of the right to work.

Analysis: Adults deprived of legal capacity are prohibited from working, and indeed employment contracts concluded with a person deprived of legal capacity must be declared null and void by the court.⁹⁴

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

⁹² 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.

⁹³ Recommendation No. R(99)4, Principle 3(2).

⁹⁴ Labour Code, art. 60.

with the outside world.⁹⁵ The European Social Charter (revised) also contains provisions protecting the right to work.⁹⁶ 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.⁹⁷ 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.⁹⁸

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

Conclusion: An incapacitated adult is automatically deprived of the opportunity to exercise the right to manage property.

Analysis: Legislation restricts adults who have been deprived of their legal capacity of the right to manage property. Law specifies that adults deprived of legal capacity may not exercise property rights directly, only through the guardian.⁹⁹

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.'

⁹⁵ *Niemietz v. Germany*, Application No. 13710/88, judgment 16 December 1992, (A/251-B) (1993) 16 EHRR 97, para 29.

⁹⁶ Article 15(2) of the European Social Charter (revised), Strasbourg, 3 May 1996.

⁹⁷ Recommendation No. R(99)4, Principle 6.

⁹⁸ Although not yet legally binding in Kyrgyzstan, the European Employment Framework Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC of 27 November 2000) requires legislation in EU Member States to prohibit discrimination in employment and training on grounds including disability. Specifically, see Articles 1, 2 and 5. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>, Accessed 1 June 2006.

⁹⁹ Civil Code, art. 64(2).

Recommendation No. R(99)4 follows this sentiment by recommending that ‘[w]henver possible the adult should be enabled to enter into legally effective transactions of an everyday nature’.¹⁰⁰ The Council of Europe returned to this theme in its 2006 ‘Action Plan to promote the rights and full participation of people with disabilities in society,’ which listed concrete measures to be taken by Member States. These measures included action ‘to ensure the equal right of persons with disabilities to own and inherit property, providing legal protection to manage their assets on an equal basis to others’.¹⁰¹

Indicator 16	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to marry, to found a family, and to respect of family life.</i>
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Conclusion: Adults who have been deprived of their legal capacity are automatically deprived of the opportunity to exercise the right to marry, to found a family, and to respect of their family life.

Analysis: Kyrgyz law prohibits marriage if one of the parties has been deprived of legal capacity.¹⁰² Such a marriage can be dissolved by means of an application by the guardian.¹⁰³

In affiliation cases the identification of paternity in which an adult deprived of his or her legal capacity is involved is allowed only with the consent of the guardian or the guardianship authority.¹⁰⁴

Adults deprived of legal capacity are also not allowed to be foster parents, and may be denied the right to raise their own children.¹⁰⁵ Children can be automatically removed from a parent deprived of legal capacity, and be placed for adoption without the parent’s consent.¹⁰⁶

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home and correspondence. This imposes on States a negative obligation not to interfere with, as well as a positive

¹⁰⁰ Recommendation No. R(99)4, Principle 3(4).

¹⁰¹ 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).

¹⁰² Family Code, art. 15.

¹⁰³ *Ibid*, arts. 17, 20.

¹⁰⁴ *Ibid*, art. 51(5).

¹⁰⁵ *Ibid*, art. 133.

¹⁰⁶ *Ibid*, art. 136.

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’,¹⁰⁷ and that ‘[p]ersons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood’.¹⁰⁸

Indicator 17	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.</i>
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Conclusion: Adults deprived of legal capacity are automatically deprived of their right to associate, or to establish unions, but are given the right to be a member of non-profit organisations.

Analysis: Legislation specifies that founders of non-profit organisations¹⁰⁹ should be legal entities and individuals with full legal capacity.¹¹⁰ This law contains a clear prohibition of adults deprived of legal capacity from establishing an association,¹¹¹ but the law is unclear about establishing public foundations in that it uses the term legally ‘able’ (not ‘capable’, which means with full legal capacity).¹¹² Law also prohibits adults deprived of legal capacity from establishing trade unions.¹¹³ Adults deprived of legal capacity may be members of non-profit organisations¹¹⁴

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

¹⁰⁷ 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.

¹⁰⁸ *Ibid*, Rule 9(2).

¹⁰⁹ Non-profit organization is all legal entities, the main purpose of which is not related with profiting, and which do not share profit earning between the members.

¹¹⁰ Law on Non-Profit Organizations, Art. 2 – General definitions.

¹¹¹ Public association is voluntary association of citizens, associated on the basis commonness of their interests for satisfaction spiritual and other non-material needs. *Law on non-profit organizations, art. 2.*

¹¹² Law on Non-Profit Organizations, art.23.

¹¹³ Law on Trade Unions, art. 2.

¹¹⁴ *Ibid*, art. 2 – General definitions.

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.¹¹⁵ It is difficult even to imagine a scenario in which restricting the rights of people under guardianship to associate would be ‘necessary in a democratic society.’ A blanket ban on doing so almost certainly violates binding international human rights law.

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

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

Indicator 18	<i>A person under guardianship is not precluded from making decisions in those areas where he/she has functional capacity.</i>
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Conclusion: Deprivation of legal capacity restricts an adult in making decision in all areas of his or her life. There is no partial guardianship in Kyrgyzstan.

Analysis: Kyrgyz legislation allows for only plenary guardianship. Thus, an incapacitated adult who is placed under guardianship is restricted in making decisions practically in all spheres of life.

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

¹¹⁵ *Sidiropoulos v. Greece*, Application No. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

act without requiring the appointment of a representative or a representative with continuing powers'.¹¹⁶ Principle 3 recommends that legislation should allow for a maximum preservation of capacity:

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

In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.

Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative’s consent, to undertake specific acts or acts in a specific area.

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

A best practice example could be from France, where legislation successfully incorporates this principle. When establishing guardianship in France, the judge may list transactions that an adult may undertake independent of the guardian. A medical expert must be consulted when the judge assesses those tasks the decision-making of which the adult will retain.¹¹⁷ 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 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.’¹¹⁸

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

¹¹⁶ Recommendation No. R(99)4, Principle 2(5).

¹¹⁷ 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).

¹¹⁸ Uniform Guardianship and Protective Proceedings Act (1997), art. 3, para. 313(a).

Indicator 19	<i>An adult subject to guardianship must be consulted about major decisions, and have his/her wishes adhered to whenever possible.</i>
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Conclusion: There are no legal obligations for a guardian to consult the adult concerning decisions and actions.

Analysis: Kyrgyz law does not require that the wishes and feelings of an adult under guardianship should be considered when the guardian makes a decision or takes action on behalf of the adult. The only case when the wishes of the adult can be considered, if it is possible, is in the procedure appointing a guardian.¹¹⁹ According to the Civil Code, the guardian can make decisions and take actions without the consent of the adult or the guardianship authority in matters related to the everyday life of the adult. However, any decisions related to property should be made only with the consent of the guardianship authority.

