



Guardianship and Human Rights in Russia

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 Russia

Analysis of Law, Policy and Practice
2007



Copyright © Mental Disability Advocacy Center, 2007
All rights reserved.

ISBN: 978-963-87607-5-3

This report is available in English and Russian from MDAC's website:
www.mdac.info

Mental Disability Advocacy Center (MDAC)
Rákóczi út 27/B
1088 Budapest
Hungary
Telephone: +36 1 413 27 30
Fax: +36 1 413 27 39
Email: mdac@mdac.info
Website: www.mdac.info

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

The Sigrid Rausing Trust and

In-kind contributions from the Council of Europe

The opinions expressed in this document are the opinions of the authors and may not reflect the opinions of the donors. Responsibility for the information contained therein lies solely with MDAC. The donors take no responsibility for the content and for any use that may be made of the information contained therein.

CONTENTS

Executive Summary	5
Recommendations	7
1. Introduction.....	10
1.1 Guardianship	10
1.2 Researching Guardianship	12
1.3 Acknowledgements	12
1.4 Method	13
1.4.1 Stage one: Legislative Review	13
1.4.2 Stage two: Collection of Data from the Field	14
1.5 Indicators for a Human Rights-Based Assessment of Guardianship	14
2. Guardianship Law and Policy in Russia	16
2.1 Introduction	16
2.2 Demographic and Social Background.....	16
2.3 Russia’s Legal System	19
2.4 Mental Health Law in Russia	20
2.5 Guardianship in Russia.....	20
2.6 Human-Rights Based Assessment of Legislation.....	23
2.6.1 Principles Running Throughout Legal Frameworks (Indicator 1).....	24
2.6.2 Procedural Rights During Guardianship Proceedings (Indicators 2-7)	25
2.6.3 Quality of Evidence Provided to the Court in Incapacity Cases (Indicators 8-12)	34
2.6.4 Rights of the Adult After Guardianship Is Established (Indicators 13-17) ...	40
2.6.5 Obligations of the Guardian After Guardianship Is Established (Indicators 18-25)	45
2.6.6 Necessity of Guardianship and Alternatives (Indicators 26-29)	56
3. Guardianship Practice in Russia	60
3.1 Aims and Objectives	60
3.2 Methodology	60
3.3 Research Findings on Guardianship in Practice	63
3.3.1 Court Files.....	63
3.3.2 Court Hearings	63
3.3.3 Guardianship Authority Files.....	64
3.3.4 Interviews	65
3.4 Application	66
3.5 Notice of and Presence at Court Hearings	67
3.6 Legal Representation	69
3.7 Incapacity Assessment.....	70

3.8 Presenting and Challenging Evidence	72
3.9 Right to Appeal	73
3.10 Appointing a Guardian	74
3.11 Control Over Guardian’s Actions	76
3.12 Lifting of Guardianship	78
3.13 Civil Death	79
3.14 General Observations, Overall Judgements	79
3.15 The Need for Further Research	82

ANNEXES

A: Glossary of Terminology.....	83
B: Summary Table of the Indicators	85
C: Protocol for Researchers on Protection of Research Data and Participants.....	88
D: List of Interviews	91
E: Data Gathering Sheets	93

This report is dedicated to the Russian disability rights activists who contributed to ensuring that Article 12 of the Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, provides that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'

EXECUTIVE SUMMARY

This report is the first to look in any depth into laws and practice relating to guardianship in Russia. As with a number of other post-communist states, Russia has failed to amend its guardianship laws to bring them in line with current human rights standards. It is these standards, and their implementation, that form the focus of this report.

The legal and moral imperatives on Russia to amend its guardianship laws are demonstrated in this report, a report that is particularly timely in view of the recent adoption by the UN General Assembly of the Convention on the Rights of Persons with Disabilities.¹ It is of note that Russia took an active part in drafting this Convention, Article 12 of which calls on all countries to ensure that people with disabilities have the right to recognition as persons before the law and that they enjoy legal capacity on an equal basis with others in all aspects of life.²

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

This report offers an analysis of domestic legislation on guardianship, such legislation being viewed through the lens of current binding human rights standards. The outcome

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

² *Ibid.*, art. 12.

³ These terms are defined in the Annex A on page 83.

of this examination indicates that although the Russian Constitution provides for respect for the human rights of people with mental disabilities in accordance with international standards, a series of legislative weaknesses result in serious deficiencies throughout its legislative framework. The report also provides the results of court case file reviews, guardianship authority case file reviews, interviews with stakeholders. MDAC attempted to observe court hearings, but these requests were largely denied by the courts.

The main findings of the report reveal that the Russian law fails to protect the rights of people under guardianship, indicating that reforms are required urgently. The report details how officials involved in the guardianship process – judges, lawyers, psychiatrists and guardianship officials – take a minimalist approach and demonstrate discriminatory views about adults who need assistance in making decision, discriminatory views which directly impact upon these adults’ human rights. The most important of these findings are:

- Russia relies on plenary (all encompassing) guardianship that serves to remove fundamental human rights. The concept of partial guardianship does not exist in Russia. Partial guardianship allows for specific and focused provisions to be made for specific individuals, thus ensuring a proportionate legal response to their needs. A proportionate legal response is a requirement of international law.
- Adults under guardianship are subject to significant, arbitrary and automatic deprivations of their human rights. These include a deprivation of their right to property, to a family life, to marry, to vote, to associate freely, to access courts, and to make a will.
- Russian guardianship law and practice lacks rigour and quality. It is lacking in basic procedural protections, such as the obligation on the court to meaningfully notify the adult, whose legal capacity is in question, of a court hearing. Where there are procedural protections, such protections can be undermined by a failure to make them effective. Thus, for example, an adult has the ‘right’ to an attorney during guardianship proceedings, but there is no accompanying legislation making formal provision for an attorney to be provided universally or paid for by the State.
- Guardianship contributes to social exclusion. Contrary to international law⁴ an adult in Russia may be detained for an incapacity assessment. More significantly, once an adult is placed under guardianship, he or she can be placed, without the adult’s consent, into a social care institution for the rest of his or her life. No appeals are available. Further, there is no statutory obligation on guardians to promote independence or seek community-based or less restrictive living arrangements. Once under guardianship the adult is prohibited from voting, working, marrying and managing his or her own finances. Indeed, in Russia there are no real alternatives to guardianship (for example,

⁴ UN Resolution 46/119 on the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991, Principle 5, Medical Examinations.

advance directives and supported decision-making) for people with disabilities who need assistance in making certain decisions.

Additional deficiencies include the failure to regulate adequately the powers of guardians. There is, for instance, no duty on guardians to take the opinions of adults under guardianship into account when making decisions about the lives of those adults. Guardianship agencies of local authorities have statutory responsibility for overseeing guardianship arrangements, but their duties are not adequately defined in legislation, a situation which permits negligent and abusive guardians to go undetected. Similarly, there are no legal provisions preventing conflicts of interest, allowing for possible financial impropriety throughout the guardianship process. Once placed under guardianship through this flawed procedure, adults, possibly traumatized and confused, have just ten days to request termination of that guardianship. After that ten day period the right to request termination of guardianship expires.

The Mental Disability Advocacy Center urges the Russian government to reform its guardianship laws, implement training for all professionals working in the guardianship system, and provide more information to adults under guardianship. This must be done in a way that actively both involves and respects people with psycho-social (mental health) disabilities and intellectual disabilities, as well as their local and national organisations.

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

RECOMMENDATIONS

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

1. **Provide alternatives to guardianship:** The Russian government should require the use of least restrictive alternatives which promote the independence of, and also protect the adult by:
 - ⇒ Creating supported decision-making services. Such services should be based on the following basic principles.

- The adult retains full legal capacity whilst receiving services from a support person/network.
 - A support person/network should not be appointed without the adult's consent.
 - There must be a relation of trust between the adult and the supporting person/network. A court should therefore not create such relationship, only recognise its existence.
 - The support person/network should not act on behalf of the adult. This role is limited to merely providing the adult with support and assistance in making and communicating decisions.
 - There must be safeguards in place to protect the adult against abuse and exploitation.
 - ⇒ Providing the right to create legally-binding advance directives (in which an adult specifies his or her wishes in case of future functional incapacity) and powers of attorney (where an adult specifies a person to take decisions in case of future functional incapacity). (Indicator 26)
 - ⇒ Requiring that guardianship is used only as a last resort. (Indicator 26)
2. **Maximise autonomy.** Ensure that adults retain the right to make decisions in all areas of life in which they have functional capacity. Specifically:
- ⇒ Abolish the automatic deprivation of the fundamental rights of adults under guardianship to
 - Property.
 - Work.
 - Family life.
 - Marry.
 - Vote.
 - Associate.
 - Access courts.
 - Make a will. (Indicators 13, 15-17)
 - ⇒ Require guardians to seek the least restrictive living arrangements for adults. (Indicator 21)
 - ⇒ Ensure that legislation defines the scope of the guardian's obligations in light of the adult's capacity. (Indicator 20)
 - ⇒ Ensure that legislation specifies that a finding of incapacity is based on a demonstrable link between diagnosis and functional capacity. (Indicator 8)
 - ⇒ Establish regular reviews of guardianship. (Indicator 28)
3. **Improve procedures.** Provide sufficient guarantees of the right of adults to meaningful participation in the guardianship process from the beginning of the process and for as long as the adult is under guardianship. Specifically:
- ⇒ Define in law sufficiently clear and specific bases for filing an application for declaring a person incapable. (Indicator 2)
 - ⇒ Ensure that the adult is properly notified and has access to information about all proceedings related to the procedure for depriving the person of his or her legal capacity, and ensuring that the adult is present and heard at these proceedings.

Also, clearly identifying when the adult's presence is not necessary (as an exception) at guardianship court hearings. (Indicator 3)

- ⇒ Ensure provision for the adult of free legal representation paid for by the State at court hearings, including appeals. (Indicator 4)
- ⇒ Abolish involuntary detention of people solely for the purpose of incapacity assessments. (Indicator 5)
- ⇒ Ensure that the adult's wishes are considered and given due weight when appointing a guardian. (Indicator 10)
- ⇒ Ensure that an adult has the right and opportunity to challenge the appointed guardian. (Indicator 12)
- ⇒ Ensure adults are actually consulted about decisions affecting their life (Indicator 19).
- ⇒ Require guardians periodically to visit and speak with the adults for whom they are responsible. (Indicator 23)
- ⇒ Establish an effective complaints mechanism for adults under guardianship, including access to judicial remedies. (Indicator 25)
- ⇒ Establish a procedure for periodic review of guardians' actions by an objective body that would be required to take into account information received from the adult, and which would hold the guardian accountable for all decisions. (Indicator 24)

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

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

MDAC believes that implementation of these recommendations, coupled with training of professionals working in the guardianship field, will produce significant improvement in the quality of the Russian guardianship system. The recommendations would bring legislation into line with international law and standards by strengthening the protection of the human rights and interests of the adults under guardianship. MDAC looks forward to engaging and cooperating with the Russian authorities and civil society as they plan and implement reform.

1. INTRODUCTION

1.1 Guardianship

This report concerns guardianship of adults and does not deal with legal arrangements for children. MDAC defines ‘guardianship’ as a legal relationship established by a court process between an adult who is deemed to lack the requisite legal capacity to make personal decisions and the person appointed to make decisions on that adult’s behalf.⁵ The legal mechanism of guardianship exists in some form in almost every jurisdiction in the world and is widely accepted as a means of protecting individuals who are deemed incapable of managing their personal affairs as a result of a mental health problem (psycho-social disability), intellectual disability, degenerative disease or profound physical or sensory disability.

Guardianship is usually established through court proceedings, or a combination of court and administrative processes, during which an adult is found to either partially or completely lack capacity to make decisions on their own behalf. The outcome of such findings could be that the person is ‘legally incapacitated’.⁶ The court (or an administrative authority) then appoints another person to act as the guardian. The guardian’s specific authority is defined either by law or by court order. Generally, the guardian has both decision-making authority over the adult and an obligation to protect the adult’s welfare. The effectiveness of guardianship as an institution heavily depends on certain personal qualities of the guardian, such as his or her diligence and conscientiousness.

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

⁵ The English language terminology used throughout this report was arrived at after much debate. Presumably, there will be, or already are similar debates in other languages. To help the reader understand the terminology in these reports, a brief glossary of terms can be found in the Glossary, Annex A at page 83.

⁶ Throughout this report, MDAC uses the term ‘legal capacity’, as defined in the Glossary at Annex A on page 83. Different jurisdictions use different terminology to define the legal inability to act on one’s own behalf, such as, for instance, ‘incapable’ or ‘incompetent’. Some laws provide for a finding of partial or limited legal capacity.

As the global disability rights movement gains momentum, the guardianship model is coming under increased criticism for its failures in providing adequate due process protections in establishing and administering guardianship and ensuring the right of self-determination.⁷ In a small number of jurisdictions, such as in Canada and the UK, guardianship laws have been reformed, and other means of providing protection and assistance to people with mental disabilities have emerged, notably supported decision-making.⁸ As a result, legislators and courts in these countries see the guardianship model as a last resort that is to be used only after all other less restrictive measures of support and protection have been exhausted.

Guardianship has at long last been recognised as a pressing issue internationally. In the newly adopted United Nations Convention on the Rights of Persons with Disabilities (Disability Convention) legal capacity is specifically dealt with in Article 12 which states:

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

⁷ Canadian Association for Community Living (CACL) report. Task Force on Alternatives to Guardianship, August 1992, available at: http://www.worldenable.net/rights/adhoc3meet_guardianship.htm.

⁸ See the Glossary at Annex A on page 83 for a definition of supported decision-making.

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

1.2 Researching Guardianship

In many of the countries where MDAC works, guardianship laws have remained relatively unchanged for decades. However, they are likely to undergo substantial reform as countries continue to bring their legislation in conformity with international human rights standards. To highlight guardianship as an area of urgent reform, MDAC initiated its guardianship project to identify the strengths and weaknesses of existing legislative regimes. Additionally, because legislation and reality frequently diverge, the project examines the actual practices in the field of guardianship. This report presents a legislative analysis, which will be followed in 2007 by a comprehensive report that will include observations on how the guardianship system functions in practice.

MDAC started its guardianship research in late 2004 by examining the legislative structure of guardianship systems in a number of countries. The first part of the project focused on four countries: Bulgaria, Hungary, Serbia and Russia. In 2006, MDAC started research in an additional four countries: Croatia, the Czech Republic, Georgia and Kyrgyzstan.

The aim of the research is to examine the degree of compliance of national guardianship legislation in these countries with international human rights law, standards and best practices, in order to highlight any areas in need of reform. As with many research projects that serve as the first exploration of uncharted territory, this report may raise more questions than it answers. This is particularly true as it is not a statistical survey, but, rather, a comparative legal analysis. The results in this report refer only to the legislation. As explained above, research on practice is still ongoing, and it will provide information about how guardianship systems work.

1.3 Acknowledgements

Research was carried out by lawyers from each of the target countries. The researchers conducted all of the in-country research, wrote the first drafts of the country reports and participated in the editorial process. The researchers were Slavka Kukova (Bulgaria), Aleksandra Korac and Petar Sardelić (Croatia), Zuzana Benešová and David Kosar (Czech Republic), Nina Dadalauri (Georgia), Dániel Kaderják (Hungary), Meder Dastanbekov (Kyrgyzstan), Anna Smorgunova (Russia), and Vidan Hadži-Vidanović (Serbia).

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

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

MDAC would like to extend its warmest gratitude to the Guardianship Advisory Board for the individual and collective contributions they have made to this project. Marit Rasmussen developed and managed this project for over two years and interns Priscilla Adams, Jill Diamond, Jill Roche and Nicholas Tsang helped with background research and István Fenyvesi designed and laid out the reports.

The Russia report was drafted by Anna Smorgunova. Dmitri Bartenev, Yuri Marchenko, Jill Peay and Marit Rasmussen provided extensive comments. István Fenyvesi, Sarah Green and Oliver Lewis produced the final version.

1.4 Method

1.4.1 Stage one: Legislative Review

Stage One of the research, which is represented by 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 protective arrangements available under national laws as well as any other relevant national legislation by:

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

- Analysing the power and authority of guardians, their accountability and how they are monitored, as well as the processes, if any, for bringing complaints against guardians.
- Resolving disputes between guardians and people under guardianship.

1.4.2 Stage two: Collection of Data from the Field

Stage Two, which is presented in section 3 of this report, focuses on a *de facto*⁹ 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. This manner of data collection gives an opportunity to capture a snap-shot of guardianship practices.

Conducting research that includes interviews of participants, some of whom have mental health problems or intellectual disabilities, raises ethical concerns about the privacy and the capacity of interviewees to understand the purpose of the research and to give informed consent to participate in it. MDAC carefully considers the ethical issues that are raised by this aspect of research and has adopted guidance to protect the participants and the data they provide. Each researcher has a numerical system of maintaining information and stores the key and raw data in different locations. The guidance, reproduced at Annex C at page 88 of this report, sets out standards for informing research ‘subjects’ about the voluntary nature of participation in the research, the right to refuse participation at any time, and the conditions of confidentiality surrounding the information which they provide.

1.5 Indicators for a Human Rights-Based Assessment of Guardianship

Throughout the project, MDAC has used 29 indicators against which legislation is analysed.¹⁰ These indicators come from the key document concerning guardianship and supported decision-making, namely the Council of Europe Committee of Ministers’ Recommendation No. R(99)4 ‘Principles Concerning the Legal Protection of Incapable Adults.’ Further indicators were derived from the Recommendation’s explanatory memorandum,¹¹ 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

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

¹⁰ See Annex B at page 85 for a table-summary of all twenty-nine indicators.

