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STUDY

The System of Guardianship in Practice in the Republic of Moldova:

Human Rights and Vulnerability of Persons Declared Incapacitated

A study carried out with a view to supporting reforms to implement the right to equal legal capacity as set out under Article 12 of the Convention on the Rights of Persons with Disabilities

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The opinions expressed in this study do not necessarily reflect the views of the OHCHR.**

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Foreword: Guardianship, “Incapacity”, and the Guarantee of Equal Legal Capacity under Article 12 of the Convention on the Rights of Persons with Disabilities

The study under this cover – on the impact of the system of guardianship on human lives – is groundbreaking both for the Republic of Moldova as well as more generally for revealing issues concerning the treatment of persons with mental and intellectual disabilities, and directions for reform.

Guardianship (“tutelă” or “opekunstvo”), as provided and applied under the Moldovan Civil Code, similar to many countries of our region, removes a person’s legal personhood and places it with another person or institution, named as the “guardian”. People placed under guardianship are very frequently in or on the way to being placed institutions, and there is a direct link between institutionalization measures and guardianship measures. Institutionalization is very frequently life-long. Even where not institutionalized, a person placed under guardianship or otherwise declared “incapable” is deprived, pursuant to a court order to that effect, of the ability to engage in even basic socio-legal relationships, such as to marry, to divorce, to conclude a work contract, to own property, to claim social benefits, consent to medical treatment or even – the ultimate paradox – to have the standing before a court to appeal a guardianship order.

These arrangements are centuries old. They were streamlined and hardened in the atmosphere of scientific positivism dominating the Soviet Union, and linked directly to policies and practices of excluding persons with mental or intellectual disabilities – as well as persons perceived to be otherwise deviant – entirely from the body politic.

The logic of these arrangements was stood on its head by the entry-into-force in 2007 of the Convention on the Rights of Persons with Disabilities. This sets out, at Article 12, the following:

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.*

The introduction into international law of a guarantee that any protection measures for persons with mental or intellectual disabilities follow explicitly the rights, will and preferences of the person concerned throws sharp light on the institution of guardianship, calling it fundamentally into question.

It should come as no surprise then, that the European Court of Human Rights has followed these developments, increasingly reading equal legal capacity requirements into the provisions of the European Convention on Human Rights, and in a row of recent cases, finding Council of Europe Member States in violation of the Convention.¹ At least one case in this regard is pending before the Strasbourg Court against the Republic of Moldo-

¹ See for example, *Alajos Kiss v. Hungary*, *Lashin v. Russia*, *Salontaji-Drobnjak v. Serbia*, *Shtukatur v. Russia*, *Stanev v. Bulgaria*. The Court has in particular read these issues into the European Convention Article 8 right to private and family life.

va. The case concerns a woman who was unable to apply for a divorce from her husband, because she was under guardianship and her husband was her guardian. Only he had legal standing to divorce (himself).

Moldova has had an open discussion of reform of the guardianship system to comply with the requirements of international law – in particular CRPD Article 12 – since an inter-ministerial working group was constituted to examine the issue in late 2011. The work of the group has to date focused on designing a new draft law which would set out modalities for supported decision-making arrangements to replace the current substituted decision-making arrangements, as well as to make necessary amendments to the Civil Code, Family Code and other laws evidently conflicting with CRPD Article 12. The work of this group was given significant impetus as a result of two missions to Moldova by Gábor Gombos, member of the UN Committee on the Rights of Persons with Disabilities and international expert on these questions, as well as more recently by attention to the question by Deputy Prime Minister Mihai Moldovanu, Chair of the Government's Disabilities Council.

The purpose of the study presented here was to contribute to this debate by looking at the impact of guardianship/incapacity measures, as well as to look at how persons in the system perceive guardianship. The guiding assumption of the study has been the assumption that – rightly or wrongly – guardianship is conceived of in principle as a protection measure. The study in particular aimed to assess whether the guardianship system is actually functioning as a protection measure, and whether it is perceived as such. Ludmila Ciocan, a leading national expert in this area, was engaged to carry out the study. She enjoyed the assistance and support of a number of my UN colleagues, as well as experts from civil society and the legal community.

The study reveals a number of issues:

- Those working directly in the system think that guardianship is generally used for abuse, most commonly in order to seize the property of the person concerned, isolating people perceived as “dangerous” or problematic to supervised settings. Authorities involved in guardianship and guardians themselves frequently do not realize their obligations to facilitate or enable the exercise of the trustee's rights but rather think of guardianship as the provision of habitual care. Few if any people think the system is functioning effectively as a system of protection of the rights or interests of the persons concerned.
- Moldova has had a quite dramatic increase in recent years of persons placed under guardianship. At least one of the reasons for that appears to be a highly legalistic-formalistic interpretation of human rights requirements, according to which forcible institutionalization (hospitalization) should only take place after a person has had their legal capacity removed.
- **Persons placed under guardianship are in practice almost completely excluded from proceedings placing them under guardianship, as well as denied review of such decisions.**

- As one might expect, it appears that as in most of the counties, in Moldova there is also an intimate link between guardianship measures and long-term or life-long institutionalization and/or other measures to segregate persons with disabilities, particularly mental or intellectual disabilities.
- Some of these processes appear to be gendered – note the massive disparity between boys and girls deprived of legal capacity in the children's institutions in Table 2.
- There is an evident problem with data systems, because statistical data and other information available from various parts of the administration appear inconsistent. Nevertheless, the study and its annexes significantly heighten public understanding of guardianship as applied in practice.