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.¹²⁰ 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'.¹²¹ 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'.¹²² 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'.¹²³

¹¹⁹ Civil Code, art. 70.

¹²⁰ 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.

¹²¹ Principle 9(1).

¹²² Principle 9(3).

¹²³ 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: After an adult has been deprived of his or her legal capacity and placed under guardianship, there is no limitation of the scope of authority of the guardian.

Analysis: An individual appointed as guardian for an adult deprived of legal capacity is by law empowered to take all decisions on behalf of that adult. The guardian decides all important matters, such as where the adult will be live (including detaining the adult in a mental health or social care institution), whether and where the adult should be educated, whether and where the adult should be treated for medical or mental health conditions, what leisure activities the adult can engage in and with whom the adult may socialise.

Human Rights Standards: Domestic legislation should provide clear direction to the authority determining capacity to define the scope of the individual guardian's obligations in light of the particular adult's capacity. Recommendation No. R(99)4 encourages countries to take a flexible approach, noting that '[t]he measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations'.¹²⁴ 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.'¹²⁵

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'.¹²⁶ 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,¹²⁷ consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.¹²⁸

¹²⁴ Principle 2(1).

¹²⁵ Principle 3(1).

¹²⁶ The Finnish Guardianship Services Act, 442/99, para. 8(3).

¹²⁷ *Ibid*, para. 34.

¹²⁸ *Ibid*, 442/99, para. 29.

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: A guardian is not obliged to promote the interest, welfare and independence of an adult by seeking the least restrictive alternatives in living arrangements.

Analysis: While the legislation on children’s guardians contains a requirement to live together with the child, the law is silent concerning the obligations of guardians appointed for adults. The guardian can determine where the adult should live, and there is no requirement in the law according to which the guardian must seek the least restrictive living alternative. Legislation specifies obligations of the guardian that are related only to the care of the adult and his or her medical treatment. The law mandates guardianship authorities to inspect the social adaptation of the adult.¹²⁹ The guardianship authority’s officer writes a report, and if there are shortcomings the report offers recommendations to overcome the problems.

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

Article 19 – Living Independently and Being Included in the Community

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

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

¹²⁹ Guardianship Law, part VI.

- ⇒ Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.¹³⁰

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’.¹³¹ Each person has ‘the right to be treated and cared for, as far as possible, in the community in which he or she lives’.¹³² 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’.¹³³ 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.¹³⁴

Indicator 22	<i>The guardian must manage the assets of the adult in a manner that benefits the adult under guardianship.</i>
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Conclusion: The Kyrgyz legislation requires that the guardian should manage the assets of the adult in a manner that benefits the adult.

Analysis: Law specifies that the guardian must manage the adult’s assets in a manner that benefits the adult.¹³⁵ The adult’s income should be spent in such a way that benefits and satisfies the needs of the adult. Legislation specifies that the guardianship authority should give its consent before the guardian conducts property transactions, but the law is unclear on both the form of consent and on the level of property transaction for which guardianship authority consent it needed.¹³⁶

¹³⁰ 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.

¹³¹ 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.

¹³² Ibid, Principle 7, Role of community and culture.

¹³³ 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).

¹³⁴ Principle 6(2).

¹³⁵ Civil Code, art. 72(1).

¹³⁶ Civil Code, art. 72.

Additionally, should the guardianship authority find it necessary to ensure that the management of the valuable assets of the adult be managed in such a way as to exclude the possibility of abuse, the guardianship authority may conclude an asset management contract with another individual.¹³⁷

Also, with the purpose to exclude abuse and protect the property interests of the adult, legislation¹³⁸ specifies those transactions which guardians cannot engage in on behalf of the adults. For instance, the guardian has no right to engage in transactions with the adult, or to represent the adult in transactions, or in court proceedings in which the two parties are the adult and the spouse of the guardian and/or the guardian's close relative.¹³⁹ But legislation is silent about the provision of representation for the adult in such cases.

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'.¹⁴⁰ 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'.¹⁴¹ 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'.¹⁴²

Indicator 23	<i>The guardian is obliged to visit and confer with the adult periodically.</i>
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Conclusion: There is no requirement for guardians to visit and confer with the adult.

Analysis: There is no requirement in the Kyrgyz legislation that the guardian must periodically visit the adult under guardianship, or confer with the adult about any decision.

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

¹³⁷ *Ibid*, art. 73.

¹³⁸ Civil Code, art. 72(2).

¹³⁹ Civil Code, art.72, para. 3.

¹⁴⁰ Principle 8(3).

¹⁴¹ Principle 20(1).

¹⁴² 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.

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.¹⁴³ 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'.¹⁴⁴

Indicator 24	<i>A guardian's decisions are periodically reviewed by an objective body and the guardian is held accountable for all decisions.</i>
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Conclusion: A guardian's decisions are periodically reviewed by the guardianship authority, and the guardian is accountable for all his decisions.

Analysis: Guardians are obliged to submit a report for the previous year to the guardianship authority on the management of the adult's assets no later than by 15 February each year.¹⁴⁵ The guardianship authority may additionally request the guardian to submit a report before the end of the annual period. As the legislation does not require reporting on any specific issues, the content of the report is not regulated by law. This gives a possibility of cursory reports to be accepted by the guardianship authority. However, law does give the guardianship authority the power to submit an explanation and documents to support the report if it is unsatisfied with the quality or contents of the report.¹⁴⁶ The Code on Administrative Responsibility provides for the accountability of the guardian in actions that are considered harmful to the adult, or in cases when the adult is left without care and necessary financial aid. Legal sanctions in such cases may involve an imposition of an administrative fine in an amount ranging from ten to twenty specified units.¹⁴⁷ Each unit at the time this report was published was an equivalent of around two euro.¹⁴⁸

¹⁴³ See Principle 9.

¹⁴⁴ The Uniform Guardianship and Protective Proceedings Act (1997), para, 313(b)(i).

¹⁴⁵ Law on guardianship and tutorship, para. 18.4.

¹⁴⁶ Law on guardianship and tutorship, para. 18.5.

¹⁴⁷ Code on administrative responsibility, art. 66.

¹⁴⁸ Parliament Decision #1115-III of 15 June 2006.

There is no provision for the adult to participate in this process, and there is no legal requirement that the adult should be informed of, or receive a copy of, the guardian's report.

In accordance with the new regulations on guardianship and tutorship, the guardianship authority shall inspect the following activities of a guardian twice a year: general care of the adult, the adult's educational and social adaptation, how effectively the guardian organises the necessary life conditions for the adult, his or her medical treatment, the protection of the adult's rights and interests, and the management of the adult's assets. Guardianship authority officials are supposed to carry out inspections.

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'.¹⁴⁹ 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'.¹⁵⁰ 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	<i>A complaint procedure exists that triggers review of guardian's acts or omissions.</i>
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Conclusion: Legislation does not provide for a complaints procedure to initiate a review of the guardian's actions and decisions.