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

Europe, there is an expectation that they will comply with its ‘soft law’,¹² such as Recommendation No. R(99)4.

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

The indicators are not exhaustive, but do highlight critical issues faced by adults in guardianship systems. Omission of a particular point or issue from an indicator does not mean that the issue is not important or does not pose a problem in the legislative framework of the country in question. By standardising the investigation and analysis of guardianship systems, MDAC aims to create a means for people to compare and contrast guardianship systems in different countries.

¹² ‘Soft law’ refers to rules, recommendations, guidelines or broad principles that while not strictly legally binding are nonetheless legally significant. Black’s Law Dictionary (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 RUSSIA

2.1 Introduction

Russia – the largest country in the world – is situated in Northern Asia, bordering the Arctic Ocean in the north and the North Pacific Ocean in the Far East.

Because of the vast size of Russia, as well as the impracticability of conducting field research of this nature on a nation-wide basis, MDAC has focused this study only on the St. Petersburg region, a region with a population nearing 5 million people.¹³ It should be noted, however, that most of the legislation affecting guardianship proceedings in St. Petersburg is federal law and is applied in a similar way in other regions of Russia. Concerns raised throughout this report are therefore of nationwide applicability.

2.2 Demographic and Social Background

Russia's population exceeds 143 million people.¹⁴ The country is divided into six different types of administrative units (states),¹⁵ of which currently there are 89. These are: republics, krajs, oblasts, one autonomous oblast, the 2 federal cities of Moscow and St. Petersburg, and autonomous okrugs.¹⁶

Russia's population, similarly to most European countries, reflects a decreasing growth rate. In St. Petersburg, the death rate is 1.8 times higher than the birth rate. Due to this negative growth rate (-0.37 percent annually) Russia has a relatively small population of children below the age of 14 years or younger (14.6 percent). Of that age group, 51.3 percent are male and 48.7 percent are female. The largest age group, constituting 71.3 percent of the total population, falls between 15 and 64 years of age, with a gender ratio of 1.07 women per 1.00 men.¹⁷

Lower life expectancy rates (60.55 years for men and 74.04 years for women for Russia and 60.6 for men and 72.3 for women in St. Petersburg) are reflected in a small elderly population of those over the age of 65 (14.2 percent). In this age range, there are 2.17 females for every male living in Russia. These figures indicate the potentially disparate

¹³ Official website of the City Administration of St. Petersburg: <http://www.gov.spb.ru/day/people>.

¹⁴ CIA World Factbook, January 10, 2006. <http://www.odci.gov/cia/publications/factbook/geos/rs.html>.

¹⁵ In Russia, states are administrative divisions one step below the federation level and are further subdivided into districts called raions. Due to a recent amendment to the Constitution, the 89 states will be reduced to 87 in 2007.

¹⁶ The Constitution of the Russian Federation, art. 5(1).

¹⁷ CIA World Factbook, January 10, 2006, op cit.

impact that guardianship may have on women over men, given that guardianships are frequently sought for the elderly as age-related diseases may render individuals less capable of self-care and decision-making.

The number of people with certified disabilities because of mental illness is estimated at 934,200 (an increase of 2.9% since 2002), or 656 people per 100,000.¹⁸ It is noted here, and with concern, that there are no national data on the numbers of people deprived of legal capacity.

Nationwide data on mental health and social care include:¹⁹

- Social care institutions:
 - ⇒ 442 social care institutions (in Russian, ‘psycho-neurological institutions’, or ‘internats’) with a total of 124,600 beds (this is an average of 282 beds per institution).
- In-patient mental health services:
 - ⇒ 277 psychiatric hospitals (increased by 1 in comparison with 2002).
 - ⇒ 110 in-patient departments at out-patient psychiatric clinics (increased by 1 in comparison with 2002).
 - ⇒ 164,752 beds in total (decreased by 1,442 or 0.9% in comparison with 2002).
 - ⇒ 672,000 psychiatric hospitalizations in 2003, or 471.6 per 100,000 (increased by 0.4% in comparison with 2002).
- Out-patient mental health services:
 - ⇒ 171 out-patient psychiatric clinics or ‘psycho-neurological hospitals’.
 - ⇒ 2,271 psycho-neurological out-patient units in rural areas.
 - ⇒ 1,117 psycho-therapeutic out-patient units (decreased in comparison with 2001 and 2002).

In St. Petersburg there are seven psychiatric hospitals with 5,345 beds and 12 psycho-neurological health centres with 600 beds.²⁰ In 2003, 21,844 people were hospitalized (9.75 per 1,000).²¹

National Statistics

In Russia no national statistics are kept on the number, status, condition of people under guardianship. There were two opportunities for MDAC to gain statistical data, from courts and from guardianship agencies. Courts in St. Petersburg are required to submit statistics twice a year to the Judicial Department of the Supreme Court, St. Petersburg

¹⁸ The health status of the population of the Russian Federation in 2004. State report of the Ministry of Health Care and Social Development of the Russian Federation and the Russian Academy of Medical Sciences, Moscow. 2005.

¹⁹ *Ibid.*

²⁰ See: www.zdrav.spb.ru/stat_information/stat_data/pdf/set_ucr_zdravoohr.pdf.

²¹ See: www.zdrav.spb.ru/stat_information/stat_data/pdf/deyat_bolnicn_ucr.pdf.

branch. MDAC asked this department to provide statistics, and was invited to the department's statistics department, where it was revealed that courts do not submit data on legal incapacity cases separately as they fall within the 'other special proceedings' category. It was therefore impossible to get statistics from the court system.

Guardianship offices of local authorities do not submit statistics on guardianship to any other agency. MDAC attempted to discover statistics from each guardianship office in St. Petersburg. The numbers are as follows:

Municipal district	Number of people under guardianship
<i>Municipal district 7</i>	<i>20</i>
<i>Municipal district 11</i>	<i>18-24</i>
<i>Municipal district 21</i>	<i>38-40</i>
<i>Municipal district 25</i>	<i>100</i>
<i>Municipal district 42</i>	<i>10</i>
<i>Municipal district 41</i>	<i>10</i>
<i>Municipal district 58</i>	<i>5</i>
<i>Municipal district 70</i>	<i>10-15</i>
<i>Admiralteyskiy okrug</i>	<i>7</i>
<i>Akademicheskoy okrug</i>	<i>54</i>
<i>Aptekarskiy ostrov</i>	<i>11</i>
<i>Dachnoe</i>	<i>100</i>
<i>Gavan</i>	<i>40</i>
<i>Izmajlouskoe</i>	<i>18</i>
<i>Kolpino</i>	<i>97</i>
<i>Kronshtadtskoe</i>	<i>58</i>
<i>Kronverkskoe</i>	<i>10-15</i>
<i>Morskoy</i>	<i>10</i>
<i>Moskovskaya zastava</i>	<i>32</i>
<i>Narvskiy okrug</i>	<i>27</i>
<i>Okkervil'</i>	<i>47</i>
<i>Pavlovsk</i>	<i>22</i>

<i>Petrodvorets</i>	300
<i>Poselok Metallostroy</i>	12
<i>Pushkin</i>	87
<i>Sampsonievskoe</i>	28
<i>Saperniy</i>	4
<i>Shushary</i>	18
<i>Sosnovaya polyana</i>	34
<i>Sosnovskoye</i>	26
<i>Strelna</i>	5
<i>Svetlanovskoe</i>	38
<i>Tyarlevo</i>	2
<i>Uljanka</i>	70
<i>Zvezdnoe</i>	40

As the above table shows, some of the offices could provide only estimated figures. The number of people under guardianship in each municipal district varies from zero to more than 100 people. The average is 20-30 people. There are 111 municipal districts in St. Petersburg. Rough estimations suggest therefore that more than 3,000 people are currently under guardianship in St. Petersburg.²² If we continue this rough calculation and extend it to the whole Russian Federation, there are an estimated 94,000 people under guardianship nation-wide. Russia's population is 142.8 million,²³ so the percentage of people under guardianship can be estimated at approximately 0.07%.

2.3 Russia's Legal System

Russia is a federal republic. Its Constitution, adopted in 1993, has supreme legal force.²⁴ It is enforceable throughout Russia and all laws must be consistent with its provisions.²⁵ Beyond the Constitution, federal laws have the highest status in the legal system, then Presidential decrees (called 'ukaz'), followed by governmental decrees (called 'postanovlenie'). Another important source of legal regulation is ministerial decrees – the so-called departmental acts.

²² Population of St. Petersburg is 4.581 million people (2006). Federal State Statistics Service. http://www.gks.ru/free_doc/2006/b06_13/04-14.htm.

²³ Federal State Statistics Service, data as of 2006. http://www.gks.ru/free_doc/2006/b06_13/04-02.htm.

²⁴ Constitution, arts. 4 and 15.

²⁵ Constitution, art. 15.

States have little discretion in law making.²⁶ For example, only federal legislation may contain regulations regarding guardianship.²⁷ State legislation may however define the structure, rights and duties of guardianship agencies, but only within the limits established by the federal laws.²⁸ Acts of municipal bodies are at the lowest level of the hierarchy of laws.

2.4 Mental Health Law in Russia

The main act that regulates the provision of psychiatric care in Russia is the law 'On psychiatric care and guarantees of citizens' rights in its provision'.²⁹ In addition, other laws deal with mental health issues, the most important of which are 'Fundamentals of the Laws of Russian Federation Regarding Protection of Citizens' Health',³⁰ and 'On State Court-Expert Activity in the Russian Federation'.³¹ These laws deal mainly with relations between the individual and the state in terms of compulsory admission to, and treatment in, psychiatric hospitals. The laws link with the Civil Procedure Code on procedural issues.

The crossover between classic mental health laws and the guardianship system are found in two decrees issued by the Ministry of Health. One 2003 decree introduced a formal standard for psychiatric examinations in the guardianship process,³² whilst the other contained guidelines for psychiatrists who carry out forensic psychiatric examinations in State psychiatric institutions.³³

2.5 Guardianship in Russia

Guardianship issues are governed by federal law and fall within federal jurisdiction.³⁴ The two main acts that regulate guardianship and establish the rights and responsibilities of guardians are the Civil Code³⁵ and the Civil Procedure Code.³⁶ These are referred to

²⁶ Constitution, arts. 71-73.

²⁷ According to art. 71 of the Constitution, civil law and civil procedure are under federal jurisdiction.

²⁸ Constitution, art. 73.

²⁹ 2 July 1992, latest version 22 August 2004.

³⁰ 22 July 1993, latest version 2 February 2006.

³¹ 31 May 2001, latest version 30 December 2001.

³² Decree of the Ministry of Health of 12 August 2003, no. 401.

³³ Decree of the Ministry of Health and Social Development of the Russian Federation 'On adoption of the instruction on holding court-psychiatric examinations in the state psychiatric institutions', 30 May 2005.

³⁴ Federal law of the Russian Federation 'On the general principles of organization of local government in the Russian Federation', art.14, para. 1, part 16, 6 October 2003; latest version 16 October 2006.

³⁵ Civil Code – part 1 (November 30, 1994, latest version 27 July 2006) and part 2 (26 January 1996, latest version 2 February 2006).

³⁶ Civil Procedure Code (November 14, 2002, latest version 27 December 2005)

extensively throughout this report. The Civil Code sets out the functions of guardianship authorities of local government, which carry out specific functions as set out in law, and which will be detailed in the main section of the report.³⁷ The Civil Code does not specify guardianship beyond stating that guardianship can be established over adults who are declared ‘incapable’ by the court as a result of a mental illness.³⁸

There is only one mechanism through which a person may be placed under guardianship. This mechanism encompasses a two-step process.

The first step requires a court ruling declaring the individual in question to be deprived of legal capacity. Legal capacity is defined in law as the ability of citizens through their actions to acquire and exercise their civil rights, and to fulfil their civil obligations (civil capability) that accrue upon reaching the age of 18.³⁹ A person, who, as a result of a mental disorder, cannot understand the meaning of his or her actions or guide them, may be declared by the court as incapable.⁴⁰ The second step is an administrative procedure through which the guardian is selected and appointed.⁴¹ The guardian is appointed by the guardianship authority of the local government.⁴² Greater detail of these steps is provided below. It must be pointed out at this stage however that the legislation enumerates in more detail the first step. Very little is said about how a guardian can be appointed, which suggests an immediate weakness of the system, a weakness to which the report will later turn.

Depriving a person of legal capacity is performed by a court. The standard for the deprivation of legal capacity is not merely the presence of a mental illness, but rather that the mental illness prevents a person from understanding the meaning of his actions or guiding them.⁴³

The procedure for depriving a person of legal capacity is governed by laws for so-called special proceedings. Special proceedings are designed to determine legally relevant facts or to decide certain specific matters.⁴⁴ The main stages and principles of civil procedure must be observed.⁴⁵ One of the main differences of special proceedings is that there are no actual parties to the case, only interested parties. A person whose legal capacity is under question is called an ‘interested party’ or ‘person concerned.’

³⁷ Civil Code, art. 34(1).

³⁸ *Ibid*, art. 32(1).

³⁹ *Ibid*, art. 21(1).

⁴⁰ Civil Procedure Code, ch. 31, arts. 281-286. Other articles of the Civil Procedure Code that contain general provisions for the civil procedure, i.e. chapters 1-22, and 40-42, also apply.

⁴¹ Civil Code, ch. III, arts. 21, 22, 26, 29-32 and 34-40.

⁴² *Ibid*, art. 29(1).

⁴³ *Ibid*, art. 29.

⁴⁴ Civil Procedure Code, art. 262.

⁴⁵ *Ibid*, art. 263.

Those who take part in the proceedings, including the person whose legal capacity is at issue, can ask for a private hearing.⁴⁶ In default the hearing is open to the public unless the judge declares otherwise.⁴⁷

The judge can ask an expert to conduct an incapacity assessment. The assessment must be conducted at an institution operated by the State health care system, a provision which limits the opportunity to obtain a truly independent opinion, and which suggests that in all cases a psychiatrist should carry out the assessment.⁴⁸ The standard form for the examination report was outlined in the 2003 Decree, referred to above. This provided, for the first time, a template on conducting psychiatric examinations, including instructions on how to complete the template.⁴⁹ The report must be submitted to the court in writing, signed by the expert or experts, and must be completed no later than ten days following the incapacity assessment. The report consists of three parts: introduction, research, and conclusions.

The introduction to the report should contain the name of the institution, the time and place of the examination, information about the person who is the subject of examination (name, date of birth, etc), and information about the expert(s) (name, education, length of service, etc.). The introduction should contain a declaration about the truthfulness of the expert's opinion. Indeed experts are subject to criminal sanctions for providing false expert opinion.⁵⁰ All relevant additional background information, including details of previous hospital admissions, and make reference to relevant medical and case notes.

The research section of the report should contain the description of methods and relevant medical information. This includes hereditary psychiatric disorders, previous psychiatric disorders, personal qualities and changes in personality that occurred as a result of the mental illness. It may also include a description of the adult's reactions to various events, including psychological traumas and other somatic illnesses and traumas, peculiarities of critical age periods, references from professional colleagues, and a description of the adult's somatic, neurological and mental state.

The description of the adult's mental state is a central part of the research section. It includes the following elements: the adult's state of consciousness, peculiarities of thinking, memory, mental power, emotions, will, attitude, and attention. It can include the adult's attitude towards previous mental disorders, psychotic disorders at the time of examination, and the adult's attitude to the legal case. All medical facts are documented.

⁴⁶ *Ibid*, art. 10(2).

⁴⁷ *Ibid*, art. 10.

⁴⁸ 'Fundamentals of the laws of the Russian Federation about the protection of citizens' health,' Federal law of the Russian Federation (22 July 1993), art. 52. For example, there is only one institution in St. Petersburg which is authorised to conduct expert assessment of capacity.

⁴⁹ Decree of the Ministry of Health no. 401, issued on 12 August 2003.

⁵⁰ Criminal Procedure Code, art. 307.

The final, the conclusions, section should contain an evaluation of the examination results and a substantive formulation of conclusions. Diagnosis of the mental disorder should be matched against international standards. Experts should provide answers to all questions asked by the court or otherwise explain their inability to provide these.

The report is then submitted to the court. All interested parties can familiarise themselves with case materials, including the report.⁵¹ Although an adult has the right to see the report, the law does not require that a copy be sent to the adult. The consequence is that adults can see the report only if they specifically go to the court's office. The law states that when a person is notified about the hearing, he or she is supposed to be provided with copies of procedural documents.⁵²

The examination report should be read out during the hearing.⁵³ If the court deems the first examination inconclusive, additional examinations may be carried out by the same or a different expert.⁵⁴ If the court, the prosecutor or any other interested party is dissatisfied with the results of the examination, the court can order a re-examination. This can be performed by a different expert or group of experts. There is, therefore, on the face of it a right to seek a second medical opinion.

If the court deprives the adult of legal capacity, the case is sent to the guardianship authority of the local government with a direction from the court to place the adult under guardianship. In these instances the court must send the case to the adult's local guardianship authority within three days of the deprivation of legal capacity.⁵⁵

2.6 Human-Rights Based Assessment of Russia'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

⁵¹ Civil Procedure Code, art. 35, part 1.

⁵² *Ibid*, art. 113, part 2.

⁵³ *Ibid*, art. 187.

⁵⁴ *Ibid*, art. 87.

⁵⁵ Civil Code, art. 34, para. 2.

guardian. The third area explores less restrictive alternatives as well as mechanisms for review and termination of guardianship once imposed.

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

2.6.1 Principles Running Throughout Legal Frameworks (Indicator 1)

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

Conclusion: The Constitution and other laws provide for the respect for the human rights and dignity of people with mental disabilities in accordance with international standards.

Analysis: The Constitution declares it the duty of the State to recognize, respect and protect the rights and liberties of individual citizens,⁵⁶ such rights to be so recognised and protected in conformity with the commonly recognized principles and norms of international law.⁵⁷

The law entitled ‘On psychiatric care and guarantees of citizens’ rights in its provision’ states that psychiatric care should be carried out based upon the principles of lawfulness, humaneness, and respect for human rights.⁵⁸ Similarly, the federal law ‘Fundamentals of the Laws of Russian Federation Regarding Protection of Citizens’ Health’ states that the main principles of health protection are respect for human rights and the provision of state guarantees related to such rights.⁵⁹

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 be-

⁵⁶ Constitution of the Russian Federation.

⁵⁷ *Ibid*, art. 17(1).

⁵⁸ *Ibid*, art. 1(2).

⁵⁹ *Ibid*, art. 2(1).

ing. 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.⁶⁰

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.’⁶¹ The WHO cites the Polish Mental Health Protection Act preamble as embodying this principle. This example states, ‘[a]cknowledging that mental health is a fundamental human value and acknowledging that the protection of the rights of people with mental disorders is an obligation of the State, this Act proclaims [...]’⁶² 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.’⁶³

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>
-------------	--

Conclusion: Legislation defines who may make an application for appointment of a guardian, but it fails to define a sufficiently clear and specific basis for founding applications.

⁶⁰ Recommendation R(99)4, Principle 1.

⁶¹ 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.

⁶² 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.

⁶³ 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.

Analysis: The law provides that a procedure establishing a deprivation of legal capacity can be initiated through a formal application for guardianship. It further defines those who may initiate the proceedings.⁶⁴ These include:

- Family members of the adult (spouse, children who have reached the age of 18, parents, and other relatives who live with the adult).
- Close relatives (parents, children, siblings) regardless of the fact if they are residing together with the adult.
- Guardianship authorities of local government.
- Psychiatric hospitals or social care (psycho-neurological) institutions.

The application should contain a description of evidence indicating the presence of a mental illness severe enough to prevent a person from understanding the meaning of his actions or guiding them.⁶⁵ An applicant should also provide documents supporting the application but the law does not specify what kind of documents is required.

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.’⁶⁶

The Recommendation calls for ‘fair and efficient procedures for the taking of measures for the protection of incapable adults’.⁶⁷ 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

⁶⁴ Civil Procedure Code, art. 281(2).

⁶⁵ *Ibid*, art. 282.

⁶⁶ Principle 11(1).

⁶⁷ Recommendation No. R(99)4, Principle 5(1).

one year old. The court found a violation of Article 6(1) because, among other procedural defects, the Slovakian Court failed to secure sufficient evidence in light of Principle 12 of Recommendation No. (99)4, which requires an ‘up-to-date report from at least one suitably qualified expert.’⁶⁸ When legislation prescribes the type of evidence to be submitted with an application, a procedure such as that suffered by the applicant in *H.F. v. Slovakia* can be avoided.

Indicator 3	<i>An adult has a right to actual notice, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.</i>
-------------	---

Conclusion: Russian legislation provides for the right to receive notice and to be present at court hearings. However, this right can be waived if the adult’s health prevents attendance.⁶⁹

Analysis: A person who is subject to legal incapacity proceedings and further placement under guardianship has the right to be both notified that a procedure has been instituted,⁷⁰ and to attend the hearing, unless his or her health prevents the adult from doing so.⁷¹ This exception, however, seriously undermines the individual’s right to be present at the hearing because the law fails to provide clear grounds for the judge to decide not to summon the adult to the hearing. Thus, the law allows for an excessively broad judicial margin of appreciation of what the health status means when the case may be heard without the adult.

All interested parties (the applicant, the adult, the guardianship authority, etc.) must be notified and summoned, subject as noted above to the adult’s health, to appear in court.⁷² The summons contains information about the court, including its name and address, the time and place of the hearing, in what capacity a person is supposed to

⁶⁸ *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/>.

⁶⁹ Civil Procedure Code, art. 284.

⁷⁰ Civil Procedure Code, art. 113.

⁷¹ *Ibid.*, art. 284.

⁷² *Ibid.*, art. 113. The notification is delivered by registered mail, while the subpoena, accompanied by other relevant documents such as the application, may be delivered either by registered mail or by a person commissioned by the court to do so. The subpoena is usually delivered to the address that is stated in the application and must be handed personally to the adult, who must sign either the stub that is returned to the court or the receipt (if subpoena is delivered by mail). In case the person is not at the place of residence at the time of delivery, the subpoena can be served to an adult family member that lives together with this person.

appear in court, and the case number.⁷³ The summons is delivered in advance, so that all participants may have enough time to prepare for the hearing,⁷⁴ but the exact timing of the summons is not specified.

The application may also contain information regarding the adult's ability to attend the court hearing. Medical case records, hospital references, previous psychiatric examination reports, and testimonials can serve as evidence of mental illness. When an application is filed with the court, the judge checks whether necessary evidence is included. If the application contains all necessary evidence, the judge issues an order to carry out an examination. In this order, the judge puts several questions to the expert, and others, as to whether the adult is capable of attending the court hearing. Therefore, the questions of presence and the medical grounds for declaring an adult incapable are decided by an expert in the course of the same examination. Furthermore, the expert must present the grounds for his or her assessment. If the adult cannot attend, for example, if the person is detained in a psychiatric institution, then the case will be heard in the adult's absence.⁷⁵

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.'⁷⁶ The Explanatory Memorandum to Recommendation No. R(99)4 reiterates the necessity of this procedural safeguard, citing the requirements of Article 6 of the European Convention on Human Rights.⁷⁷ 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.'⁷⁸

⁷³ *Ibid*, art. 114, para. 1.

⁷⁴ *Ibid*, art. 113, para. 3.

⁷⁵ Commentary to the Civil Procedure Code (article 284). Ed. by Zhujkov V.M., Puchinsky V.K., Treushnikov M.K. Moscow, 2003.

⁷⁶ 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'.

⁷⁷ 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.

⁷⁸ 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

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.’⁷⁹ 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 6.⁸⁰

Indicator 4	<i>An adult has a right to free and effective legal representation throughout guardianship proceedings.</i>
-------------	---

Conclusion: There is no right to free legal aid for adults subject to guardianship proceedings.

Analysis: The adult has the right to have an attorney represent him during the proceedings.⁸¹ However, there is no entrenched legislative right to free legal representation. Free legal representation is only available to Russian citizens with low incomes and in only specific cases, of which only one form, World War II veterans, applies to incapacity proceedings.⁸² Other individuals with low incomes are not provided with legal representation in incapacity hearings.

In some states, for instance, in St. Petersburg, free legal aid is provided by the state through special programmes to all individuals with low income in any cases except commercial matters.⁸³ However, the adult must request this service from the relevant law firm before the hearing. The court is not required to seek free legal aid in incapacity proceedings for the adults, or even to notify the adult of the existence of the special programme.

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.

⁷⁹ Principle 13.

⁸⁰ 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.

⁸¹ Civil Procedure Code, art. 48(1).

⁸² ‘On advocates’ activity and advocacy in Russian Federation’, federal law of 31 May 2002 no. 63-FZ, art. 26. See also Civil Procedure Code, art. 50.

⁸³ Agreement of 14 June 2006 No. 234-2006 ‘On Providing Free Legal Aid of All Types to All Veterans of World War II, Victims of the Siege of Leningrad, Poverty-Stricken Citizens and Their Family Members Living in St. Petersburg’. See additional information in the Russian language at: http://www.apspb.ru/bespl_pom.php.

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.’⁸⁴ 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.⁸⁵ As the requirements of Article 14(3) of the ICCPR are considered basic guarantees of a fair hearing,⁸⁶ 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.’⁸⁷

Enforcing this requirement by providing effective legal representation is especially crucial when the person is alleged to lack capacity to represent him or herself.⁸⁸ 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.⁸⁹

Indicator 5	<i>An adult may not be detained in order to be subjected to an evaluation of his or her legal capacity.</i>
-------------	---

Conclusion: Legislation allows for the detention of adults in psychiatric hospitals in order to carry out an incapacity assessment.

Analysis: Russian law provides the opportunity for the adult to consent to an incapacity assessment. The law requires that either the adult or their representative should give their

⁸⁴ 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.

⁸⁵ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, para. 51.

⁸⁶ See UN Human Rights Committee, General Comment 13, para. 5.

⁸⁷ Principle 7.

⁸⁸ 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.

⁸⁹ 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).

consent to the examination in writing.⁹⁰ The consent should contain reasons for holding the examination, the conditions of the examination (out-patient or in-patient), and the time it will take to perform the examination.

However, the law also allows psychiatrists to detain adults purely to carry out an incapacity assessment. This decision, which must be made by a judge, may be made only if the prosecutor and a psychiatrist are present at the court hearing. The law does not specify the procedure for such a hearing, or whether it must be held in the presence of the adult.

The court can order an adult's detention in an institution for an incapacity assessment solely on the basis of one expert conclusion that the assessment cannot be held on an out-patient basis. Curiously, the Civil Procedure Code contains provisions about compulsory incapacity assessments for people who refuse to be examined in general, and not those who refuse to be detained in a hospital for examination.

Once the court has decided to detain the adult for an incapacity assessment, it must notify the person's family members, relatives or other individuals named by the adult within 24 hours. If these people are unavailable, the court must notify the local police force.

An adult may be detained in an institution for up to 30 days for an incapacity evaluation.⁹¹ This term may be extended by a court in the jurisdiction where the examination is taking place based solely on a request of the expert or experts carrying out the incapacity assessment. The court is obliged to decide on this extension request and inform the experts within three days following the request. These cases must be heard with the participation of the adult's representative and the adult him or herself unless prevented so by reason of his or her health.⁹² If the judge refuses to extend the term, the adult must be discharged. If the extension is granted, the director of the hospital informs the adult of the judge's decision.⁹³

In exceptional cases, the timeframe of an examination can be extended for a second time, although the maximum term of institutionalization for an incapacity assessment is 90 days.⁹⁴ If these terms are not observed, the adult, his representative or advocate, and/or the director of the institution can file a complaint with the district court.

Adults detained in hospitals for an incapacity assessment are subject to general mental health laws as noted above.⁹⁵

⁹⁰ 'On state-court expert activity in the Russian Federation', art. 28.

⁹¹ *Op. cit.*

⁹² Civil Procedure Code, art. 304(1) and (2).

⁹³ The system allows for the involvement of two different judges: the first being the one who ordered an examination, while the second a judge of the court in the jurisdiction where the examination is taking place.

⁹⁴ 'About state court-expert activity in the Russian Federation,' art. 30, Decree of the Ministry of Health of the Russian Federation no. 401, issued on 12 August 2003, art. 18.

⁹⁵ 'About state court-expert activity in the Russian Federation', art. 32.

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.’⁹⁶ 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 5.⁹⁷ In other cases, the Court additionally held that forced psychiatric examinations violate Article 6 (right to fair trial)⁹⁸ and Article 8 (right to respect for private and family life, home and correspondence)⁹⁹ of the European Convention on Human Rights. Consequently, the mere possibility that a person may lack legal capacity, either partially or entirely, is not a sufficient basis, by itself, to involuntarily detain a person.

Indicator 6	<i>An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence (witnesses).</i>
-------------	--

Conclusion: Russian legislation allows an adult to present evidence and call witnesses, as well as to examine and challenge the evidence presented by others. However, the law fails to provide that the adult be informed about this right in incapacity proceedings, especially as there is no free legal representation (see Indicator 4, above), as well as to take into account the adult’s lack of functional capacity which limits their ability to understand complex procedural issues.

Analysis: Adults subject to incapacity proceedings and imposition of guardianship have the right to present evidence and witnesses,¹⁰⁰ as well as to examine and challenge the evidence against them.¹⁰¹ As there are no restrictions stating otherwise, it is assumed that the adult can also present evidence or witnesses in the pre-trial stage.

⁹⁶ 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.

⁹⁷ *Nowicka v. Poland*, Application No. 30218/96, judgment of December 3, 2002, paras. 58-61.

⁹⁸ 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.

⁹⁹ 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.

¹⁰⁰ Civil Procedure Code, art. 57.

¹⁰¹ *Ibid*, arts. 177, 179 and 188.

A person who is the subject of an examination, similarly to any other individual, enjoys all procedural rights, including the following rights regarding its process:

- To submit questions that should be decided during the examination, provided that the adult is aware of the incapacity application lodged against him or her.
- To request that the judge hold a re-examination, a complex examination (more than one field of science, for example psychiatry and psychology), or a commission examination (involving more than one expert).¹⁰²

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'.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ In the case of proceedings on legal incapacity and guardianship, the ability of the adult to challenge evidence is especially important, because only when evidence is tested do weaknesses or hidden motivations come to light. For instance, through cross examination the court may be able to hear about family conflicts and the application being motivated by the possibility of having control of the adult's finances. Furthermore, at this stage, the adult may also be able to point out procedural irregularities, such as medical reports that are out of date or incomplete, as well as evidence demonstrating the adult's functional abilities.

Indicator 7	<i>No adult is deprived of legal capacity without being the subject of a capacity evaluation, conducted by a qualified professional and based upon recent, objective information, including an in-person evaluation.</i>
-------------	--

Conclusion: Law provides that legal capacity may be deprived only after an incapacity assessment by a psychiatrist. However, the law is silent on the standard of the assessment.

Analysis: The incapacity evaluation must be carried out by a certified state expert. There is no requirement for an expert to have a special training on capacity assessment, and

¹⁰² *Ibid.*, art. 79.

¹⁰³ Principle 7(1).

¹⁰⁴ For application of Article 6(1) to guardianship proceedings, see *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979.

¹⁰⁵ 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.

the law does not specify how recent the assessment should be. Further requirements of incapacity assessments are fully detailed under Indicator 5 and are not repeated here.

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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

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>
-------------	---

Conclusion: The law requires that a finding of the deprivation of legal capacity be based on a causal relationship between mental disorder and the adult’s inability to understand the meaning of his actions or take purposeful decisions.

Analysis: Russian law requires that a psychiatric examination has to take place.¹⁰⁹ The Civil Code states that a person who, due to a mental illness cannot understand his actions or guide them, can be deprived of legal capacity.¹¹⁰

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

¹⁰⁶ See Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights.

¹⁰⁷ Principle 12.

¹⁰⁸ *H.F. v. Slovakia*, op. cit.

¹⁰⁹ Civil Procedure Code, art. 283.

¹¹⁰ Civil Code, art. 29.

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.

Indicator 9	<i>A finding of incapacity is based upon sufficient evidence and serves the interests of the adult.</i>
-------------	---

Conclusion: Although the law requires ‘enough’ evidence to deprive or restrict an adult’s legal capacity, it fails to specify the type or quality of evidence needed.

Analysis: As an initial safeguard, the court, as part of the process of preparation for the court hearing, determines whether there is enough evidence of an individual’s mental disorder presented in the application to order a comprehensive psychiatric examination.¹¹¹ This includes evidence that the adult is being treated at a psychiatric institution, has experienced trauma that could cause mental illness, or has been subject to a court ruling finding the person committed a criminal offence but lacked the requisite mental element, and as a consequence was sent to a psychiatric hospital for involuntary detention and treatment.

However, the law does not specify the standard of proof required to deprive an adult of legal capacity. Therefore, the judge has broad discretion to decide whether there is enough evidence proving the state of mental disability of the concerned person and, consequently, whether or not an incapacity assessment should be held. If the court finds insufficient evidence, the application is dismissed or the applicant is requested to provide more evidence.

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.

¹¹¹ Civil Procedure Code, arts. 150 and 283.

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.¹¹² 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.¹¹³ 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.’¹¹⁴ To achieve this, the individual’s circumstances must be taken into account and the protection offered by guardianship should be weighed against any possible negative consequences. As stated in Principle 5 of Recommendation No. R(99)4, restriction should not be imposed ‘unless the measure is necessary, taking into account the individual circumstances and needs of an adult.’ For example, as employment is an important source of social interaction and self-esteem, guardianship may not be in the adult’s best interests if, as a result of it, the right to work is restricted. Such aspects should be thoroughly examined during proceedings in order to meet the necessity, subsidiarity, and proportionality requirements prescribed in Principles 5 and 6.

Indicator 10	<i>Selection of a guardian is based on objective criteria and the wishes and feelings of the adult are considered.</i>
--------------	--

Conclusion: The appointment of a guardian is based on objective criteria, and the legislation specifies that the wishes of the person to be placed under guardianship should be considered. However, law is silent on the weight to be attached to the adult’s preference.

Analysis: There are a number of objective standards for the appointment of a guardian. A guardian must be fully capable, must be an adult (18 years or above), and must be a Russian citizen.¹¹⁵ A guardian may be appointed only if the potential guardian agrees. The

¹¹² Principle 12.

¹¹³ *H.F. v. Slovakia*, Application No. 54797/00, judgment of November 8, 2005.

¹¹⁴ Principle 8(1).

¹¹⁵ Civil Code, art. 35(2).

guardianship authority must take into account moral and other qualities, and whether the candidate has an acceptable relationship with the adult. There are no requirements or restrictions concerning criminal conviction, maximum age, absence of conflicts of interest or level of education, although all these matters can be considered by the guardianship agency when selecting a guardian. The law specifically states that, if possible, the wishes of the person under guardianship should be considered when selecting the guardian,¹¹⁶ but is silent on how these wishes should be taken into account.