Analysis: The new guardianship law specifies the power of the guardianship authority to consider complaints related to the guardian's actions.¹⁵¹ However, the legislation does not specify who can make such a complaint, nor does it specify the procedure of such complaints.

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

¹⁴⁹ Principle 16.

¹⁵⁰ Principle 20.

¹⁵¹ Guardianship Law, para. 8.1.

of the recommended ten basic principles of mental health law. The components of the review, according to the WHO are availability, timeliness, accessibility to the individual concerned and an opportunity for the adult to be heard in person.¹⁵²

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.¹⁵³

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

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

Indicator 26	<i>Less restrictive alternatives to guardianship are available and are demonstrably exhausted before a guardianship is imposed.</i>
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Conclusion: Plenary (all-encompassing) guardianship is the only available legal measure for adults who need assistance in making decisions.

Analysis: Legislation states simply that if an adult, because of mental disorder, is unable to understand the significance of his or her actions or is not in control of them, the adult should be deprived of legal capacity and placed under plenary (all-encompassing) guardianship. There are no forms of supported or assisted decision-making models in Kyrgyzstan, nor is partial guardianship available.

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

¹⁵² 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.

¹⁵³ See, e.g., Alaska Stat. §13.26.125 (Bender 2005).

the principle of minimum necessary intervention, or the least restrictive alternative. It suggests that an adult should not be placed under guardianship unless other less formal arrangements have been exhausted. A best practice example of legislation that meets the standard set out in this indicator can be found in Canada. The Manitoba Vulnerable Persons Living with a Mental Disability Act specifies that a substitute decision maker may not be appointed before it is determined whether the individual has a support network and ‘reasonable efforts have been made to involve the support network’.¹⁵⁴ 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.¹⁵⁵

Indicator 27	<i>Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.</i>
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Conclusion: Only plenary guardianship is available, which is an all-encompassing blanket guardianship which ignores the adult’s functional capacity. No tailor-made approaches are available.

Analysis: There is no provision in Kyrgyz law to assist a person with disability to make decisions only in some aspects of life, or for support persons to be appointed to assist adults to make decisions. Law recognizes only plenary guardianship, and if an adult is deprived of legal capacity, he or she is automatically placed under plenary guardianship and, as noted elsewhere in this report, all rights are removed.

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.¹⁵⁶

¹⁵⁴ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, paras. 49(a)-(b) (1993).

¹⁵⁵ *Ibid.*, ch. 29, para. 50(2). This approach is also followed in other Canadian jurisdictions. For example, in Ontario a court cannot appoint a guardian to take care of an adult’s property unless an alternative course ‘less restrictive to the person’s decision making rights’ is unavailable. (Mental Health Act, S.O., ch. M.7, para. 33.1 and para. 33.7 (1990); Substitute Decisions Act, S.O., ch. 30, para. 22(3) (1992)). Similarly, in Yukon, the court cannot appoint a guardian unless ‘forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.’ Adult Protection and Decision Making Act S.Y. ch. 21, Schedule A, §32(1) (Yukon).

¹⁵⁶ 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’.¹⁵⁷ 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.¹⁵⁸

Indicator 28	<i>Guardianship is periodically reviewed and continues only as long as appropriate.</i>
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Conclusion: There are no periodic reviews of guardianship.

Analysis: Kyrgyz legislation does not provide for periodic reviews of the necessity of guardianship. No duration of guardianship orders are specified in the law. Technically if the original reasons for guardianship cease to exist, there is no need for guardianship. However, it is difficult for the adult to lift guardianship because only the guardian, the adult’s relatives, the psychiatric institution, the guardianship authority, and the prosecutor have the legal right to apply to court to lift guardianship.¹⁵⁹ The adult has no such right.

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.¹⁶⁰ 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’.¹⁶¹

¹⁵⁷ Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

¹⁵⁸ 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.

¹⁵⁹ Civil Code, arts. 75 and 287.

¹⁶⁰ Recommendation R(99)4, Principle 14.

¹⁶¹ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on December 17, 1991, Principle 1(6).

Indicator 29

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

Conclusion: The adult has no right to request termination of guardianship or change of a guardian in court. Modification of guardianship is not possible because plenary (all-encompassing) guardianship is the only type available.

Analysis: A decision on guardianship cannot be modified because there is no other type of arrangement available, as there are no other mechanisms for adults deprived of legal capacity. An adult under guardianship has no legal capacity and therefore no legal standing to request termination of guardianship.¹⁶² This can only be done through the guardian, for whom the guardianship arrangement may be convenient or financially beneficial. The legislation does not specify directly the right of the adult to appeal the appointment of a guardian, an adult can appeal it only as a ‘concerned party’.¹⁶³

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 is thus falls under the protection of Article 6.¹⁶⁴ 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.¹⁶⁵ 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.

¹⁶² Concerning the termination of guardianship there is a contradiction between the Civil Code and the Civil Procedure Code on who can initiate a capacitating procedure. According to Article 287 of the Civil Code, court proceedings on lifting guardianship can be initiated by the guardian and the guardianship authority. However, the Civil Procedure Code states that such proceedings can be initiated by the guardian, the adult’s family members, the adult’s close relatives, the psychiatric institution, the guardianship authority and prosecutor. The right of an adult to request a termination of guardianship is contained neither in the Civil Code nor the Civil Procedure Code.

¹⁶³ Civil Code, art. 70(1).

¹⁶⁴ Winterwerp v. the Netherlands, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979) 2 EHRR 387.

¹⁶⁵ Matter v. Slovakia, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32.

3. GUARDIANSHIP PRACTICE IN KYRGYZSTAN

3.1 Aims and objectives

The principle objective of this part of the research was to gain an understanding of guardianship practice in Kyrgyzstan. To do this MDAC sought to:

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

3.2 Methodology

Given the limits in the available information on guardianship practice in Kyrgyzstan, MDAC sought to collect as much relevant information as possible and from a broad range of sources. Methods were to include national databases, in-depth case studies, review of case files, observation of court hearings, and interviews with people under guardianship, their guardians, relatives and professionals. It was hoped that specific cases could be followed from the initial application, through the court hearing and for a period thereafter. To obtain a broad but representative overview of the situation, MDAC researcher based in Kyrgyzstan, sought access to a range of courts and authorities. This part of the research was conducted between October 2006 and February 2007.

MDAC co-operated with first instance courts in Bishkek and in the second largest city Osh, with guardianship authorities in Bishkek and Osh, expert psychiatrists of the National Centre of Mental Health, practicing lawyers (case guardians), prosecutors, the National Statistics Office, the Ministry of Health, the Ministry of Labour and Social Care, the Supreme Court, the Court Department of the Ministry of Justice, and other public agencies.

In early 2006, MDAC developed data gathering sheets for its team of in-country researchers who then used these data gathering sheets to record data, examine court case files, guardianship authority case files and conduct interviews with various participants of the guardianship process. Based on the 29 indicators which MDAC elaborated to assess guardianship legislation and which are addressed in this report, the data gathering sheets were designed to highlight similarities and differences in how guardianship happens in practice.