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’.¹¹⁷ It also suggests that States take steps to ensure that qualified guardians are available, such as creating training associations.¹¹⁸ 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.¹¹⁹

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’.¹²⁰ 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.¹²¹ 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>
--------------	--

Conclusion: The law provides only weak safeguards to protect against conflict of interest situations arising.

¹¹⁶ *Ibid*, art. 35(3).

¹¹⁷ Principle 8(2).

¹¹⁸ Principle 17.

¹¹⁹ 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.

¹²⁰ Recommendation No. R(99)4, Principle 9(2).

¹²¹ Explanatory Memorandum to Recommendation No. R(99)4, para. 44.

Analysis: The most notable feature of guardianship in this respect, is that the directors of the institutions within which adults are detained are appointed the guardian of that adult. The potential actual conflict is very real as is the appearance of such conflict. However certain protections within guardianship generally are provided. Guardians, for instance, perform their duties free of charge.¹²² A guardian is not allowed to enter into a legally binding contract with the person under guardianship. This contributes to limiting the risk of adults under guardianship giving property as a gift or for free use to the guardian. He or she is not allowed to represent the person under guardianship in transactions or in court proceedings that involve the guardian's own spouse or close relatives, such as children, parents and siblings.¹²³

Human Rights Standards: Conflicts between an appointed representative and the adult are not directly addressed by Recommendation No. R(99)4. Best practices from other countries include France, where legislation directly provides that an 'additional supervisory guardian' is appointed who, among other duties, is designated to represent the adult when his or her interests are in conflict with the guardian's interests.¹²⁴ The Standards of Practice adopted by the National Guardianship Association, an American membership organisation of guardians and legal professionals, address the issue of conflicts of interest between a guardian and an adult in Standard 16, which states that:

'The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the ward.'¹²⁵

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'.¹²⁶ 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.

¹²² Criminal Code, art. 36(1). The law does not provide for any compensation to the guardians of adults deprived of legal capacity, hence they perform their duties free of charge. Compensation is only paid to foster parents until their children reach full age.

¹²³ Civil Code, art. 37(1).

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ *Ibid*, Standard 16.

Indicator 12

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

Conclusion: An adult has the right to appeal a finding of incapacity, but must do so within ten days of the court's decision produced in writing, irrespective of whether that adult has actually received the decision. No free legal assistance or representation is provided in these proceedings.

Analysis: The court ruling must be given to the adult if he or she is present at the hearing, or, alternatively, must be sent by regular mail within five days of the hearing if the adult was not present at the court hearing.¹²⁷ The adult has the right to appeal the court's finding of incapacity, but may only do this within ten days from the date of the court's decision. If this deadline is missed, the adult must apply for an extension providing valid reasons for not filing a timely appeal.¹²⁸ It is then within the court's discretion whether or not to allow the appeal.

In accordance with federal law 'On the order of reviewing citizens' appeals', people have the right to file a complaint with any of the state or municipal agencies that are competent in making a decision about the complaint.¹²⁹ The law does not contain any limitations of this right for adults under guardianship.

The law does not provide adults under guardianship a right to appeal the appointment of a guardian. In fact the adult has no access to judicial remedies to lodge any form of legal complaint about such an appointment. Once deprived of legal capacity, that person loses the procedural capacity to file a complaint about any decision made by any authority without the guardian's permission. The adult is not recognised as having any legal standing.

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'.¹³⁰ 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

¹²⁷ Civil Procedure Code, art. 336.

¹²⁸ *Ibid*, art. 338.

¹²⁹ Federal Law No. 59 of 2 May 2006, arts. 2 and 8.

¹³⁰ 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.¹³¹ 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>
--------------	--

Conclusion: People deprived of legal capacity are automatically deprived from exercising all political rights.

Analysis: Basic political and civil rights are automatically denied to an adult who has been deprived of legal capacity:

- ⇒ They are banned from voting in any election.¹³²
- ⇒ They are prohibited from running for any elective public office¹³³ or standing for any non-elective public office.¹³⁴
- ⇒ They are denied the right to access courts, even in issues affecting their human rights.¹³⁵

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

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 17 December 1991, Principle 1(6).

¹³² Constitution, art. 32(3). See also the law 'On the basic guarantees of electoral rights and rights for participation in the referendum for the citizens of the Russian Federation' art. 4, which states that citizens who have been deprived of legal capacity are not allowed to vote, be elected, or participate in referenda.

¹³³ *Ibid.*

¹³⁴ On State Civil Service in the Russian Federation, federal law no. 79-FZ of 27 July 2004, art. 16.

¹³⁵ Civil Procedure Code, art. 135(3)(1).

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.’¹³⁶ 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’.¹³⁷

Specifically addressing individuals with mental disabilities, the right to autonomy and self-determination is elaborated in Principle 3 of Recommendation No. R(99)4. This specifies that legislative frameworks need to incorporate guardianship laws that recognise that different degrees of functional capacity exist as well as the dynamic nature of functional capacity over time. Recommendation No. R(99)4 emphasises that a measure of protection such as guardianship ‘should not automatically deprive the person concerned of the right to vote, or to ... make other decisions of a personal character at any time when his or her capacity permits him or her to do so’.¹³⁸

Indicator 14	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to work.</i>
--------------	---

Conclusion: The right to work for people deprived of legal capacity is not regulated clearly in Russian law.

Analysis: Article 37 of the Constitution states that everyone has a right to use his abilities to work, choose a profession and specialization. There are no limitations to this right in

¹³⁶ 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.

¹³⁷ Recommendation No. R(99)4, Principle 3(2).

¹³⁸ Recommendation No. R(99)4, Principle 3(2).

the Constitution. Nor are there any provisions in the Labour Code that limit the adult's right to work.¹³⁹ However, in order to enter into an employment contract, a person must have so-called work 'capacity', a term not expressly defined in law. In the context of this report referring to work 'capacity' has the potential to cause confusion. Consequently, and for this reason only, the word 'authority' is used in its place. A person should have functional ability and legal authority to perform the work that is outlined and defined in the employment contract.¹⁴⁰ Functional ability is the availability of physical, intellectual, and volitional qualities that constitute the person's general and particular proficiencies for work. Evidence of the lack of such authority can be the person's disability and/or youth. Legal authority comprises such elements as age, education, in some cases citizenship, and absence of any medical circumstances that could prevent the person from fulfilling his duties. The Labour Code specifies only one aspect of labour related capacity authority which is that the minimum age for employment is 16. Therefore the position of people under guardianship and the right to work remains unclear.

Human Rights Standards: Article 8 (right to privacy) of the European Convention on Human Rights includes the right to work. The European Court of Human Rights has said that 'it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.' The European Social Charter (revised) also contains provisions protecting the right to work. Recommendation No. R(99)4 provides that where a measure of protection is necessary, it should be proportional to the degree of capacity of the adult and tailored to the individual circumstances and needs of the person. Therefore, while some restriction may be necessary in certain situations, a blanket prohibition from employment of all people under guardianship may exclude individuals from participating in certain realms of life and activities despite their capacity to do so.

Indicator 15	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to property.</i>
--------------	---

Conclusion: Adults under guardianship are automatically deprived of making decisions relating to their property.

Analysis: An adult placed under guardianship is not deprived of his right to property – he or she has the right to own, use, and dispose of property. But the law specifies that all transactions, including those related to property, must be carried out by the guardian.¹⁴¹ An adult's finances are also controlled by the guardian. The guardianship authority of

¹³⁹ 30 December 2001, No. 197-FZ, last amended on 30 June 2006.

¹⁴⁰ Commentary to the Labor Code of the Russian Federation. (2005) Ed. By A. Kurennoj, S. Mavrin, E. Khohlov. Accessed through the legal database 'Consultant-Plus'.

¹⁴¹ Civil Code, art. 29(2)

the local government should authorise expenditure of the finances or property belonging to the person under guardianship except that which is of an every day nature.¹⁴² Any transactions made by a person under guardianship without the guardian's consent are considered null and void.¹⁴³

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

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

Recommendation No. R(99)4 follows this sentiment by recommending that '[w]henver possible the adult should be enabled to enter into legally effective transactions of an everyday nature'.¹⁴⁴ 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'.¹⁴⁵

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>
--------------	--

Conclusion: Russian law removes from people deprived of legal capacity the right to marry, to found a family and to enjoy respect for family life.

Analysis: The law treats adults under guardianship as minors in denying them their family rights. People deprived of legal capacity are prohibited from marrying¹⁴⁶ and an

¹⁴² *Ibid*, art. 37(1).

¹⁴³ *Ibid*, art. 171.

¹⁴⁴ Recommendation No. R(99)4, Principle 3(4).

¹⁴⁵ 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).

¹⁴⁶ Family Code, art. 14.

adult deprived of legal capacity is prohibited from filing for divorce unless the guardian agrees and acts for the adult.¹⁴⁷

If a parent is deprived of legal capacity, his or her children will be considered not to be in the care of ‘parents’, assuming there is no other parent with full legal capacity.¹⁴⁸ The consequence is the automatic removal of children from the family¹⁴⁹ and the denial of parenthood.

Human Rights Standards: Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home and correspondence. This imposes on States a negative obligation not to interfere with, as well as a positive obligation to respect a person’s private and family life. There are similar Convention obligations to respect a person’s right to marry and found a family under Article 12, which reads, ‘[m]en and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.’ The UN has also addressed this issue. Rule 9 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities contains strong language on the rights of people with disabilities to family life and personal integrity, affirming that ‘States should promote the full participation of persons with disabilities in family life. They should promote their right to personal integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood’,¹⁵⁰ and that ‘[p]ersons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood’.¹⁵¹

Indicator 17	<i>By being placed under guardianship, an adult is not automatically deprived of the opportunity to exercise the right to associate.</i>
--------------	--

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

Analysis: The Constitution guarantees the right to associate, including association in the trade unions.¹⁵² In order to exercise this right, one should be able freely to join associations, participate in its activities, etc. However, some laws that further regulate the right to associate specifically state that a person under guardianship cannot be a

¹⁴⁷ *Ibid*, art. 16(2).

¹⁴⁸ *Ibid*, art. 121.

¹⁴⁹ *Ibid*, art. 123.

¹⁵⁰ 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.

¹⁵¹ *Ibid*, Rule 9(2).

¹⁵² Constitution, art. 30.

member of an association. According to Article 23, paragraph 2 of the federal law ‘On political parties’,¹⁵³ a person who is deprived of legal capacity cannot be a member of a political party. Other laws, such as, federal law ‘On non-commercial organisations’,¹⁵⁴ or federal law ‘On associations’,¹⁵⁵ are silent on whether people deprived of legal capacity can join such organisations.

Human Rights Standards: The right to associate can be especially important for people with disabilities, as membership in advocacy and peer support groups can foster skills development, empowerment and autonomy. Advocacy associations in particular may give individuals a collective political voice to lobby for legislative protection. A prohibition from associating with others to pursue a common aim engages Article 11 of the European Convention on Human Rights, which states: ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ Any restrictions on these rights must be clearly stated in law and necessary in a democratic society for one of the listed grounds in Article 11(2), such as for the protection of health or morals or for the protection of the rights and freedoms of others. The European Court of Human Rights has confirmed that ‘an inherent part of the right set forth in Article 11’ is the right to form associations.¹⁵⁶ 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>
--------------	--

Conclusion: Only plenary (all encompassing) guardianship exists in Russia for people with psycho-social (mental health) disabilities and intellectual disabilities. Law does not provide a mechanism for people to retain legal capacity in areas where they have functional capacity.

¹⁵³ Federal Law No. 95 of 11 July 2001.

¹⁵⁴ Federal Law No. 7 of 12 January 1996.

¹⁵⁵ Federal Law No. 82 of 19 May 1995.

¹⁵⁶ *Sidiropoulos v. Greece*, Application No. 26695/95, judgment 10 July 1998, (1998) EHRR 633.

Analysis: Adults deprived of legal capacity lose the legal right to acquire civil rights and duties and exercise them. Russian guardianship is all-encompassing. It is total and no aspect of it is tailored to reflect the actual functional capacity of an adult. Accordingly, there is no requirement or possibility to limit capacity and apply guardianship only to those areas in which a person does not have functional capacity.

Human Rights Standards: As noted, international human rights law demands a least-restrictive approach to guardianship. This approach which maximises self-determination and autonomy, basic principles of human rights which permeate Recommendation No. R(99)4. For example, the document recommends that ‘[t]he range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.’¹⁵⁷ 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 independently of the guardian. A medical expert must be consulted when the judge assesses those tasks for which the adult will retain decision-making.¹⁵⁸ 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:

¹⁵⁷ Recommendation No. R(99)4, Principle 2(5).

¹⁵⁸ French Civil Code, op. cit, art. 501. Unofficial translation provided by Legifrance, a service of the French Government. Available at: www.legifrance.gouv.fr (last accessed 1 May 2007).

‘A guardian shall exercise authority only as necessitated by the ward’s limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward’s own behalf, and develop or regain the capacity to manage the ward’s personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.¹⁵⁹ In this paradigm, the guardian is responsible for ensuring the adult’s participation and opportunity to act whenever possible.’

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

Conclusion: There is no requirement in Russian law for guardians to consult the adult under guardianship before making any decisions.

Analysis: There is no notion of surrogate decision-making under Russian law. It follows therefore that the guardian is under no legal obligation to consult the adult about their wishes with respect to any decisions. Nor is the guardian obliged to follow such wishes if the adult is given an opportunity to express them. These decisions include major medical decisions.

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.¹⁶⁰ 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’.¹⁶¹ 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’.¹⁶² Principle 2 of the Recommendation goes further, recommending that when trying to find the best solution to an individual’s circumstances,

¹⁵⁹ See Uniform Guardianship and Protective Proceedings Act (1997), art. 3, para. 313(a).

¹⁶⁰ 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.

¹⁶¹ Principle 9(1).

¹⁶² Principle 9(3).

'[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'.¹⁶³

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>
--------------	---

Conclusion: Russian legislation specifies the scope and authority of the guardian, but because it relies on plenary (all encompassing) guardianship, the authority of guardians can go beyond the areas where the adult needs assistance.

Analysis: Law does not provide an exhaustive list of the obligations of the guardian. It outlines the authority of the guardian in the following circumstances: the authority to make medical decisions, to consent to psychiatric examination of the person under guardianship, and to place adults into psychiatric and social care institutions.¹⁶⁴ Since the loss of legal capacity is total, it is generally accepted that the guardian should make all decisions on behalf of the adult. There is, therefore, a link with life-long institutionalisation, as is discussed in Indicator 21, below.

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'.¹⁶⁵ 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.'¹⁶⁶

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,

¹⁶³ Principle 2(6).

¹⁶⁴ See art. 32 of 'Fundamentals of the laws of Russian Federation about the protection of citizen's health', arts. 23, 25, 28, 29 and 32 of the Law of the Russian Federation 'On psychiatric care and guarantees of citizens' rights in its provision'.

¹⁶⁵ Principle 2(1).

¹⁶⁶ Principle 3(1).

matter, or property'.¹⁶⁷ 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,¹⁶⁸ consent to marriage or adoption, or make or revoke a will, absent specific permission of the court.¹⁶⁹

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>
--------------	--

Conclusion: Guardians need not promote independence or seek community-based or less restrictive living arrangements.

Analysis: Russian law does not require the guardian to promote the independence of the person under guardianship. The law does not go beyond specifying that guardians must support the people who are under their guardianship (ensure adequate food and housing), provide care and medical care, and 'protect their rights and interests'.¹⁷⁰

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

Article 19 – Living Independently and Being Included in the Community

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

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

¹⁶⁷ The Finnish Guardianship Services Act, 442/99, para. 8(3).

¹⁶⁸ *Ibid*, para. 34.

¹⁶⁹ *Ibid*, 442/99, para. 29.

¹⁷⁰ Civil Code, art. 36(3).

living and inclusion in the community, and to prevent isolation or segregation from the community.

- ⇒ Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.¹⁷¹

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'.¹⁷² Each person has 'the right to be treated and cared for, as far as possible, in the community in which he or she lives'.¹⁷³ 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'.¹⁷⁴ 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.¹⁷⁵

Indicator 22

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

Conclusion: The law ensures, but not to the fullest possible extent, that the guardian manages the assets of the adult under guardianship for the benefit of that person.

Analysis: All income of the adult under guardianship, including income from any estate, should be spent by the guardian only in the interest of that adult.¹⁷⁶ The guardianship authority of the local government must give its consent for:

- Transfer of the adult's property, including leases, use of the property without getting any payment for it, and mortgages.

¹⁷¹ 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.

¹⁷² 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.

¹⁷³ *Ibid*, Principle 7, Role of community and culture.

¹⁷⁴ 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).

¹⁷⁵ Principle 6(2).

¹⁷⁶ Civil Code, art. 37.

- Agreements that lead to the adult losing property, such as division of his property, or allocation of any shares he might own.
- Any other agreements that might lead to a reduction of the adult's assets.¹⁷⁷

Money required to support daily living for the adult (such as food, clothing and medicine) is considered to be an exception and the guardianship authority need not give its consent for such items.

The law allows the guardian to give away the property of the person under guardianship as a gift if there is consent from the guardianship authority of the local government.¹⁷⁸ The value of this gift is however limited in that it should not exceed the total value of five times the monthly minimum wage.¹⁷⁹

If the adult has valuable assets, such as real estate or securities, the guardianship agency may propose a trust contract with a third party in order to manage the assets.¹⁸⁰ The trust contract is drawn up in the same manner as a regular contract, with the primary difference being that the guardianship authority must appear in the contract as the property owner.¹⁸¹ All rules applicable to for the guardian handling the property of the adult¹⁸² apply equally to the trustee.¹⁸³ Trustees may not represent the adult in transactions or in court proceedings that involve the guardian's spouse or close relatives.¹⁸⁴ Similarly, trustees may not enter into a contract which will lead to a reduction of the adult's property.

Any income or gain from the adult's property remains the property of the adult. Furthermore, when a trust is established for specific valuable assets, the guardian retains duties with regards to the rest of the adult's property.¹⁸⁵ The trust is terminated on termination of guardianship.¹⁸⁶

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'.¹⁸⁷ 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'.¹⁸⁸ This principle suggests that a guardian should be held liable for mismanagement or

¹⁷⁷ *Ibid*, art 37(2).

¹⁷⁸ *Ibid*, art. 37(3).

¹⁷⁹ *Ibid*, art. 575.

¹⁸⁰ *Ibid*, art. 209(4) and ch. 53.

¹⁸¹ *Ibid*, art. 1026.

¹⁸² *Ibid*, art. 37(2) and (3).

¹⁸³ *Ibid*, art. 38(1).

¹⁸⁴ *Ibid*, art. 37(2) and (3).

¹⁸⁵ *Ibid*, art. 38(1).

¹⁸⁶ *Ibid*, art. 38(2).

¹⁸⁷ Principle 8(3).

¹⁸⁸ Principle 20(1).

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'.¹⁸⁹

Indicator 23

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

Conclusion: There is no obligation for a guardian to periodically visit or consult with the adult.

Analysis: Law specifies that the guardian need not live with the adult,¹⁹⁰ but must inform the guardianship agency in the event of a change in residence. There are no provisions requiring the guardian to visit the adult.

Human Rights Standards: A cornerstone of Recommendation No. R(99)4, and person-centred protective systems generally, is the need to ensure that the adult remains central within the decision-making process. In order to take the adult's wishes into account, it follows that the guardian must consult with the adult. Recommendation No. R(99)4 importantly places an obligation on the guardian to provide the adult with sufficient information concerning major decisions to put the adult in a position to express an informed view on the issue.¹⁹¹ 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'.¹⁹²

¹⁸⁹ 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.

¹⁹⁰ Civil Code, art. 36.

¹⁹¹ See Principle 9.

¹⁹² The Uniform Guardianship and Protective Proceedings Act (1997), para. 313(b)(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>
--------------	--

Conclusion: Legislation fails to ensure that guardians are sufficiently accountable for their decisions.

Analysis: In order to challenge a guardian's decision, the adult under guardianship may appeal to the guardianship agency or prosecutor. However, adults under guardianship are legally prohibited from hiring a lawyer themselves, and may only be legally represented if the guardian agrees. These elements combine to effectively prevent adults under guardianship from accessing courts and authorities, and enable guardians to act with impunity.

Any person in Russia is entitled to lodge judicial appeals of any decision or action of a State agency or a municipal agency if they believe that such actions violate their rights and freedoms.¹⁹³ The law allows no exceptions. Theoretically therefore, an adult under guardianship can appeal to a court to review a decision of a guardianship agency which violates the adult's rights. However, the adult is put in an impossible position, because laws mandate courts to reject any applications filed by a person deprived of legal capacity.¹⁹⁴ Appeal rights remain purely illusory.

State and municipal agencies, organisations and any person are allowed to file an application with the court in order to protect other people's rights, freedoms and lawful interests in cases where the law explicitly provides for such a right.¹⁹⁵ Such applications can be filed on behalf of a person deprived of legal capacity, regardless of the wishes of the adult or the guardian.¹⁹⁶

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

¹⁹³ 'On appealing actions and decisions that violate citizens' rights and freedoms,' adopted on April 27, 1993, last amended on 14 December 1995. See also Civil Procedure Code, Chapter 25.

¹⁹⁴ Civil Code, art. 222.

¹⁹⁵ Civil Procedure Code, art. 46. Such cases are limited. For example, the Law 'On psychiatric care and guarantees of citizens' rights in its provision' provides that actions of health care professionals which violate rights of the citizens in the provision of mental health care can be challenged in court by non-governmental organizations if their statutes contain such a right.

¹⁹⁶ It has been argued that these applications are usually declined by courts on the grounds of art. 134(1) of the Civil Procedure Code which states that the judge refuses to accept the application from an agency or organization not provided with this right by the Civil Procedure Code or other laws. See Anna Demeneva (2005), *Incapacity forever?* published on the internet at http://www.sutyajnik.ru/rus/cases/rakevich_v_russia/nesposobnost_navsegda.htm (last accessed 1 December 2006).

decisions of representatives'.¹⁹⁷ 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'.¹⁹⁸ 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>
--------------	---

Conclusion: Provision is made for guardianship agencies to oversee the acts or omissions of guardians. However, there is no specific complaint mechanism to trigger this duty.

Analysis: Guardianship authorities of local governments are required to oversee and supervise the activities of guardians.¹⁹⁹ They are supposed to systematically monitor the living conditions of the adult under guardianship, as well as the manner in which guardians perform their duties. Such authorities are also supposed to provide assistance to guardians. There is no standard procedure for reviewing guardians' decisions, and no instructions as to whether or not he or she should provide written reports on the condition of the person under guardianship. The guardian is not required to report to the court as to his/her activities on behalf of the person on assets or living conditions. Neither the adult nor his/her family members have the right to review the guardian's decision.

Several actions can be undertaken if the guardian makes a decision or takes an action that harms the person under guardianship (dismissal of a guardian from his duties, calling a guardian to account for his actions, etc.).²⁰⁰

A guardian can be removed from his position:

- When the adult is placed in a health care or a social care institution. The guardianship agency has an obligation to dismiss the guardian unless this is contrary to the adult's interests.²⁰¹
- Where there are extraordinary extenuating circumstances: guardian's illness, lack of mutual understanding, etc.²⁰²

¹⁹⁷ Principle 16.

¹⁹⁸ Principle 20.

¹⁹⁹ Civil Code, art. 34(3).

²⁰⁰ *Ibid*, art. 39(3).

²⁰¹ *Ibid*, art. 39(1).

²⁰² *Ibid*, art. 39(2).

- In cases of negligence. If the guardian does not carry out duties properly (neglects duties, abuses rights, uses guardianship for own purposes, leaves the adult without supervision and/or necessary assistance), the guardianship agency may dismiss the guardian and undertake necessary measures provided by the law to hold the guardian to account.²⁰³

The prosecutor can initiate criminal, civil or administrative proceedings against guardians who abuse the rights of adults. The consequences for the guardian if these proceedings are successful are varied and depend on the nature of the offence. They do however include fines and prison sentences. If the guardian is suspected of abusing or neglecting the adult, the guardian may be criminally liable under a provision of criminal law which makes it an offence to deliberately leave a person in a state that is dangerous to their life or health, where that person is unable to assist themselves due to infancy, old age, disease or helplessness.²⁰⁴ It is a crime for a person under an obligation to either care for, or assist, another, to fail to render that care or assistance. Such failure can be punished by way of fine, compulsory work, correctional work, arrest²⁰⁵ for up to one year.²⁰⁶

If psychiatrists or administrators of psychiatric hospitals detect abuses by guardians, they must report the matter to the guardianship authority of the local government.²⁰⁷

Human Rights Standards: Limitation or deprivation of legal capacity should not exclude an adult from access to courts, authorities or complaints mechanisms to review a guardian's decision. It is imperative that there are bodies which have a legal mandate to amend or reverse a guardian's decision. Regrettably Recommendation No. R(99)4 does not directly address this point, but the World Health Organization has listed the availability of procedures for review of a guardian's decisions as one of the recommended ten basic principles of mental health law. The components of the review, according to the WHO, are availability, timeliness, accessibility to the individual concerned and an opportunity for the adult to be heard in person.²⁰⁸

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.²⁰⁹

²⁰³ *Ibid*, art. 39(3).

²⁰⁴ Criminal Code, art. 125, which sets out the offence of 'leaving a person in danger'.

²⁰⁵ Criminal Code, art. 44(i).

²⁰⁶ Criminal Code, art. 125.

²⁰⁷ 'On psychiatric care and guarantees of citizens' rights in its provision' art. 31.

²⁰⁸ 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.

²⁰⁹ See, e.g., Alaska Stat. §13.26.125 (Bender 2005).

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

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

Indicator 26

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

Conclusion: In Russia there is no less restrictive alternative to guardianship.

Analysis: There is no requirement under Russian law for the exhaustion of alternatives before placing a person under guardianship. In fact, Russian law does not recognize less restrictive alternatives to guardianship.

Article 41 of the Civil Code provides grounds for placing a person under voluntary 'patronage' which can be considered an alternative for guardianship for adults with functional capacity, such as the advanced elderly, or those with any type of health problem. People in need of being placed under patronage do not necessarily have to have a mental disorder. This provision cannot be considered an alternative to guardianship, as it is designed for people who do not have a psycho-social disability (mental health problem) or intellectual disability.

Partial legal incapacity exists in Russia, but is only available for drug and substance (including alcohol) abusers and who jeopardise their family's finances.²¹⁰

Human Rights Standards: Recommendation No. R(99)4 states in Principle 5 that a protective measure such as legal incapacity and guardianship should be based on the principle of minimum necessary intervention, or the least restrictive alternative. It suggests that an adult should not be placed under guardianship unless other less formal arrangements have been exhausted. A best practice example of legislation that meets the standard set out in this indicator can be found in Canada. The Manitoba Vulnerable Persons Living with a Mental Disability Act specifies that a substitute decision maker may

²¹⁰ Civil Code, art. 30.

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’.²¹¹ 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.²¹²

Indicator 27	<i>Guardianships are tailored to the individual needs of the person involved and address the varying degrees of capacity.</i>
--------------	---

Conclusion: Russian law does not allow for a tailor-made guardianship.

Analysis: Under existing law in Russia, guardianship cannot be individually tailored to the particular needs and varying degrees of the functional capacity of each adult. Adults are deprived of all their rights, not restricted in some of them. The guardian takes decisions in all areas of life, not just those where the adult needs assistance. There are no degrees of legal capacity, which means that in every case a blunt legal tool is used without consideration of the proportionality of the adult’s proven needs.

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.²¹³

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’.²¹⁴ 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

²¹¹ Vulnerable Persons Living with a Mental Disability Act, R.M., ch. 29, paras. 49(a)-(b) (1993).

²¹² *Ibid.*, ch. 29, para. 50(2). This approach is also followed in other Canadian jurisdictions. For example, in Ontario a court cannot appoint a guardian to take care of an adult’s property unless an alternative course ‘less restrictive to the person’s decision making rights’ is unavailable. (Mental Health Act, S.O., ch. M.7, para. 33.1 and para. 33.7 (1990); Substitute Decisions Act, S.O., ch. 30, para. 22(3) (1992)). Similarly, in Yukon, the court cannot appoint a guardian unless ‘forms of available support and assistance less intrusive than guardianship have been tried or carefully considered.’ Adult Protection and Decision Making Act S.Y. ch. 21, Schedule A, para. 32(1) (Yukon).

²¹³ Explanatory Memorandum to Recommendation R(99)4, para. 40.

²¹⁴ Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion, Dare to Care (World Health Organization, Geneva, Switzerland, 2005), p. 43.

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.²¹⁵

Indicator 28

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

Conclusion: There are no regular reviews of guardianship and it is established for an indefinite period.

Analysis: The law does not provide any regulation on the length of guardianship or for periodic review of the necessity of guardianship. Guardianship can be terminated only when a court declares that the adult has full capacity.²¹⁶

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.²¹⁷ 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'.²¹⁸

Indicator 29

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

Conclusion: Adults under guardianship do not have the right to request termination of guardianship.

²¹⁵ 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.

²¹⁶ Civil Procedure Code, art. 286.

²¹⁷ Recommendation R(99)4, Principle 14.

²¹⁸ 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).

Analysis: Guardianship can be revoked if the circumstances in which the adult was deprived of legal capacity no longer exist.²¹⁹ In such cases, a court should issue a finding of full capacity. However, the adult under guardianship does not have the right to request this review and can only ask their guardian, the psychiatric institution or the guardianship agency to apply to the court in order to declare them legally capable.

Human Rights Standards: The right to fair trial in determination of civil rights is set out in Article 6 of the European Convention on Human Rights. The European Court of Human Rights has held that guardianship that affects someone's property rights falls within 'civil rights' and thus falls under the protection of Article 6.²²⁰ 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.²²¹ 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.

²¹⁹ Civil Code, art. 30, para. 2.

²²⁰ *Winterwerp v. the Netherlands*, Application No. 6301/73, judgment 24 October 1979, (A/33) (1979) 2 EHRR 387.

²²¹ *Matter v. Slovakia*, Application No. 31534/96, judgment 5 July 1999, (2001) 31 EHRR 32.

3. GUARDIANSHIP PRACTICE IN RUSSIA

3.1 Aims and Objectives

The principal objective of the Stage Two research was to gain an understanding of guardianship practice in Russia. To do this we 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

As available information on guardianship practice in Russia is so limited, MDAC sought to collect as much relevant information as possible and from a broad number of sources. It was planned that these would include national databases, in-depth case studies, a review of case files, observation of court hearings, and interviews with people under guardianship, their guardians, relatives, and professionals involved in the case. As the research was to take place over a full year, March 2006 to March 2007, MDAC hoped that specific cases could be followed from the initial application, through the court hearing and for a period thereafter.

To obtain a broad but representative overview of the situation, MDAC's researcher based in Russia, sought access to a range of courts and guardianship authorities.

MDAC's researcher assessed 53 court case files from four district courts in St. Petersburg. The time frame for the selected cases was January to June 2005, which was the period in which the final court decision for each case was made. The geographic remit of these four districts courts varies. One had a psychiatric hospital within its jurisdiction, one had a social care institution with more than 1,000 residents with psycho-social (mental health) disabilities and intellectual disabilities, one did not have any such institutions, and the last one was located in a suburban area.

MDAC's research (in which the research reviewed all available case files within the given period of time noted in the previous paragraph) did not reveal any significant differences in the numbers of cases in the urban district courts. However, the suburban district court had fewer cases.

All four district courts provided MDAC's researcher with the full case files. The time for case-file review by the researcher was not limited. All of the courts provided MDAC's researcher with a working place within the office of the court's registry.

The researcher attempted to attend court hearings in the four district courts in which case files were reviewed. In total only two court hearings were observed. The reason for this disappointingly low number is that MDAC faced significant obstacles to attending court hearings. These included the difficulty in obtaining information about the date and time of the court hearing, as such information is not available to the public in advance. In some courts the schedules for the hearings appear on a noticeboard on the judge's door only on the day of the hearing itself. In other courts these schedules are not available even on the date of hearing. MDAC's researcher therefore had to obtain information personally from the judge or the judge's assistant. To ease this procedure, MDAC's researcher obtained letters signed by the presidents of the four district courts. These letters requested the judges in the four district courts to provide the researcher with access to the guardianship court hearings. However, despite the letter by the senior judge of each court, some judges did not provide information about court hearings and did not allow MDAC's researcher to observe court hearings. The judges accompanied their refusal with the reasoning that legal incapacity hearings reveal personal information about the adult and his or her relatives. Other judges – at least four from three different courts – were more cooperative, but did not provide information about the date and time of upcoming hearings. It was common for judges to say to the researcher that all of these cases are sent to doctors and that the researcher should call later with the same enquiry. This approach did not prove to be a successful one because it took months to keep track of these cases, and secretaries were reluctant to provide information.

Another obstacle in observing the court hearings was that the court hearings were often delayed by one or two hours. A further problem was that some cases were adjourned to another day which in several cases made it impossible for the researcher to be present at hearings even when all necessary information and permissions were obtained. As a rule, it takes more than one hearing for an incapacity case to be decided on. The first hearing is when a medical assessment is ordered; the second hearing is the one at which the decision is made. For instance, one hearing that the researcher observed was adjourned because the results of the medical assessment were unclear and the judge ordered another one.

Whilst the cooperation of the district court presidents in this research is acknowledged and welcomed, the limit of that cooperation is troubling: troubling in itself and in relation to this report the final outcomes of which have been considerably weakened. Notably, the refusals have denied MDAC the important opportunity to observe first hand the performance of judges, lawyers and other guardianship personnel in the court hearings. The research findings must therefore be read in this light and its limitations recognised.

Guardianship files are kept by local guardianship agencies at municipal districts of St. Petersburg. There are 111 municipal districts in the city. MDAC's researcher asked approximately 15 such guardianship authorities for permission to review the guardianships files for the purposes of this research. Guardianship authorities were reluctant to show their files to the researcher. They explained that these files contain personal information about people who are very ill and they did not think it would be ethical to show these files to any external party even for the research purposes. The researcher reviewed only five such files.

MDAC's researcher conducted interviews with seven judges (from three district courts), four court secretaries (from three district courts), twenty guardianship officers (from 20 local authorities) and one prosecutor. (Interview schedules are attached in Annex D).

All interviews were conducted based on the questionnaires developed by MDAC for this research. Judges and court secretaries were also asked questions about actual hearings in order to compensate for researcher's inability to attend these hearings (see preceding paragraphs). Most interviewees were cooperative and readily answered the questions, but only 2 of them allowed the researcher to record the interviews on a portable voice recorder. The researcher made notes on paper for all other interviews. The researcher was fortunate in having the opportunity to conduct informal discussions about the system of guardianship in Russia with officials from guardianship offices who attended seven two-day training sessions which were organised jointly by MDAC and the St. Petersburg-based human rights organisation Citizen's Watch in 2006-2007. Each training session, of which there were nine, brought together around twenty guardianship officials. Therefore, the results of the research are informed by information provided informally by 171 guardianship experts.