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

- ⇒ Observation of court hearings.
- ⇒ Review of court case files.
- ⇒ Review of guardianship files.
- ⇒ Interviews with judges, prosecutors, lawyers, experts, adults to be placed under guardianship, and guardians.

When conducting the research, MDAC faced several difficulties in gathering information on how the system works. The first and foremost problem was the unpopularity of this issue in the minds of all courts, guardianship agencies, ministries and other relevant state agencies, which caused difficulties in carrying out the researcher. In addition to this, Kyrgyz government keeps no statistics on the number, status or condition of incapacitated people under guardianship.

Interviews with public officials revealed that many officials understood the word ‘guardianship’ to be exclusively associated with child care. Perhaps such confusion can be explained, firstly, by the fact that existing legislation has the same word for both child care and care of adults with disabilities. The second possible explanation is that there are actually few people under guardianship in the Kyrgyz Republic, giving credence to the officials’ view that this is a non issue. Guardianship authority officials said that there annually are on average five to ten adult guardianship cases nationwide.¹⁶⁶

The confusion in the notion of guardianship of children and adults was also encountered at the National Statistics Office which compiles statistical information on children guardianship but not adult guardianship, because, ‘the government is not interested in such statistical data yet. When the issue becomes important for the government, we will start to work in this direction’.¹⁶⁷

In order to obtain statistics on the number of adults under guardianship, letters were sent to the Informational Centre of the Ministry of Health. The Centre replied that it has no such information.

MDAC’s researcher sent requests to, and interviewed, guardianship authorities in Bishkek. The authorities do not have any kind of statistics, and recommended the researcher to seek this information from the National Statistics Office which, as noted above, does not compile statistics on adult guardianship. In accordance with the guardianship law,¹⁶⁸ both the Ministry of Health and local municipalities must compile statistics on the numbers of adults under guardianship.

It was not possible to gain an overall picture of guardianship cases in action, mainly because the MDAC researcher received permission from authorities to examine

¹⁶⁶ Process of appointment of guardian for incapacitated person.

¹⁶⁷ Interview with an employee of National Statistic office, MDAC Reference No. 034

¹⁶⁸ Regulation on guardianship and tutorship, Chapter II, para. 6.2. and Chapter V, para. 12.4.

guardianship case files only of closed cases which had already entered into force. The MDAC researcher was prohibited from observing seven court hearings. Judges in these cases denied access to the hearings on grounds of data protection and personal nature of the case. In three cases, the judge asked the applicant whether they agree for the researcher to sit and observe, and in all these cases the applicants refused to give consent. In the four other cases, the judges themselves denied access to the court hearings.

Three requests out of four submitted by the researcher to first instance courts asking them to provide the number of cases on deprivation of legal capacity, were answered and information was provided. For instance, below is the information provided by the Oktyabrskaya district court, which is one of the four administrative districts of the capital city of Bishkek.

Numbers of guardianship cases heard in the Oktyabrskaya district court (source: Oktyabrskaya district court)

Years	2002	2003	2004	2005	First half of 2006
Received cases	8	5	8	7	8
Cases that ended with deprivation of legal capacity	5	5	4	4	1
Closed cases	1	0	2		1
Returned	1	0	1	1	2
Cases left without consideration	1	0	1	2	1
Ongoing					3

Similar numbers can be found in the other three district courts. In Bishkek an average of eight to twelve applications are received in district courts each year. Osh town court refused to provide the researcher with any statistics.

Court clerks said that cases are not resolved when either applicants fail to attend court hearings, or because the applicant or adult died. In this latter category of cases the adults are, reportedly, elderly people. Cases are returned if the applications are outside the jurisdiction of a particular court, or the applicant is not considered 'suitable'.

3.3 Research findings of guardianship in practice

Putting to one side 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 this report.

3.3.1. The Practice of the Guardianship Process

Court files

Between November 2006 and February 2007, the MDAC researcher in Kyrgyzstan sent letters to the four districts court in Bishkek,¹⁶⁹ as well as the Osh court, requesting permission to examine guardianship court files. In three cases, the court administration gave permission to examine guardianship case files, but only from the court's archive. The court cases that were kept in the archive were ones that were closed.

In the Leninskaya district court of Bishkek, the researcher examined eleven guardianship files, and in the Oktyabrskaya district court, five files. In the Leninskaya district court and the city court of Osh, the archive officers allowed the researcher to select guardianship case files from the registry, and prepared the selected files to be examined the following day. An archive officer sat next to the researcher to prevent him from copying documents.

As a result, 22 court case files were reviewed of which 18 case files were court decisions from Bishkek, and four case files from Osh. In two of these 22 cases the decision of the court had been appealed. The researcher reviewed all documents in the case files: the application, minutes of the court hearings, the expert opinion, witness statements, and the court decision.

A typical court file was in a folder; sometimes several cases in one folder. The folder's front page showed the number of the case, name of the adult concerned, and the file contained on average ten to fifteen documents, generally:

- ⇒ A list of documents contained in the folder (about half of the 22 court files contained this).
- ⇒ Application asking the court to deprive the adult of legal capacity.
- ⇒ Notifications of the prosecutor and of the guardianship authority officer depending on how many hearings were held.

¹⁶⁹ The city of Bishkek consists of four administrative districts: Pervomayskaya, Oktyabrskaya, Sverdlovskaya, and Leninskaya.

- ⇒ Documents outlining the relationship between the applicant and the adult (identification document, birth certificate, marriage certificate etc.).
- ⇒ Medical certificates, certificates from the National Centre of Mental Health (not all case files contained this because this document is not compulsory).
- ⇒ Expert psychiatrist opinion (two to three pages). This was contained in most, but not all files. Two cases in Osh contained no incapacity assessments, and these cases seemed to rely on other medical ‘certificates’).
- ⇒ Minutes of court hearings depending on how many hearings were held (usually three pages).
- ⇒ Court decision (usually one or two pages).

None of the 22 case files contained evidence that the adult had been informed of the procedure against him or her.

A typical judgement in the court guardianship files, examined by the researcher, included the following information:

- ⇒ Date and place of the court hearings, name of the court making the decision.
- ⇒ Name, address and identification document information of the applicant and the adult.
- ⇒ Names of all persons present at the hearing.
- ⇒ Description of where and with whom the adult lives, and in what ways he or she posed a danger to other people.
- ⇒ The reasons and circumstances of the adult’s mental illness, and any other reasons why a guardian is needed. Each court file contained the part of the court decision describing the illness of the adult and the circumstances influencing the illness, as well as direct quotations from the expert psychiatrist opinion.
- ⇒ The subject of the application (that is, what the applicant requested the court to do).
- ⇒ The court decision.
- ⇒ Deadlines and possibilities of appealing.