To ensure consistency in all its research in each country, MDAC developed at the outset data gathering sheets to be used by each researcher (see Annex E of this report). These were based on the 29 indicators developed to assess guardianship legislation and which can be found in section 2 (page 16) of this report and which are reproduced in list form in Annex B on page 85. The data gathering sheets were used throughout the research process, at court hearings, in the review of court case files, and during, where possible, all interviews.

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

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

3.3 Research Findings on Guardianship in Practice

3.3.1 Court Files

MDAC reviewed 53 court files. None of these cases were subject to appeal. Almost all case files contained similar information²²² and were around 20-30 pages long, and contained the following documents:

- ⇒ Application to deprive an adult of legal capacity (1-2 pages).
- ⇒ Copy of the identity card of the adult (1 page).
- ⇒ Documents certifying the adult's place of residence (1-2 pages).
- ⇒ Guardianship agency's review of the living conditions of the adult (in some district courts) (1-2 pages).
- ⇒ Official letter from the hospital or social care home stating that the adult because of health reasons is not able to attend the court hearing (in some district courts) (1 page).
- ⇒ Court's order for the capacity evaluation to be carried out with questions to the expert commission (1-2 pages).
- ⇒ Court's requests to the medical institutions to provide medical information to the court (this information is required for the experts to hold capacity evaluation) (1-4 pages).
- ⇒ Copies of the official notifications to parties involved in hearings (1-5 pages).
- ⇒ Minutes of the court hearings (usually the case required 2-3 hearings) (2-10 pages).
- ⇒ Incapacity assessment report (2-4 pages) (in one district court the incapacity assessments were attached to the case file in a sealed envelope).
- ⇒ Court's decision (1-2 pages).
- ⇒ Notice that the decision has been sent to the guardianship agency and federal registration service of St. Petersburg (1-2 pages).

3.3.2 Court Hearings

As noted, MDAC's researcher was able to observe only two court hearings, each in a different district court. The following description therefore should be read bearing this in mind.

A case about legal capacity usually takes two or three hearings from beginning of the application to a decision about legal capacity. Both hearings observed by the researcher were notable in that they lasted no longer than five minutes. At the first hearing a medical assessment was ordered. At another hearing in a different case a reexamination was ordered. In both cases the adult was not present at the hearing.

MDAC's researcher reviewed the court records contained within the 53 court files reviewed. Based on this and on the two observed hearings, this is what a 'typical' court

²²² The one exception was the case when the attorney was present.

hearing looks like: The judge opens the hearing and confirms the presence of the parties, namely the applicant, the prosecutor, the representative of the adult, and the court secretary. The judge then explains the rights of the participants in the proceedings, and asks the applicant (who, in 42 out of 53 reviewed court case files was a relative of the adult) to explain the reason for the application to deprive the adult of legal capacity. The applicant then answers this question (this is information which is already described in the applicant's written application to the court). The judge then asks the applicant whether he/she can pay for the incapacity assessment of the adult, which usually costs 3,060 RUR.²²³ If the applicant cannot pay, the proceedings will not be initiated. The applicant can ask the court to pay for the assessment from the budget of the judicial department, and the judge has the discretion to rule so, but in the course of the research the researcher did not come across a single example of this.

Once the applicant has answered this question, the judge asks the prosecutor and the representative of the guardianship agency whether they have any questions. The judge then asks the same people for their opinion about whether they think an incapacity assessment should be ordered. Then the judge usually orders an incapacity assessment. The judge must order incapacity assessment before depriving an adult of legal capacity.

3.3.3 Guardianship Authority Files

The five cases for which MDAC's researcher was given permission to see, all contained than 20 pages. One of the files was for a person who has been under guardianship since the early 1970s. This file contained slightly more than 30 pages. One of the reasons for that is that the duty to serve as guardianship agencies was transferred to the municipal districts after the new civil code and new municipal laws were adopted. Prior to that, these functions were implemented by large local psycho-neurological institutions (in Russian called dispensers). Guardianship files were not transferred properly from these institutions to municipal guardianship agencies. Therefore, even for clients who have been under guardianship for a long time guardianship agencies had to have new files. The research also showed that the practice varied in different districts, and much depended on the guardian. Some managed to obtain the files from the out-patient medical institutions (in Russia called dispensers), while others started new files. There seems to be no uniformity across municipal districts.

Structure of a guardianship authority file:

- ⇒ Court decision declaring a person incapable (1-2 pages).
- ⇒ Application from a person who wants to become a guardian (1 page).
- ⇒ Copy of the adult's identification document (1 page).
- ⇒ Copy of the guardian's identification document (1 page).
- ⇒ Documents certifying the adult's and the guardian's place of residence (2 pages).

²²³ This is approximately 88 euro at the exchange rate of the European Central Bank as of 22 June 2007.

- ⇒ Written consent from adult's relatives residing with him or her in one apartment stating that a particular person will be appointed as his or her guardian (not in all municipalities) (1 page).
- ⇒ Medical documents for the prospective guardian certifying the state of his health (a list of medical documents varies for different municipal districts) (1-3 pages).
- ⇒ Reference from the prospective guardian's employer (not in all municipalities) (1 page).
- ⇒ Reference from the prospective guardian's housing office (not in all municipalities) (1 page).
- ⇒ Guardianship agency's initial and subsequent reviews of the living conditions of the adult (usually 1 for each 6 months or a year) (2 pages for each review).
- ⇒ Decision on the guardian's appointment (signed by the head of the municipal district) (1 page).
- ⇒ Copy of the guardian's certificate (1 page).
- ⇒ The guardian's annual financial reports (1 page).
- ⇒ Guardianship agency's authorization for any transactions concerning the adult's property accompanied with the guardian's requests for these transactions (2 pages).

None of the case files reviewed contained any other documents, for example evidence of any communication between the guardianship agency experts and the adult or guardian (except for the periodic review of the living conditions), or evidence of complaints filed by the adult and how such complaints were dealt with. The lack of such documentation is perhaps indicative of passivity on behalf of the guardianship authorities.

3.3.4 Interviews

It was unfortunately not possible for MDAC's researcher to get into the institutions to interview people under guardianship. Guardianship agencies were reluctant to organise interviews for the researcher saying that in their view it might disturb their clients, and they also said that the majority of their clients either were in institutions or the state of their health would not allow them to be interviewed. MDAC finds this a poor excuse and notes that people under guardianship do still retain the the ability, to communicate.

There was contact information of people under guardianship in the court files that the researcher reviewed, but as it would have been unethical to use this information, the researcher did not make a record of any names, phone numbers or addresses.

Information contained in the following sections (5-9) of the research was collected from all sources (court files reviews, court hearings observations, interviews with professionals, guardianship authority files).

3.4 Application

The application was filed by a relative of the adult in 42 out of 53 court files reviewed by MDAC. Psychiatric hospitals and social care homes were the second largest category of applicants, constituting eight cases. As a judge said to MDAC, ‘In eighty percent of all cases close relatives go to court. Sometimes it is the prosecutor or institution – if a person is unattached’.²²⁴ Guardianship agencies rarely file such applications. One of the judges interviewed confirmed this, saying that in that judge’s district a guardianship office has been the applicant in only one or two cases.²²⁵

The application document itself is usually one page long which contains a standard statement: ‘Due to the state of his/her mental health this person does not understand the meaning of his/her actions and is not capable of managing them, therefore he/she needs to be declared incapable and placed under guardianship.’

An applicant should also provide the court with documents supporting the application but the law is silent on the type of documents required. Courts do not specify the list of documents that should accompany an application for deprivation of legal capacity. In most cases court files revealed that applicants provided medical references from hospitals where the adult received treatment in the past. Later the judge orders these medical institutions to provide documents (including medical case history) to the court and sends these files to experts who are conduct an incapacity assessment on the adult.

Law does not require the applicant, or the court for that matter, to provide detailed justification for applying for, and ordering, a deprivation of legal capacity. No court case files contained specific information about the reason for applications. In interviews with MDAC however, judges and guardianship officials suggested that the most common reasons for an application are property management (gaining control of the adult’s apartment, other property transactions, or related to inherited property), a financial notary’s refusal to attest a person’s signature on the letter that gives the right to a third party (mostly the relative) to receive the adult’s pension or other earnings), inability of the adult to provide for his own basic needs, potential danger to the adult him or herself or others as a consequence of the adult’s mental health, detention in a mental health or social care institution when an adult refuses to be placed in these on a voluntary basis. The latter reason is not commonly indicated by the applicants, although some of the interviewed individuals claimed that ‘Relatives usually do not say that they want to place a person into an institution, but I admit that this is often the case’.²²⁶ The most common are pensions and privatisation as both judges and GA authorities perceive it.

One of the judges interviewed offered an explanation as to why adults are deprived of legal capacity: ‘Usually those people are very ill. In most cases it [deprivation of legal capacity] is

²²⁴ Interview with a guardianship authority worker, MDAC Reference No. J-05.

²²⁵ Interview with a guardianship authority worker, MDAC Reference No. J-02.

²²⁶ Interview with a guardianship authority worker, MDAC Reference No. J-07.

done for their own good. The person who is placed under guardianship benefits the most from it. Relatives need this measure to address the issues of his property management, other transactions, pensions. They need it in order to be able to undertake some legally relevant actions'.²²⁷

There is a similar understanding of the issue among other judges and employees of guardianship offices: 'It became more intensive due to privatisation – it is not possible to privatise (an apartment) without guardianship',²²⁸ 'it is not possible to get pension without a guardian's certificate'²²⁹ since 'it is not possible to get a trust document that is needed for a 3rd party to receive the adult's pension, or mail at the post-office'.²³⁰

3.5 Notice of and Presence at Court Hearings

In 52 out of 53 court case files which MDAC reviewed the adult was not present at the court hearing. In the one case where the adult was present, the court refused to deprive that person of legal capacity. In the same case the adult had hired an attorney, called witnesses, and provided other evidence of his functional capacity.

The view of judges is that the adults need not be present at the court hearings. As one judge explained, 'Their [the adult's] absence does not prevent me from deciding the case. Maybe it is needed when the act of a psychiatric examination is disputable. But the experts are credible and they are warned about their responsibility in case they provide false evidence. Therefore, person's rights are not violated',²³¹ 'What will such a person do in the court if he does not understand anything? In most cases those people are elderly people. And, anyway, first we need to get an expert opinion';²³² 'It would hurt a person who is ill';²³³ 'In 90% of the cases it is stated that a person is not capable of attending a hearing. It is usually proved by a long history of psychiatric disease, or by a fact that a person is disabled due to the state of his mental health. We don't send them notice of the hearing'.²³⁴ One judge claimed that 'it happens that the adult is taken to the hearing and it is useful, although it is the experts who are asked all necessary questions regarding his or her incapacity'.²³⁵

The reason that adults overwhelmingly were not present at their court hearings is simply that the Russian legal system does not inform them. Alarming, in 48 out of 53 court case files reviewed by MDAC, there was no proof of written notice sent to the adult. In the five cases when such a proof was in the file, four of the notices were not signed by the

²²⁷ Interview with a guardianship authority worker, MDAC Reference No. J-01.

²²⁸ Interview with a guardianship authority worker, MDAC Reference No. J-05.

²²⁹ *Ibid.*

²³⁰ Interview with a guardianship authority worker, MDAC Reference No. J-06.

²³¹ Interview with a guardianship authority worker, MDAC Reference No. J-01.

²³² Interview with a guardianship authority worker, MDAC Reference No. J-02.

²³³ Interview with a guardianship authority worker, MDAC Reference No. J-05.

²³⁴ Interview with a guardianship authority worker, MDAC Reference No. J-06.

²³⁵ Interview with a guardianship authority worker, MDAC Reference No. J-07.

adult (one was signed by a secretary of the psychiatric hospital). In Russia there are two ways of providing a notice to the adult: delivering it to the adult in exchange for the adult's signature on a copy of the notice, or delivering it to his relatives (or other people living with the adult). When an adult is in a mental health or social care institution, the notice can be delivered to the secretary of the institution, and it is thereafter impossible to find out whether the adult was ever given the notice, or informed in any other way about the forthcoming court hearing, unless the administration of the institution delivers the notice to the adult in return for his signature.

In none of the reviewed court cases were notices delivered for all hearings of any case. Where an adult was formally informed at all, this happened in an average of one out of a possible total of two or three court hearings.²³⁶

In 52 out of 53 cases there was a clear indication in the court files that the adult was not present at the hearings (evident from the protocol of the hearing).

The court case files were unclear about the reasons why the adults were adjudged as being incapable of attending the court hearing. This suggests that the judges did not provide any factual grounds when deciding not to summon the adult to the hearing and in most cases the decision not to notify the adults is made automatically. In six cases there were letters from the social care institution in which the particular adult was living, informing the court that the adult was not capable of attending (no further details about exactly why the adult was apparently not capable of attending were offered). In five cases doctors carrying out the incapacity assessment on the adult recommended to the court that the adult should be excluded because the adult was incapable of attending (again, no further details were given about the nature of this incapability). One file contained the mysterious statement: 'Participation in the court hearing is unsuitable since she is not transportable'.²³⁷

Interestingly, guardianship offices of local authorities complained that in many instances they were not notified. Interviewees from such offices complained that in some cases they were sent notifications just one day before the court hearing, and that notifications were not accompanied by the application document or other copies of other relevant documents such as the incapacity assessment. Guardianship office staff said that in such situations they have to provide their opinion about an adult's capacity without ever seeing the adult, and sometimes even without even reading the application or the incapacity assessment. Some courts require guardianship offices to provide reports of the living conditions of the adult that is to be placed under guardianship. In cases guardianship experts are notified properly, and thus they can make better informed decisions.

Courts do not keep only the adult and the guardianship authority in the dark about hearings. Other parties of the proceedings are not always notified about the hearings

²³⁶ Russian law allows for not sending a notice for a hearing when the adult is not capable of attending a hearing (Civil Procedure Code, Art. 284).

²³⁷ Case file No. 01-12.

either. None of the 53 case files which MDAC reviewed contained copies of notices sent to all necessary participants for all hearings that took place. In other words, in all of the case files one or more of the key participants was un-notified about one or more court hearings. Another peculiarity is that courts have different understandings of who actually are these key parties to a guardianship case. In all cases the courts summon a prosecutor. Usually the courts summon applicants and guardianship office representatives, but in some cases they also summon directors of the relevant mental health or social care institutions. In summary, MDAC's research has revealed wildly different practices by different courts in St. Petersburg. The law is clearly not being followed by judges in practice.

3.6 Legal Representation

In only one out of 53 court case files was the adult represented by an attorney. As noted above, in this case the adult was not deprived of legal capacity.²³⁸ Eighteen guardianship officers told MDAC that they have in fact never seen an adult being represented by an attorney during legal capacity hearings, and 2 guardianship officers told MDAC that it happens, but rarely. Some guardianship office staff are supportive of the notion that an attorney can provide a safeguard. One guardianship authority staff member told MDAC that an attorney should be used because 'an attorney can explain the consequences of placement under guardianship, it is necessary in disputable cases'.²³⁹ Another's opinion was that the 'court hearing is a challenge for a person with mental health problems, therefore an attorney is needed to assist an ill person if he participates in the hearing'.²⁴⁰ More generally guardianship authority staff think that it is advantageous to have an attorney represent the adult 'to inform an adult'.²⁴¹ Two officials referred to rights, one saying that an attorney will 'protect his [the adult's] rights and freedoms',²⁴² and the other saying that the attorney would 'ensure the equality of rights of the parties'.²⁴³ It is curious that this person thought that the adult's attorney could (and should) protect the rights of other parties than the adult. Finally one guardianship official was supportive of an attorney's participation 'in disputable cases', because, 'participation of an attorney helps an adult to defend his opinion. Judges act differently in the hearings where an attorney is present'.²⁴⁴

Judges were not convinced that an attorney would be beneficial in legal capacity cases, with some judges thinking that an attorney would be detrimental to the process. Some judges told MDAC that the prosecutor is effective at safeguarding the adult's rights in the course

²³⁸ There was another case in which the adult was not deprived of legal capacity. The experts then claimed in the assessment report that the adult should not be declared incapable. In this case, however, it was not the judge who ruled that the person was capable, but the applicant who withdrew his applications after seeing the examination results.

²³⁹ Interview with a guardianship authority worker, MDAC Reference No. GA-03.

²⁴⁰ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

²⁴¹ Interview with a guardianship authority worker, MDAC Reference No. GA-07.

²⁴² Interview with a guardianship authority worker, MDAC Reference No. GA-09.

²⁴³ Interview with a guardianship authority worker, MDAC Reference No. GA-32.

²⁴⁴ Interview with a guardianship authority worker, MDAC Reference No. GA-21.

of proceedings. One judge said, ‘I never noticed any violations in the course of proceedings. In order to control those violations there is a prosecutor present at the hearings’.²⁴⁵ Another judge said pragmatically, ‘usually those people do not have money [to hire an attorney]. An attorney does not decide anything in such a case. I have never seen an attorney that provided real assistance, they just contribute to the protraction of the case’.²⁴⁶ Two judges expressed an opinion that the presence of an attorney would provide more guaranties for the protection of an adult, but there was a strong belief in the judiciary interviewed that guardianship cases are not ‘difficult’ cases and thus require no attorney.