Court hearings

The MDAC researcher faced several problems trying to access court hearings. Judges in seven cases refused to allow the researcher attend court hearings on the grounds of confidentiality. Thus, the MDAC researcher was able to observe only three court hearings. Based on these three observed court hearings and the information told to the researcher during interviews, an average court hearing can be described as follows:

‘Court hearings take place at a time specified by the court in advance. The first court hearing is usually attended only by the applicant, although in accordance with the legislation there should also be a guardianship officer and the prosecutor. The applicant first waits outside the courtroom. The hearings usually start around twenty minutes late. The judge calls the applicant in and invites him or her to sit

down. Usually, due to the absence of the prosecutor and a guardianship officer, the judge adjourns the hearing, then sends notices to the absent guardianship officer and the prosecutor. Hence, the first hearing normally lasts for about five minutes.’

At the next hearing, the prosecutor and/or the guardianship officer attend or submit a letter informing the judge that they are unable to attend the court hearing and ask the judge to consider the case in their absence. (In one case three hearings took place. In two out of these three hearings the prosecutor was absent and the guardianship officer attended the second hearing, but did not attend the third one.) The researcher gained the impression that the prosecutor and the guardianship officer usually do not attend the first hearing, only the second and the third.

The judge then reads out some information about the case, such as the names of the persons involved and the subject of the case, and then asks the people in the room to identify themselves. The judge then asks the applicant to describe briefly the subject of the application. In all three cases observed he applicants were relatives of the adult.

The judge then reads out the conclusion of the expert psychiatric opinion, and asks the applicant, the guardianship officer and the prosecutor to offer their opinions, and invites them to submit any further evidence or to share any other relevant information. As a rule, either the guardianship officer or the prosecutor agrees with the expert opinion. When all evidence has been heard, the judge makes the decision. Then the judge asks the applicant if he or she understood the decision, and sometimes explains how the decision can be appealed. In the hearings observed by the researcher, the judge did not describe the entire procedure to appeal, presumably because in practice nobody appeals the decision of the court. In all of the three cases, the decisions satisfied the applicants’ request. And in all three cases the adult was not present and not notified.

The participants of the hearing then leave the room. The duration of the hearings is about fifteen minutes, and the atmosphere is very formal. One cannot have an informed opinion on the basis of observing just three court hearings, so the researcher tried to find more information about such court hearings during interviews with judges and guardianship officers, and the results of these interviews are outlined below.

Guardianship authority files

The researcher sent letters to the four local guardianship authorities asking for permission to review guardianship files in September and October 2006. These letters also requested statistical data on adults with disabilities placed under guardianship, and contained questions about the procedure to appoint a guardian and about the annual reports which the guardians must submit to the guardianship authority.

Access to guardianship authority files was rejected by three local guardianship authorities. The official explanation was that the files contained information of private nature which could not be shown to the researcher. The guardianship officer of the Leninskaya

district guardianship authority, however, rejected the researcher's request for access on the grounds that the researcher was not a resident of the Leninskaya district.

Two guardianship officials showed the MDAC researcher some guardianship case files. The Oktyabrskaya district guardianship authority allowed access only to one folder that contained recent guardianship cases. In the Sverdlovskaya district guardianship authority access was provided to guardianship files for the years 2004, 2005 and 2006, divided into separate folders, so the researcher had an opportunity to examine guardianship cases archived chronologically.

As a result of reviewing guardianship cases in local guardianship authority offices, the researcher managed to examine 21 cases in Oktyabrskaya and Sverdlovskaya guardianship authorities.

Each guardianship case file contained the following documents

- ⇒ Decision of the guardianship authority on the appointment of the guardian (usually one page).
- ⇒ Court decision depriving the adult of legal capacity (usually one to two pages – see above for a description of these).
- ⇒ Witness statements (from the adult's relatives, friends or neighbours).
- ⇒ Documents certifying the relationship between the guardian (who was usually the applicant in the court procedure) and the adult (such as birth certificate, marriage certificate or passport).

None of the files contained any document dated after the decision of guardianship authority. There were no annual reviews, which guardians are supposed to submit to the guardianship authority. The lack of these annual reports casts serious doubt on whether these reports are actually received, and therefore the actual oversight provided by the guardianship authorities.

There was one case in which an environmental study document about the living conditions and circumstances of the adult was enclosed in guardianship case file.

3.3.2 Interviews

The MDAC researcher conducted interviews with the following groups of people involved in the guardianship proceedings:

- ⇒ Judges
- ⇒ Lawyers
- ⇒ Guardianship authority officers
- ⇒ Guardians
- ⇒ Psychiatrists

The aim of these interviews was to collect information on how guardianship works in practice. In addition to the questions set in the data gathering sheets (see Annex E), the MDAC researcher asked questions which could not be answered by examining the court and guardianship files or observing court hearings.

As a result, the researcher interviewed three psychiatrists, five judges, two lawyers, five guardianship officers of local guardianship authorities, and two guardians. But there was no opportunity for the researcher to make an interview with an adult placed under guardianship or an adult deprived of his or her legal capacity but not placed under guardianship. For example, the researcher made an attempt to communicate with the residents of the Tokmok psycho-neurological care home No. 1 for men. The researcher spoke with the director of this institution in person, who refused to give permission to conduct interviews with the residents. The director of this care home said, ‘they do not understand the nature of interviews and will not be able to answer your questions. Also, it is unsafe to stay alone with a resident, so, if something happens, who will be held accountable for it, because the residents of this institution are mentally ill people.’¹⁷⁰

Interviews with judges

All five interviews with judges were based on the data gathering sheets. All interviewed judges in general expressed interest in the research project. None of the three judges who presided over the hearings which the researcher observed agreed to be interviewed immediately after the court proceedings. The harsh manner in which the judges communicated the refusals seemed to the MDAC researcher that the judges perceived the researcher as a person whose only aim was to criticise the judge. When the researcher interviewed the judges during their office hours, the judges were more willing to share their past experiences about guardianship cases.

All five judges considered the expert psychiatrist’s opinion as evidence ‘which often has a decisive role’.¹⁷¹ All of the interviewed judges believed in the professionalism of the psychiatric experts of the National Centre of Mental Health, and thought that the psychiatric opinion should not be questioned. When asked why judges do not notify the adults in question about the pending court hearings, one of the judges responded, ‘it is unnecessary to have the mentally ill adult in the court room, especially when you are depriving them of their legal capacity, so availability of the expert psychiatric opinion is enough’.¹⁷² Another judge said ‘for us it is essential that the adult undergoes a medical assessment’.¹⁷³

¹⁷⁰ Meeting with the director of the Tokmok psycho-neurological care home No. 1 on 16 November 2006.

¹⁷¹ Interviews with judges of a first instance court, MDAC Reference No. jud 3-4 (17/11/2006); jud 3-5 (20/11/2006); jud 3-6 (20/11/2006); jud 3-7 (21/11/2006); jud 3-8 (24/11/2006).