3.7 Incapacity Assessment

As noted under indicator 7 on page 33, incapacity assessments must be ordered in all cases, and this is usually done by the judge during the first hearing if the judge decides to initiate the proceedings. On average, the time between the incapacity assessment evaluation and the hearing where the question of incapacity is decided is 2.7 months. In most cases this time is 2 to 2.5 months. Five out of the 53 court case files reviewed indicated that the incapacity assessment was conducted five to six months before the hearing. In all cases at least a month passed between the incapacity assessment and the subsequent court hearing. In St. Petersburg incapacity assessments are allowed to be carried out by only one expert institution, namely Psychiatric Hospital Number Six. The applicant in the legal capacity proceedings bears the costs of the incapacity assessment which is 3,060 Russian roubles²⁴⁷ for an out-patient evaluation. In-patient incapacity assessments are many times more expensive, approximately 12,000 Russian roubles.²⁴⁸ The judge enquires the applicant about all medical institutions where he or she had previously received psychiatric treatment. At the applicant’s motion or by his own decision, the judge requests the adult’s medical records from the outpatient mental health institutions and mental hospitals where the adult used to be treated. Medical institutions must provide this information. This takes around 1 month. Then this information is sent by the judge to an expert along with the application and court ruling to hold an examination. According to the information collected during the research, no one ever complained about this procedure.

An in-person incapacity assessment must be conducted in all cases (see analysis under indicator 7 on page 33). However, one of the judges interviewed claimed that he knows of a case when the incapacity assessment was conducted without experts having seen the person – allegedly they talked with the adult through a door and then wrote in their report that the adult’s answers showed that he did not understand the meaning of his actions and could not manage them.²⁴⁹ This case, if true, seems to be an exception from the regular practice of incapacity evaluation.

²⁴⁵ Interview with a guardianship authority worker, MDAC Reference No. J-01.

²⁴⁶ Interview with a guardianship authority worker, MDAC Reference No. J-03.

²⁴⁷ Approximately EUR 85.

²⁴⁸ Approximately EUR 340.

²⁴⁹ Interview with a guardianship authority worker, MDAC Reference No. J-02.

No case files indicated that a person was subject to involuntary psychiatric evaluation and detained. Examinations in in-patient institutions are ordered quite rarely (in 2 case files out of 53) – only in cases when an out-patient examination was not sufficient or if a person at the time of examination was receiving treatment at a psychiatric hospital. From the interviews the researcher had an impression that in some cases judges are not even aware of the possibility to order an involuntary examination and believe that it is not possible to force a person to be examined.²⁵⁰ One judge claimed that he does not order an involuntary examination because ‘if a person refuses to be examined – it means that he understands something and therefore there is no need to declare him incapable’.²⁵¹

Incapacity assessments are usually two to four pages long including the front page containing information about experts, the institution from which they come, etc. In all 53 case files reviewed by MDAC the judge asked the experts to answer the following two questions, which are set out in the Ministry of Health 2003 Decree (described in section 2.3 above, page 19):

- ⇒ Does the adult have any type of psychiatric disease and if yes since when?
- ⇒ Can the adult understand the meaning of his actions and manage them?

It is noteworthy that no other question of substance was asked by the judge in any of the 53 cases. In 12 cases the judge asked the experts to make a recommendation as to whether a person can participate in the court hearing. These questions were answered by the experts separately at the end of the incapacity assessment report.

In the conclusions section of the incapacity assessments the experts stated the diagnosis and in case when they believe guardianship is a necessary measure there is a standard phrase which is used, namely that ‘the person cannot understand the meaning of his actions and manage them, and should therefore be declared incapable’.

When MDAC’s researcher discussed the brevity of these reports with judges, one judge said, ‘We are not interested in the diagnosis. Experts evaluate the person, talk to him – that is enough. We require all necessary medical information but we do not evaluate it – it is the job of the doctors, I am not a specialist in medical issues’.²⁵² 6 judges admitted that they were not competent enough to see the link between diagnosis and alleged incapacity.

Everyone whom MDAC’s researcher interviewed claimed that the incapacity assessment is the major piece of evidence for deciding the question of legal capacity. Judges repeated that they are not experts in psychiatry and that they therefore are obliged to trust the opinion of psychiatrists. One judge explained this further:

²⁵⁰ Interview with a guardianship authority worker, MDAC Reference No. J-01, J-02.

²⁵¹ Interview with a guardianship authority worker, MDAC Reference No. J-03.

²⁵² Interview with a guardianship authority worker, MDAC Reference No. J-01.

‘I can’t just dismiss medical information, if I don’t trust expert’s opinion I must order another examination. Because it is my subjective opinion. There are specialists who are to decide. Re-examination is the right of the court. There is always somebody who is dissatisfied. Even if a person asks for a re-examination I have the right to refuse his request. Independent examination? Independent from what?’²⁵³

However, judges and guardianship officers do accept that the incapacity assessments are not very informative and that the quality of the so-called expert opinion is not always expert. One judge said that ‘in many cases assessments are not profoundly motivated’, meaning that the experts did not examine the adult properly.²⁵⁴ Despite admission by judges and others that the decisive evidence is not always of good quality, MDAC’s research has revealed that in none of the 53 cases did judges call psychiatric experts to give live testimony.

Judges rarely seek other opinions, and do not place much, if any, value on the opinions expressed in cases by representatives of guardianship offices. One judge blamed this on the guardianship offices themselves, pointing out that ‘It all depends on a particular person. Some of them [guardianship officers] go to the place where the adult lives, and try to make sure that he or she needs this measure. Others treat those cases in a formal way’.²⁵⁵ It seems, unfortunately, that the judicial response to a perceived inappropriate formality on the part of guardianship agencies, is to follow suit and conduct the court hearings in a formalistic and superficial manner.

3.8 Presenting and Challenging Evidence

Given the wholesale withdrawal of fundamental rights when an adult is placed under guardianship (see section 2.6.4 on pages 40, above) it may be surprising that in only one case reviewed by MDAC did the adult provide his/her own evidence to the court to try and retain legal capacity. What may not be surprising is that this case is the one in which the adult was represented by an attorney. Given that in the majority of cases the adult is not present at the hearing and is not even notified about the hearing, it is not surprising that the adult does not present any evidence.

Before depriving an adult of legal capacity judges require evidence of mental illness. Judges obtain this evidence directly from mental health or social care institutions where the adult has at some previous time, received treatment. Some district courts require that guardianship agencies give evidence of the adult’s living conditions, but the civil procedure law does not require this as obligatory. According to judges and many guardianship officials interviewed by MDAC, the incapacity assessment is the most important document in the case, and they attach far less weight to other types of evidence. This view is illustrated by

²⁵³ Interview with a guardianship authority worker, MDAC Reference No. J-03.

²⁵⁴ Interview with a guardianship authority worker, MDAC Reference No. J-02.

²⁵⁵ Interview with a guardianship authority worker, MDAC Reference No. J-06.

a statement of one of the judges: ‘Witnesses should not be allowed to provide information about the person’s state of health because it is confidential information of medical nature, and witnesses are not experts in the area of psychiatry’.²⁵⁶ That a judge should present such a misguided view of the nature of health, ordinary people’s ability to comment on it, and of the notion of confidentiality, is alarming. MDAC’s researcher was given the opinion by many interviewees that other types of evidence should be used only if there are any doubts about the psychiatric examination.

Guardianship officials told MDAC that other types of evidence may be useful in determining a person’s capacity: ‘when a mercenary interest from the side of applicants is evident and the adult seems to be capable, witness (friends, neighbours, colleagues) testimonies can play an important role’.²⁵⁷ According to their opinion, the following types of evidence should be collected: documents of inspection of the adult’s living conditions, opinions of close relatives and guardianship office employees, and a written interview with the adult if he or she is deemed not able to attend the court hearing. Guardianship officials, who act as a quasi representative of the adult’s interest, showed a remarkable level of trust in the incapacity assessment. Their unanimous opinion is that the incapacity assessment is by far the most important piece of evidence for the judge, and many told MDAC’s researcher that guardianship officials form their view on the basis of the incapacity assessment.

3.9 Right to Appeal

All interviewees told MDAC that appeals are incredibly rare. None of the 53 court case files reviewed by MDAC contained appeals. An explanation as to the lack of appeals could be that adults are simply not informed about the court process and court hearings at which their legal capacity is in question, and nor are they informed that there are rights to appeal. This was confirmed by a judge who told MDAC, ‘In most cases they are ill people. We don’t send them a copy of the decision’.²⁵⁸ Another reason for the lack of appeals is that the Russian law allows a time period of merely ten days to appeal. This time period starts running when the decision is made, not, unlike other jurisdictions, when the adult is actually informed about the decision.

3.10 Appointing a Guardian

The court sends a copy of its decision to the guardianship office of local authority, which then has one month to appoint a guardian. In most cases the applicant, who initiated the proceedings to deprive the adult of legal capacity, requests to be appointed as a guardian. As noted above, the vast majority of applicants are relatives of the adult. If the guardianship office cannot find an appropriate guardian, then the office can appoint itself as guardian.

²⁵⁶ Interview with a guardianship authority worker, MDAC Reference No. J-04.

²⁵⁷ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

²⁵⁸ Interview with a guardianship authority worker, MDAC Reference No. J-01.

Alternatively the guardianship office sends the adult to a mental health or social care institution, and in these cases it is the host institution that becomes the adult's guardian.

As noted under indicator 10 on page 36 above, the guardianship office is required to take into account the skills and qualities of a potential guardian, and whether this person has an acceptable relationship with the adult. However, these criteria are vague, and there are no requirements or restrictions concerning criminal record, minimum level of education, absence of conflicts of interest with the adult. It appears that before being appointed as guardian, the candidate must present documents in order to be appointed. These documents vary from guardianship office to guardianship office, but generally include:

- ⇒ Application to be appointed as a guardian.
- ⇒ Medical documents (including references from the general practitioner, infectionist, veneriologist, tuberculosis specialist, neuropathologist, oncologist, psychiatrist, and from an expert in narcology).
- ⇒ Reference from the housing office.
- ⇒ Reference from the employer (about personal qualities and monthly income for the last six months).
- ⇒ Consent from relatives residing with the adult.

One guardianship official explained the rationale to MDAC:

'Since the list of necessary documents is not specified by law, each municipal district requires different documents, some require the same medical documents as for the potential guardians for minors. We decided to do it rationally and require medical references from an expert in narcology and a psychiatrist, references about residence registration, income (as a proof that a guardian does not want to use adult's income for himself), reference from an employer, and an application.'²⁵⁹

This list is questionable on several grounds. First, it seems rather arbitrary that there are stricter requirements imposed by a guardianship office in one district than another. Second, there is a continued fixation about the biological status of the potential guardian. How healthy, for example, does a guardian need to be? Do guardianship authorities really preclude as guardians one in four people who (according to World Health Organization global estimates) will at some time in their lives have a mental health problem? Is a pay slip and a reference from the potential guardian's employer evidence that the guardian will not use the adult's income for their own purposes? Again these are formal requirements which do not actually provide any safeguards or guarantees about the suitability of a person to become a guardian.

Guardianship offices claim that in the event of more than one person wanting to become a guardian, preference is given to close relatives, those who have good relationship with

²⁵⁹ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

the adult, and those who do not have a financial interest.²⁶⁰ Some districts establish a committee that listens to both candidates and decides whom to appoint.²⁶¹

The law specifically states that, if possible, the wishes of the person under guardianship should be considered when selecting the guardian,²⁶² but is silent on how these wishes should be taken into account. The representatives of guardianship offices with whom MDAC spoke have no procedures to establish the adult's opinion. However, some guardianship officials believe that the opinion of the adult should be considered when possible. One guardianship official said, 'It is possible in some cases (when the person can express his or her opinion). In order to exclude abuse or inhuman treatment by the guardian'.²⁶³ Another said that finding out the adult's opinion 'is necessary to avoid conflicts between the guardian and the adult'.²⁶⁴

After all documents are collected, the guardianship office inspects the living conditions of the adult and writes a report (sometimes courts require these reports to be presented at the hearing on legal capacity, but as noted above under section 2, not always). Once this is done the guardianship authority writes a certificate which is signed by the head of the relevant municipal district.

Interviews conducted with training participants revealed that it is common for guardianship officers not to inform the adult that he or she is under guardianship assuming that this may cause 'a disturbance of his mental health' that a particular person is appointed as his guardian, and that there are certain legal consequences of these actions. From the five guardianship authority case files to which MDAC's researcher was allowed access it is not possible to say whether the adult was informed about the guardianship, since all five files did not contain any evidence that the guardian had ever communicated with the adult.

There are no exact criteria that determine in which cases adults are not informed about this decision. Guardianship officials gave MDAC an array of justifications for not informing each adult that they are under guardianship. One told MDAC that they, 'provide this information if a person is capable of understanding it'.²⁶⁵ Others gave a legalistic answer, stating that 'we do not provide it because the court does not require that we talk with the adult before the court hearing, and the adult is not present at the hearing where his rights must be explained'.²⁶⁶ One guardianship official admitted that adults should be told about their legal status, and added something which was previously unreported namely that guardians sometimes request silence:

²⁶⁰ Interview with a guardianship authority worker, MDAC Reference No. GA-31.

²⁶¹ Interview with a guardianship authority worker, MDAC Reference No. GA-26.

²⁶² See indicator 10, on page 37 above.

²⁶³ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

²⁶⁴ Interview with a guardianship authority worker, MDAC Reference No. GA-15.

²⁶⁵ Interview with a guardianship authority worker, MDAC Reference No. GA-27.

²⁶⁶ Interview with a guardianship authority worker, MDAC Reference No. GA-28.

‘We do not always inform the adult about the consequences of being placed under guardianship. Although of course it is not right. Life brings its corrections. Sometimes guardians ask us not to inform a person that he is under guardianship because they are afraid that he will become aggressive towards them.’²⁶⁷

There is nothing that an adult can legally do to challenge the appointment of a particular guardian. A court has no grounds to accept such an appeal, simply and brutally because the adult lacks legal capacity and therefore has no legal standing to bring such a case without the guardian’s permission. It is, of course, rather unlikely that a guardian would ‘represent’ an adult in a lawsuit in which the adult is applicant and the guardian is defendant. One judge told MDAC that if an adult lodges a complaint about the guardian to the court, the judge will send this information to the guardianship agency or prosecutor’s office.²⁶⁸ There is no obligation on judges to do so, and in such cases the adult must rely on the goodwill of each individual judge.

3.11 Control Over Guardian’s Actions

As noted under indicator 21 on page 49 above, one of the rights which adults lose when they are deprived of legal capacity is to choose the place of residence. Guardians have absolute discretion to place an adult into a social care institution. These are usually remote, closed and sometimes abusive institutions, where the adult will likely remain until death. Alarming, there is no obligation on a guardian to inform the guardianship agency about the placement of an adult into an institution. Thus there is no safeguard to prevent adults from getting rid of relatives, and finding ways of accessing their property.

Guardianship officials confirmed to MDAC that they have cases in which a guardian has financial or other dishonourable interests in being a guardian. Mostly the guardian wants the adult’s apartment. A guardianship official told MDAC of a case where, ‘a woman became her brother’s guardian, sent him first to a psychiatric hospital, then to a social care institution and now lives alone in his apartment’.²⁶⁹

When an adult is transferred to a social care institution, that adult’s file at the guardianship office is closed and the adult is registered at the guardianship office in the district of the social care institution. The new guardianship official does not know the adult personally and there is no requirement even to meet the adult. What happens is merely shuffling of papers from one office to another. Any control over the adult’s well-being which the guardianship system may claim it offers, is illusory. When a social care institution becomes the guardian it undoubtedly has an interest in managing the adult’s property and in receiving the adult’s pension. A guardianship official told MDAC of cases where social care institutions sold the adult’s property without the consent of the guardianship office, a clear violation of the law.

²⁶⁷ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

²⁶⁸ Interview with a guardianship authority worker, MDAC Reference No. J-04.

²⁶⁹ Interview with a guardianship authority worker, MDAC Reference No. GA-27.

A guardian has to submit a financial report to the guardianship authority about all payments that were made for the adult. The legal requirement is annual reporting, but interviews and informal conversations with GA staff suggested that some districts require reports twice a year, and some four times a year. A guardianship officer must carry out an inspection the place of the adult's residence at least once a year. These provisions appear to be safeguards to ensure that financial and other decisions are being made by the guardian in the adult's interests. However, the reality is that these safeguards are nothing more than meaningless. One guardianship official told MDAC that, 'According to the law, they [guardians] have to spend the money in the adult's interests. In reality, however, it is not possible to ensure it 100 percent. Guardians provide yearly reports that are arbitrary'.²⁷⁰

The adult's property is technically controlled by the guardianship office. If the adult lives with the guardian, the adult's house or apartment can be let out and the money be used to support the adult. For this, the guardianship office must give prior permission. Guardianship offices have mechanisms to ensure that adults' property and finances are used properly – they have the discretion not to approve transactions (such as selling property, or withdrawing funds from adult's account) that are not in the adult's interest. In the case of privatisation of the apartment,²⁷¹ guardianship agencies require that the apartment be privatised jointly with the adult.

Guardianship agencies have to examine the adult's living conditions once or twice a year depending on the practice of the district they operate in. During these visits they ask the adult questions, among others, whether he or she understands the meaning of such a visit, about his or her well-being, relationship with the guardian, etc. In most cases guardians reside together with the adult. If an adult is placed into a mental health or social care institution, the institution's director becomes the guardian. In practice, there might be hundreds of people under guardianship in each institution, which makes it impossible to ensure that the guardian confers with the adult.

Guardian's decisions are periodically (in some districts annually, in others twice a year) reviewed by the guardianship agency. Guardianship agencies use this right to file complaints to the prosecutor's office in case of violations on behalf of the adult.