¹⁷² Interview with a first instance court judge, MDAC Reference No. jud 3-7 (21/11/2006).

¹⁷³ Interview with a first instance court judge, MDAC Reference No. jud 3-4 (17/11/2006).

All interviewed judges said that they had received enough training in psychiatry at the university and during other training sessions, and they pointed out that they practice their legal skills on a daily basis. At the same time, two judges noted the need for special training on guardianship related issues, because ‘recently there have been more cases of deprivation of legal capacity in comparison with previous years. Such training are needed not only for judges, but also for all other participants of the guardianship proceedings’.¹⁷⁴

All five judges claimed that guardianship is used in cases when the adult needs protection. One judge thought it was possible that guardianship could be used also when some people have an interest in the property of an adult. This judge said, ‘It is easy to sense what the purpose of the applicant initiating an incapacitation procedure is, whether it is driven by real care, or there are property related interests behind it, and it is the judge’s task to make the right decision after considering all evidences’.¹⁷⁵

All five judges shared the opinion that once an adult is placed under guardianship, it is a lifelong mechanism providing care, and that guardianship terminates only on the adult’s death. Two judges remembered a case when the adult appealed the court’s decision. None of the judges had ever heard of a case where an adult under guardianship initiated a restoration of legal capacity.

Interviews with lawyers

Lawyers normally do not participate in the proceedings for deprivation of legal capacity as this category of cases is not considered financially attractive. The usual role for lawyers in these sorts of cases is to represent the applicant, not the adult.

Altogether two interviews were conducted with lawyers who had had experience in guardianship proceedings. These lawyers showed willingness to talk about the existing procedures and the system. One of them had represented an adult, another an applicant. The researcher found them during the examination of court case files in the Leninskaya district court in Bishkek.

Most of the lawyers refused to be interviewed when the researcher described the research, saying that they had not participated in such cases, and, therefore, had no experience in guardianship related issues.

The interviewed lawyers were convinced that placing an adult under guardianship is done exclusively for financial gain. As one of the lawyers said, ‘Indeed, there is no difference between being a legally-appointed guardian and taking care of an adult without such appointment, as there is no extra financial support from the guardianship

¹⁷⁴ Interviews with a first instance court judge, MDAC Reference No. jud 3-4 (17/11/2006); jud 3-8 (24/11/2006).

¹⁷⁵ Interview with a first instance court judge, MDAC Reference No. jud 3-4 (17/11/2006).

authorities or Government. If the relatives really want to take care of the mentally disabled relative, they can do it without initiating proceeding for the deprivation of legal capacity, without being a guardian'.¹⁷⁶

The two lawyers shared the opinion that 'on the whole, the procedure of finding a person incapable is fair in a procedural sense'.¹⁷⁷ The researcher asked whether the lawyers could remember a case where the outcome was different to that recommended by the expert psychiatrist. The lawyers could not remember any such case.

The lawyers both shared the view that the adult need not participate in court hearings, and they expressed their confidence in the medical assessment. However, they did think that the adult should be notified about the court proceedings. One lawyer said, 'In my practice there have been cases when the adult who had been deprived of his legal capacity found that out only after the proceedings'.¹⁷⁸

Both interviewed lawyers had never participated in proceedings to appoint a guardian and had not heard of other lawyers doing so either.

Interviews with officials of guardianship offices of local authorities

MDAC's researcher carried out five interviews with guardianship authority officers. According to Kyrgyz legislation, a guardianship authority is part of a local self-governing administration. In the office of the guardianship authority there is a separate room for guardianship officials. Among the responsibilities of these officials are guardianship and tutorship of children, adults restricted in capacity, as well as guardianship of adults deprived of legal capacity. All five officials said the vast majority of their work concerns guardianship of children.

In the interviews, the guardianship officials confirmed that nearly all cases of deprivation of an adult's legal capacity happen without the presence of the adult. They felt there was no need for the adult to be represented in the court proceedings on deprivation of legal capacity because the relatives take care of the adult's interests. When the researcher asked a question about legal representation in the proceedings, one of the guardianship officials said that 'it is not necessity to have the presence of a lawyer because it is simply about the appointment of a guardian'.¹⁷⁹

The majority of the guardianship officials do not monitor the living conditions of the adult under guardianship, although all of them told the researcher that they were concerned about where the adult would live after he or she is placed under

¹⁷⁶ Interview with lawyer, MDAC Reference No. adv 3-9 (22/11/2006).

¹⁷⁷ Interview with lawyers, MDAC Reference No. adv 3-9 (22/11/2006); adv 3-10 (24/11/2006).

¹⁷⁸ Interview with lawyer, MDAC Reference No. adv 3-9 (22/11/2006).

¹⁷⁹ Interview with guardianship officer, MDAC Reference No. guar 3-11 (26/10/2006).

guardianship. They reported that this concern drives them to monitor the living conditions of the adult. The review of guardianship case files revealed that only one such file contained a visit to the adult's home (a so-called 'environment study'). Two guardianship officials explained that they do not visit adults because they have no time and are overburdened. As one guardianship officer said, 'I am the only expert for my administrative district who fulfils the duties of a guardian for both children and adults, along with other different tasks of social nature, while the number of population in our district about 200,000 people'.¹⁸⁰

When MDAC's researcher asked the officials about the obligation (contained in the regulations) on guardians to submit to the guardianship authority an annual report by 15 February each year, one guardianship officer did not know about such obligation. Other officials told MDAC's researcher that they demand the annual report it from all their guardians, but guardians never actually send the reports. It was not clear that the guardianship took any action against these guardians. Some guardianship officials acknowledged that they have no time to review guardians' actions and that they have no established system of reviews.

All guardianship officials expressed, in general terms, that when they have time they try to react to all offences. One guardianship official gave an example, telling MDAC's researcher about an unidentified case when the adult under guardianship called her office complaining about the guardian and asking her to change the guardian. The guardianship official said that she promised the adult that she would talk with the guardian, and that the only action she took was to tell the guardian to pay appropriate attention to the adult.

Guardianship officials could not think of any case when an adult's guardianship was terminated because the conditions for placing the adult under guardianship no longer persisted.

Interviews with guardians

Guardians from guardianship offices and applicants in court hearings explicitly refused to talk about guardianship and refused to be interviewed by MDAC's researcher. The researcher sought the help of guardianship officials in finding guardians who would be willing to be interviewed, but this was unsuccessful. The explanation provided by the guardianship officials was that in most cases no guardians agreed to share such information for privacy reasons.

Unfortunately MDAC's researcher was able to interview only two people who had been guardians in the past, but who were no longer guardians. The researcher met both of them by chance in a guardianship office. They were the wife, and the

¹⁸⁰ *Ibid.*

daughter of two different adults under guardianship, and were reluctant to talk about guardianship issues.

Interviews with psychiatrists

The MDAC researcher conducted interviews with three expert psychiatrists who regularly carry out incapacity assessment in guardianship cases and write expert opinions to the court. All three people have an office at the National Centre of Mental Health. The researcher carried out interviews during office hours in the psychiatrists' offices.

All three psychiatrists emphasised the importance of the medical assessment in the guardianship proceedings. When one of the experts was asked about how the existing system of guardianship worked, he told the researcher the following: 'This system is not developed well enough, I mean, we have no innovations in this direction, and we work in the system which was in use in the USSR. In the future, the guardianship system will definitely be developed. The fact itself that research is being carried out about guardianship shows that an interest in it has emerged apparently with an attempt to change something for the better'.¹⁸¹

In practice, each medical assessment is conducted by a commission of usually three experts. It is conducted in a separate room where, apart from the three psychiatrists, the

adult and the accompanying person (relatives or friends).¹⁸² Each medical assessment is held in person. An average medical assessment takes about 40 to 60 minutes. Then the experts write the expert psychiatrist opinion, which normally takes three to four days. They then send the report to the court.

The researcher asked how the capacity of an adult can be evaluated if the adult lives in a rural area. The answer was that the adult is brought to Bishkek for the incapacity assessment. Nevertheless, during the examination of court guardianship cases in Osh, the researcher came across expert psychiatrist opinions in the guardianship case files provided by the Osh Center of Mental Health.

The psychiatrists unanimously saw no point in adults attending the court hearings about their legal capacity. One psychiatrist said that, 'there is no need for them to be present on court hearings; if the adult is able to talk and to explain certain things, we usually note such abilities at the end of our official opinion'.¹⁸³

If a court requests a second incapacity assessment, the experts of the National Centre of Mental Health carry this out, apparently involving additional staff.

¹⁸¹ Interview with psychiatrist, MDAC Reference No. exp 3-1(09/11/2006).

¹⁸² Usually the accompanying person is the applicant in the legal capacity deprivation procedure.

¹⁸³ Interview with psychiatrist, MDAC Reference No. exp 3-3 (16/11/2006).

On reviewing the court files, no adults been detained for an incapacity assessment. This was confirmed by the psychiatrists, who said that adults take part in medical assessments voluntarily. Psychiatrists sometimes travel to the adult if the adult is unable to come to the psychiatrist's office.

These psychiatrists from the National Center of Mental Health in Bishkek carry out incapacity assessments in north Kyrgyzstan, and in the south such assessments done by experts of the Osh Center of Mental Health. According to one psychiatrist, 'Practically there are no cases in the rural areas of Kyrgyzstan, and it can be explained with the traditions of the Kyrgyz people. A very small percent of Kyrgyz people is placed under guardianship, which is because our people have got used to take care of their disabled relatives in traditional way without any formal procedures'.¹⁸⁴

3.4 General Observations and the Need for Further Research

This report, an analysis of guardianship law and practice in the Kyrgyz Republic, reveals serious problems in the country's guardianship system. The only aspect of the guardianship procedure in which the adult is directly involved is the incapacity assessment. The striking feature of the system is that adults – for whose protection the system exists – remain excluded from the entire process. None of the court case files reviewed contained notices for the adults. None of the professionals were aware of any cases in which the adult was present at a court hearing which deprived the adult of legal capacity. This raises serious questions about Kyrgyzstan's compliance with international human rights law and standards.

Given that adults are not invited to participate in the court proceedings it is perhaps even more alarming that no State-funded legal representation is provided for adults whose legal capacity is in question. Professionals involved in the guardianship procedure believe that the adult's interests are represented adequately by other people such as relatives. One judge told MDAC's researcher that 'every person has relatives, friends, neighbours, who can be their representative'.¹⁸⁵ However, this view comes dangerously close to assuming that third parties always act in good faith, and that they always follow the wishes of the adult. Neither of these are sound assumptions.

Among the reviewed court files the researcher came across two cases where the adult was represented by a lawyer, and in those cases the adult was not found incapable. In the first of the two cases, medical assessment was conducted two times. First, the psychiatrists' opinion was that the adult should be found incapable, but the lawyer who represented the adult requested that a repeated assessment be conducted, and the second psychiatric opinion stated that an adult is capable.¹⁸⁶

¹⁸⁴ *Ibid.*

¹⁸⁵ Interview with judge of first instance court, MDAC Reference No. jud 3-7 (21/11/2006)

¹⁸⁶ Review of court case file No.7-3.

In the second case, only one medical assessment was conducted. The psychiatrists' opinion was that the adult was fully capable.¹⁸⁷

It is impossible to observe how the adult has hired the lawyers, but case files shows that adults had found themselves. I mean it is not the provision of Government.

Adults are similarly excluded from the process of appointing a guardian. In all cases observed and reviewed, the applicant became the eventual guardian. In the opinion of all guardianship officers the best guardian is a close relative, who lives with adult and will provide the best care of the adult.

Of particular interest is the seemingly low numbers of people placed under guardianship, compared to the guardianship systems in other countries which have been studied by MDAC.¹⁸⁸ The question which remains unsolved by this report is what happens to those adults who require assistance in making decisions? There are clearly hundreds of people in Kyrgyzstan who will require assistance and support in making decisions. Considering the lack of alternatives to guardianship, how are these people protected? This, like many issues touched on in this exploratory report, is an area for further research.

¹⁸⁷ Review of court case file No.7-16.

¹⁸⁸ To see these reports, see MDAC's website www.mdac.info.

ANNEX A

Glossary of Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX B

Summary Table of the Indicators

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

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

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

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
5 October 2006	Guardian
13 October 2006	Guardian
26 October 2006	Guardianship officer
26 October 2006	Guardianship officer
27 October 2006	Guardianship officer
3 November 2006	Guardianship officer
6 November 2006	Guardianship officer
9 November 2006	Expert-psychiatrist
9 November 2006	Expert-psychiatrist
14 November 2006	Director of Tokmok men psycho-neurological care home No. 1
16 November 2006	Expert-psychiatrist
17 November 2006	Judge of a first instance court
20 November 2006	Judge of a first instance court
20 November 2006	Judge of a first instance court
21 November 2006	Judge of a first instance court
22 November 2006	Lawyer
24 November 2006	Judge of a first instance court
24 November 2006	Lawyer
15 May 2007	Employee of National Statistic office

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

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

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

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

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

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

17.	I-9	<p>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: _____</p>
18.	I-9	<p>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: _____</p>
19.	I-10	<p>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: _____</p>
20.	I-10	<p>Did court enter a finding of incapacity in this case: Yes _____ No _____ If yes, the incapacity was found to be: Partial _____, Plenary _____ 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): _____</p>
21.	I-10	<p>According to the case file, the court's stated reason for entering a finding of incapacity was: Placement in institutional care _____, Financial _____, Protection of person concerned _____, Protection of others _____, Compliance with ministerial orders _____, Other reason _____. If other reason is given, explain the reason: _____ 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 _____</p>