However, there is almost no effective mechanism that would allow an adult to hold a guardian accountable for his or her decision, or lack of decisions. An adult's living conditions are inspected once or twice a year, and it is only during these visits that guardianship officials have direct access to adults, and may be in a position to discover irregularities about the way in which guardianship is operating. Guardianship officials have the power to dismiss a guardians and replace him or her with someone else. However, it happens frequently that there are no other potential guardians. Guardianship agencies that cannot find an alternative for a dismissed guardian try to place the adult in

²⁷⁰ Interview with a guardianship authority worker, MDAC Reference No. GA-12.

²⁷¹ In the 1990s in Russia the government made it possible for private citizens to purchase state-owned flats for a price that usually was below the market value of the real estate.

a social care institution since they are either unwilling or unable to carry out day-to-day responsibilities which should be performed by a guardian. Therefore, guardianship offices dismiss a guardian only in cases when the guardian's actions severely harm the adult's interests, and before they take this drastic action they talk to the guardian, explain to the guardian's duties, try to provide some social or legal assistance to the guardian.²⁷²

As noted under indicator 25 on page 54 above, there is no complaints procedure that would trigger a review of a guardian's actions. In some districts an adult has the possibility of filing a complaint with the guardianship office of the local authority. Reportedly, in some districts a guardianship council will hear the case in the presence of the adult and his guardian.²⁷³ Usually facts of abuse of guardian's rights are discovered during the inspections of the adult's living conditions. One guardianship officer told MDAC, 'Once a woman under guardianship complained about cruel treatment. Once when a report was submitted by a guardian we found out that a guardian abused his power – the guardian's daughter lived in the apartment of the adult that was supposed to be rented out, and the adult had been in hospital for years.'²⁷⁴

3.12 Lifting of Guardianship

As noted under indicator 29 on page 58 above, guardianship can be revoked if the circumstances in which the adult was deprived of legal capacity no longer exist.²⁷⁵ In such cases, a court should re-establish legal capacity. However, also as noted in the legislative analysis above, the adult under guardianship does not have the right to request this review and can only trigger a review of the deprivation of legal capacity via their guardian, the psychiatric institution or the guardianship agency. These third parties can apply to court in order to restore legal capacity. Such cases happen in practice, but usually it is difficult to convince a guardianship agency of the need of filing an application to the court. They claim that they do not do it for a number of reasons. Firstly, they do not feel competent enough to decide on issues related to capacity, secondly, they do not have financial resources to pay for psychiatric examinations, and, finally, they do not have access to such evidence as medical documents that they could use to support their application.

If a guardianship agency, a family member or a guardian refuse to file an application to restore legal capacity, an adult has no legal means to appeal that. There is no specific procedure of registration of adult's claims to restore his capacity, review guardianship by guardianship agencies or any other state or municipal bodies.

Judges told MDAC that it is usually the guardian who applies for the restoration of the adult's legal capacity,²⁷⁶ with some judges believing that 'it would be good to have the

²⁷² Interview with a guardianship authority worker, MDAC Reference No. GA-20, GA-32.

²⁷³ Interview with a guardianship authority worker, MDAC Reference No. GA-28.

²⁷⁴ Interview with a guardianship authority worker, MDAC Reference No. GA-05.

²⁷⁵ Civil Code, art. 30, para. 2.

²⁷⁶ Interview with a guardianship authority worker, MDAC Reference No. J-01.

review every three to five years. It all depends on the level of the development of the society. We have too many cases that we have to decide apart from guardianship – therefore such a review should not be the court’s initiative. Guardianship agencies should be responsible for that. I have not had cases of termination of guardianship in my practice’.²⁷⁷ Other judges say that there is no need to review a deprivation of legal capacity because the measure is used for the people who are severely ill.²⁷⁸ This view is, in MDAC’s opinion, simply wrong. Functional capacity can in many instances fluctuate throughout someone’s life.

3.13 Civil Death

As explained under indicators 13 to 17 on pages 40 to 44 of the legislative review above, several basic human rights are automatically denied to an adult who has been deprived of legal capacity. Therefore, such status can be described as civil death. The right to work for people deprived of legal capacity is not regulated clearly in the Russian law. Guardianship officers told MDAC that some adults under guardianship do in fact work, but were unsure whether these adults work officially with an employment contract. The Labour Code does not specify that a court decision depriving an adult of legal capacity can be a justification for terminating an employment contract. Therefore, it is possible that adults previously with legal capacity when they started working, actually continue working despite a court order depriving that person of legal capacity.

As noted under indicator 15 on page 42 above, adults under guardianship are automatically deprived of the right to make decisions related to their finances or property. In reality of course, the law cannot (and indeed should not) prohibit adults from entering into everyday transactions, such as buying a newspaper. 17 out of 20 guardianship agency employees held that adults should be able to carry out small transactions is supported by guardianship officers interviewed by MDAC. They also believed that adults under guardianship should also be allowed to live alone in the community (if they are capable of doing that), decide everyday questions including decisions about spare time, clothing, etc.

Russian law removes from people deprived of legal capacity the right to marry, to vote and to associate. In interviews with MDAC, guardianship officers told of some cases which slipped through the gap, where adults managed to marry, to vote and to join a political party. These are instances, of course, of being lucky that there seems to be no system for State agencies to communicate effectively with each other about which citizens are deprived of legal capacity.

²⁷⁷ Interview with a guardianship authority worker, MDAC Reference No. J-02.

²⁷⁸ Interview with a guardianship authority worker, MDAC Reference No. J-06.

3.14 General Observations, Overall Judgements

Russian judges, who decide whether an adult should be deprived of legal capacity, have a wholly one-sided view of these cases. They do not seek the opinion of the adult, and see no reason to do so. Judges seem content to deprive an adult of legal capacity – thus subjecting the adult automatically to a range of human rights abuses – on the basis of one medical report which they never challenge.

In guardianship cases – just like in mental health detention cases – psychiatrists wield enormous power. Judges and guardianship officials encourage doctors to usurp their role as expert witnesses and become the judicial decision-maker. Psychiatric opinions are viewed as Scientific Truth, with judges merely agreeing with them in all cases. Legal capacity cases remain a cosmetic procedure lacking any meaningful safeguards. Once deprived of legal capacity an adult is stripped of all human rights, and most tragically, even in cases where they were not even notified about the court procedures, they are routinely denied the possibility to challenge the guardianship itself. Vulnerable adults are denied the right to access justice. This hidden corner of injustice is crying out for reform. MDAC hopes that this exploratory report is a wake-up call to the Russian government, and that all relevant State agencies will take urgent action to protect some of its most vulnerable citizens.

MDAC's research into guardianship in practice is the first of its kind in Russia. It is also an exploratory study, which raises more questions than it answers, and which calls out for further research will full support from all levels of government, which MDAC was not fortunate enough to obtain. MDAC's research highlighted the following issues which we present here in no particular order of importance:

- The most common reasons for applying is not the well-being of the adult, but the convenience of his or her relatives. This conclusion is based on the judges' and guardianship authorities' experience and understanding of the reasons why people apply, which was drawn from the interviews carried out by the MDAC researcher.
- Russian legislation provides for the right to receive notice and to be present at court hearings. In practice adults are almost never present at the court hearings. Adults are routinely not even informed about the forthcoming court hearings about their legal capacity.
- Regardless of whether adults are present in the court room, State-funded lawyers do not provide legal representation in guardianship cases. In MDAC's research only one out of 53 cases featured a lawyer (paid for by the adult) and it is in this sole case that the judge did not deprive the adult of capacity. MDAC considers legal representation absolutely essential, to provide vigorous advocacy on the instructions of the adult. Legal representation is especially important in these cases where the very allegation is that the adult lacks functional capacity.
- Adults are not informed that they have a right to examine and challenge the evidence presented by others. This, and the lack of adults at the hearings, means

that psychiatric evidence is routinely untested and the adult has no opportunity to present any contrary evidence.

- Law provides that legal capacity may be deprived only after an incapacity assessment by a psychiatrist. Such assessments were ordered in all cases reviewed by MDAC. However, the quality of expert opinion was criticised by stakeholders in the process as being too medically focused, and little actual assessment of the adult's functional capacity. Further these assessments do not articulate links between a diagnosis and lack of functional capacity.
- Very few adults appeal a deprivation of legal capacity. This may be explained by the excessively short ten day appeal period, the likelihood that the adult has not even been informed of the decision, the lack of any written information on appealing, and the lack of State-funded attorneys who could advise on, and represent adults in an appeal.
- Adults are routinely not asked who they would like to be their guardian, and in some cases adults are even not notified that they are under guardianship or the identity of the guardian.
- Adults are routinely placed under the guardianship of people who are in a clear conflict of interest position. This includes directors of mental health and social care homes being appointed the guardian to people living in the institution they manage.
- Guardianship offices are required to monitor the well-being of adult under guardianship. In reality, this monitoring is limited to annual visits and annual financial reports submitted by the guardian (no narrative reports are required).
- Once deprived of legal capacity, it is unlikely that an adult would regain it. There are no reviews of the need for guardianship. The adult cannot apply to a court to regain legal capacity. Because regaining legal capacity is not in the interests of the guardian, it is very rare that a guardian will apply on the adult's behalf to regain legal capacity.
- Guardianship offices carry out their functions in a superficial way. They do not consider themselves to be experts who can influence legal capacity decisions, and do not see it as their responsibility to challenge medical opinions which remain decisive.

3.15 The Need for Further Research

We begin this section with a general, but vitally important comment: governments should not embark on legislative or policy reform unless such reform is based upon, and informed by, a thorough understanding of the issues it seeks to address. MDAC's research is only the first step towards reaching that understanding. Unfortunately, in this instance research was not facilitated as greatly as it might have been by those responsible for implementing such legislation and policy.

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

More specifically, the denial by the guardianship authorities of access to their case files on the basis of confidentiality, despite assurances that confidentially would be appropriately honoured, is troubling for two principal reasons. First it ensured that no full picture of the manner in which guardianship cases are dealt by the guardianship authorities could be obtained. Second, and on a more general level, such a refusal should be considered in light of the fact that legislation itself fails to ensure adequate supervision of those authorities. Combined therefore, legislation and practice suggest inadequate monitoring and oversight of their work.

MDAC is conscious that this research only touched the surface of the views and feelings of participants in the guardianship system, principally because of the lack of interviews undertaken with adults under guardianship and their families.

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

Glossary of Terminology

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

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

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

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

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

Mental disability: This term is applied to people who have been diagnosed with, or labelled as having psycho-social (mental health) disabilities and/or intellectual disabilities.

Mental health problem: see psycho-social disability.

Partial guardianship (or limited guardianship): Partial/limited guardianship is established when a person who has some capacity to make decisions or take action on his or her own behalf and is deemed to have partial capacity. What a person may or

may not be allowed to do for himself or herself when under partial guardianship is a matter for national legislation and/or courts to decide and will vary from country to country or within the same country.

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

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

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

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

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

ANNEX B

Summary Table of the Indicators

Indicator 1	<i>The legislative purpose or preamble to the law encompasses respect for the human rights, dignity and fundamental freedom of people with mental disabilities.</i>
Indicator 2	<i>Legislation clearly identifies who may make an application for appointment of a guardian and the foundation needed to support it.</i>
Indicator 3	<i>An adult has a right to actual notice of, and to be present and heard at all proceedings related to the application for deprivation of his or her legal capacity and appointment of a guardian.</i>
Indicator 4	<i>An adult has a right to free and effective legal representation throughout guardianship proceedings.</i>
Indicator 5	<i>An adult may not be detained in order to be subjected to an evaluation of his or her functional capacity.</i>
Indicator 6	<i>An adult has the right and opportunity to present his/her own evidence (including witnesses), and to challenge the opposing evidence.</i>
Indicator 7	<i>No adult is deprived of legal capacity without being the subject of an assessment 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
February 22, 2007	Guardianship Officer
February 22, 2007	Guardianship Officer
February 22, 2007	Guardianship Officer
February 22, 2007	Guardianship Officer
February 22, 2007	Guardianship Officer
February 7, 2007	Guardianship Officer
February 7, 2007	Guardianship Officer
February 7, 2007	Guardianship Officer
February 7, 2007	Guardianship Officer
February 7, 2007	Guardianship Officer
January 23, 2007	Guardianship Officer
January 23, 2007	Guardianship Officer
January 23, 2007	Guardianship Officer
January 16, 2007	Guardianship Officer
January 16, 2007	Guardianship Officer
January 16, 2007	Guardianship Officer
January 16, 2007	Guardianship Officer
January 16, 2007	Guardianship Officer
October 9, 2006	Court Secretary
October 9, 2006	Court Secretary
October 6, 2006	Judge

October 6, 2006	Judge
October 6, 2006	Prosecutor
June 19, 2006	Guardianship Officer
June 7, 2006	Judge
June 7, 2006	Guardianship Officer
June 6, 2006	Judge
June 6, 2006	Judge
June 5, 2006	Court Secretary
June 5, 2006	Judge
October 4, 2005	Court Secretary
September 28, 2005	Judge

ANNEX E

Data Gathering Sheets

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	<p>Outcome of case was court order for: Plenary guardianship _____, Partial guardianship _____, No guardian _____. Change of guardian _____.</p>
7.	I-7	<p>Capacity evaluation was ordered: Yes _____, No _____.</p>
8.	I-2	<p>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).</p>
9.	I-3	<p>File indicates proof of written notice of proceedings to person involved: Yes _____ No _____ Amount of time between when written notice was served and the proceeding: _____ (in days) Person concerned was present at the initial court hearing: Yes _____ No _____ Not Available _____</p>
10.	I-3	<p>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: _____</p>
11.	I-4	<p>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): _____</p>
12.	I-4	<p>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 _____.</p>

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>
8.	<p>Capacity evaluation was ordered: Yes _____, No _____</p> <p>Person was ordered to be detained in order to complete capacity evaluation: Yes _____ No _____.</p> <p>Person already detained for other reasons: _____.</p> <p>If person was detained in order to submit to capacity evaluation, how long were they detained: _____ (in days).</p>
9.	<p>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>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>

	<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> <p>Does there appear to be a conflict of interest between the person concerned and the person appointed guardian: Yes _____, No _____.</p>
<p>5. I-16</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>
<p>6. I-12</p>	<p>Has this case ever undergone a case review by the GA: Yes _____ No _____. If yes, how many: _____ _____ How much time elapsed between each review: _____</p>
<p>7. I-20</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

Many of the questions suggested for the quasi-formal interview process are open-ended questions meaning that they are designed to elicit a narrative response. Listen and record the answers carefully (using a data recorder if possible) and ask for examples and elaboration of opinions when possible.

Interviews with Professionals:

Date, Time and Location of Interview: _____
 Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____
 Role of Interviewee in guardianship processes (ie: 'judge,' 'prosecutor,' 'professional guardian'):
 _____.
 Number of years person has been involved in guardianship cases: _____
 Interviewee's estimate of how many guardianship cases he/she has been involved in: _____
 Training/educational background of the interviewee: _____

Interviews with Person Concerned:

Date, Time and Location of Interview: _____
 Identification Code for Interviewee (pursuant to your own confidential system which protects identity of research participants): _____
 Interviewee's experience with the guardianship processes (ie: 'is under guardianship' 'was once under guardianship' 'was the subject of a guardianship application'):
 _____.
 Interviewee lives in: Institution _____, Community _____, Other _____ (specify).
 Number of years person has been under guardianship: _____
 Mental health history, diagnosis, background of the interviewee: _____

Corresponding Indicator	Suggested questions for interviews with participants in the guardianship proceedings
Indicator 1	<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 s 4 & 5	<p>Interviewee: Professionals Is it important/necessary for the person involved in guardianship proceedings to be represented by a lawyer? (why or why not) In your experience, how often does the person involved have a lawyer to represent them during the proceedings? Is there/should there be a system to provide free lawyers to people facing guardianship proceedings? Is it common for the person concerned to present 'a case' on their own behalf? What kind of evidence is most likely to be presented by the person concerned (or their representative)? (ie alternative capacity exam, witnesses such as friends/family etc.)</p> <p>Person Concerned Did you know you had the right to have a lawyer to represent you? Did you have a lawyer to represent you during your case? (why or why not) If not, did you have anyone (such as a 'case guardian') represent your interest during the proceedings? Would you have liked to have a lawyer to represent you? If someone did represent you during the proceedings, did that person meet with you before court?</p>

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

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

<p>Indicator 12</p>	<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>
<p>Indicator 13</p>	<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> <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>
<p>Indicator 14</p>	<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>
<p>Indicator 15</p>	<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?</p>

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

Indicator 24	<p>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>
Indicator 26	<p>Interviewee: Professionals Should guardianship be a first response or a last resort for people with mental disabilities? (explain)</p> <p>Person Concerned</p>
Indicator 27	<p>Interviewee: Professionals How often are (should) guardianship cases be reviewed by the guardianship authority? What is the purpose of guardianship reviews?</p> <p>Person Concerned To your knowledge, are the decisions that your guardian makes for you ever reviewed by anyone else to determine if they are good decisions or not? To your knowledge, has your case ever been reviewed to determine whether you still need a guardian? If so, how often?</p>
Indicator 28	<p>Interviewee: Professionals How often are guardianships terminated and the person under guardianship restored to their full capacity? Who usually initiates applications for termination of guardianship? How often are guardianships changed from partial to plenary or plenary to partial guardianships?</p> <p>Person Concerned Have you ever wanted to have your guardianship changed somehow or ended all together? If so, what did you want changed? How would you go about getting it changed?</p>