		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)
22.	I-6	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:

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

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

Data Gathering Sheet for Statistical Information

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

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

General Country (Regional) Statistics

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

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

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

Question and Answer Sheet for Interviews with Professional Participants in the Guardianship Processes	
<p>Many of the questions suggested for the quasi-formal interview process are open-ended questions meaning that they are designed to elicit a narrative response. Listen and record the answers carefully (using a data recorder if possible) and ask for examples and elaboration of opinions when possible.</p>	
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	<p>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)</p> <p>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)</p>

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

<p>Indicator 6</p>	<p>Interviewee: Professionals Are you aware of any case where the person concerned filed an appeal of the court’s capacity finding? <i>If yes:</i> 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?</p> <p>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?</p>
<p>Indicator 7</p>	<p>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?</p> <p>Person Concerned</p>
<p>Indicator 8</p>	<p>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?</p> <p>Person Concerned</p>
<p>Indicator 9</p>	<p>Interviewee: Professionals What is the most common reason, in your opinion, for applicants to file requests for guardianship? (ie financial reasons, protection of person or others etc.) What do you think is the most important result of the appointment of a guardian?</p> <p>Person Concerned Why do you think that an application was filed to appoint a guardian for you? (explain)</p>

Indicator 10	<p>Interviewee: Professionals (For Judges) How do you decide whether a person should be incapacitated? (explain)</p> <p>(For Others) How should judges decide whether a person should be incapacitated? (what should they consider when making the decision?) Do you believe that judges usually receive adequate information to make the best decision? Who benefits the most from incapacitating a person and placing them under guardianship? How often are cases dismissed without a finding of incapacitation? What is usually is the reason that cases are dismissed? What risks are involved in not incapacitating a person with mental health problems? When making the decision, do judges consider what the person involved will lose in terms of their individual rights once incapacitated?</p> <p>Person Concerned In your case, was there information that you thought the judge should know before making a decision? If yes, give examples:</p> <p>Why did the judge not have that information (the information described above)?</p>
Indicator 11	<p>Interviewee: Professionals What qualities do you think make a person a good (appropriate) guardian? (explain) If more than one person wants to be the guardian of a person, what should the decision be based upon? Should the person involved have the right to choose who will be their guardian? (explain why or why not)</p> <p>Person Concerned Have you ever been asked who you would want to be your guardian if a guardian is going to be appointed? If yes, was the person you wanted made your guardian? (why or why not) What qualities do you think make for a good guardian?</p>
Indicator 12	<p>Interviewee: Professionals What constitutes a conflict of interest that would or should prevent a person from acting as a guardian? (give examples)</p> <p>Person Concerned</p>
Indicator 13	<p>Interviewee: Professionals (For Guardians) Have you ever (or would you ever) consent to an individual exercising civil or political rights that can only be exercised with guardian's consent? If yes, please explain: If not, why not?</p>

Indicator 13	<p>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?</p>
Indicator 14	<p>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?</p> <p>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?</p>
Indicator 15	<p>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?</p> <p>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?</p>
Indicator 16	<p>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?</p> <p>(For Guardians) Do you consult the person under guardianship when you are making a decision (a major decision) about their life? Why or why not?</p> <p>Person Concerned Does your guardian ever ask you what you think/want? If so, what kinds of things has your guardian asked you about? Do you feel that your guardian listens to your wishes/opinions? (explain)</p>

Indicator 17	<p>Interviewee: Professionals</p> <p>Person Concerned Are you aware of any way in which you can challenge a decision that your guardian has made on your behalf about your life? If yes, what can you do?</p>
Indicator 18	<p>Interviewee: Professionals Do you accept that a guardian is responsible for providing all the basic necessities of the person under guardianship? What happens to a guardian who fails to provide for a person under guardianship? How does that guardian get discovered?</p> <p>Person Concerned What is your understanding of what your guardian's job is? Who is responsible for making sure that you have enough food and clothing, for example? What happens if you don't have what you need?</p>
Indicator 19	<p>Interviewee: Professionals Is there a mechanism for complaints about a guardian? If so, how are complaints investigated? (ie who is responsible for investigating and how is investigation done?)</p> <p>Person Concerned</p>
Indicator 20	<p>Interviewee: Professionals 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)?</p> <p>Person Concerned Has anyone ever asked you if you think your guardian is doing a good job for you? If yes, who asked you?</p>
Indicator 21	<p>Interviewee: Professionals Do you think it is important for a guardian to visit the person under guardianship periodically? Why or why not? How often do most guardians visit and talk to the person under guardianship?</p> <p>Person Concerned Do you see your guardian regularly? How often do you see your guardian? If so, does your guardian ask you about what you want or need? Do you feel that your guardian listens to what you say (want or need)?</p>

Indicator 22	<p>Interviewee: Professionals Who decides where the person under guardianship should live? (ie, guardian, family, psychiatrist etc.) Have you known a guardian who has moved the person from an institution into the community?</p> <p>Person Concerned (For those living in institutions) Since you've had a guardian, have you ever lived outside of the institution? (explain)</p>
Indicator 23	<p>Interviewee: Professionals How is the property (financial assets) of the person under guardianship used? Does the guardian have to report to anyone about how the assets are used/spent? If so, how often does this reporting happen?</p> <p>Person Concerned Do you have any money or property that belongs to you? If so, who takes care of it? (who manages it) Do you know how your money is spent? Does anyone ever show you any accounts or reports on how your assets (property) are being used?</p>
Indicator 24	<p>(For countries which utilize partial guardianships) 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?</p> <p>Person Concerned (Persons under partial guardianship) What kinds of things/decisions are you able to do on your own without the consent of your guardian?</p>
Indicator 25	<p>Interviewee: Professionals What (if any) alternatives to guardianship exist in your region? How often are alternatives used?</p> <p>Person Concerned Do you think that there is some help that you need/want that would allow you to live without having a guardian? If so, what would that be? (ie what kind of help do you think you need?)</p>

<p>Indicator 26</p>	<p>Interviewee: Professionals Should guardianship be a first response or a last resort for people with mental disabilities? (explain)</p> <p>Person Concerned</p>
<p>Indicator 27</p>	<p>Interviewee: Professionals How often are (should) guardianship cases be reviewed by the guardianship authority? What is the purpose of guardianship reviews?</p> <p>Person Concerned To your knowledge, are the decisions that your guardian makes for you ever reviewed by anyone else to determine if they are good decisions or not? To your knowledge, has your case ever been reviewed to determine whether you still need a guardian? If so, how often?</p>
<p>Indicator 28</p>	<p>Interviewee: Professionals How often are guardianships terminated and the person under guardianship restored to their full capacity? Who usually initiates applications for termination of guardianship? How often are guardianships changed from partial to plenary or plenary to partial guardianships?</p> <p>Person Concerned Have you ever wanted to have your guardianship changed somehow or ended all together? If so, what did you want changed? How would you go about getting it changed?</p>