As in other countries, in Moldova these systemic issues of the guardianship system are linked directly to very serious abuse issues, both inside and outside institutions. A range of issues falling in the continuum of guardianship and institutionalization have recently been shown in recent reports of the Centre for Human Rights² and the first report of the Ombudsperson for Psychiatry.³ The vulnerability created by removing entirely the legal standing of the person leads to exposure to practices such as forced medication, physical abuse including sexual abuse, arbitrary detention, the near total deprivation of privacy, arbitrary removal of property, a non-exhaustive list.

At issue then are violations of a number of fundamental human rights set out in the CRPD Convention, going well beyond the core Article 12 issues under examination here. Indeed, the threatened forms of human rights violations extend across the range of the core international human rights treaties, and include the ban on torture and inhuman or degrading treatment, the ban on arbitrary detention, the right to private and family life, the right to free and informed consent with respect to any intervention in the health field, the right to marry and found a family, the right to work, the right to social security, the right to live in the community, as well as a host of other established fundamental legal rights.

More broadly, reform of this system is ultimately one key litmus test for an inclusive society. At stake are whether legacies of removing persons perceived to be different, deviant or otherwise in need of support and assistance are forced from the public eye and condemned to lives excluded from society or, alternately, whether the vision of the CRPD Convention is realized: that the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world, are realized in practice.

Claude Cahn⁴

² http://www.ombudsman.md/sites/default/files/rapoarte/psihiatrie_web.pdf

³ Doina Ioana Stralsteanu, Institutional Ombudsman of Psychiatric Hospitals, “REPORT ON THE OBSERVANCE OF PATIENTS’ RIGHTS IN THE PSYCHIATRIC HOSPITALS OF THE REPUBLIC OF MOLDOVA, April – September 2012”, October 2012.

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INTRODUCTION

As a result of Law No. 166-XVIII of 09.07.2010, the Republic of Moldova ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), signed in New York on March 30, 2007). The ratification of the Convention requires commitment of the state to implement the provisions of the international act at the national level. This also involves measures necessary to promote, protect and ensure the exercise of all human rights and fundamental freedoms by all persons with disabilities based on the principles of equality and non-discrimination.

CRPD Article 12, entitled “Equal recognition before the law”, is a central article of the Convention. Article 12 sets out that the persons with disabilities have the right to recognition everywhere as persons before the law. Paragraph 2 of the same Article recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. To ensure full enjoyment and exercise of the right to legal capacity for persons with disabilities, the State has the obligation to develop and put in place adequate and accessible support mechanisms. Another obligation of the State is to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse and manipulation. The establishment of these types of guarantees is necessary in order to 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. Also, CRPD Article 12 explicitly sets out 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. Moreover, safeguards must be created in order to eliminate all form of arbitrarily deprivation of property.

These provisions notwithstanding, the Civil Code of the Republic of Moldova (Law No. 1107 of 06.06.2002) provides for the deprivation of the capacity to exercise rights (a component part of the legal capacity) if the person, due to a mental disorder (mental illness or mental deficiency), cannot understand or control his/her actions. Thus, as a result of Article 24 of the Civil Code, guardianship is assigned to people with intellectual and psychosocial disabilities who are declared incapacitated. As provided by Civil Code Article 33, the guardian is the legal representative of the person declared incapacitated, and concludes all necessary legal documents on behalf of this person and in his or her interest, without being mandated by the person concerned to do so.

In order to adjust the provisions of the legislation in force, in particular, the provisions of the Civil Code and the Code of Civil Procedure, to the requirements of CRPD Article 12, an Inter-sectorial Working Group was established by Inter-ministerial Order of 09.12.2011. The working group was created at the initiative of three ministries (Ministry of Health, Ministry of Labour, Social Protection and Family and Ministry of Justice) and consists of representatives of the ministries and the civil society, including representatives of the Centre for Human Rights of the Republic of Moldova (Ombudsman institution). The purpose of the Working Group is the reformation of the system of guardianship, with a view to ensuring equal legal capacity.

This reform is complex and difficult, especially because it requires a total change of the legal system established for centuries, which was considered to be effective in protecting the incapacitated persons on the one hand and the assets of the family of the persons declared incapacitated, on the other. In order to analyse the practices of establishing guardianship in the Republic of Moldova through the human rights perspective and thereby to inform these reform efforts, it was deemed necessary to conduct a practical study. This Study assesses the guardianship system from the perspective of all stakeholders involved in the process of legal capacity deprivation and placement under guardianship.

EXECUTIVE SUMMARY

This study aims at analysing whether the guardianship of persons declared incapacitated functions as a measure of protection and whether the practice and arrangements of guardianship are compatible with Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD). The study is primarily intended to support the work of the Inter-sectorial Working Group on legal capacity reform. The main findings of the study, which need to be addressed and resolved by the Inter-sectorial Group in the process of reforming the institution of legal capacity in the Republic of Moldova, are the following:

- The guardianship authorities do not appear to be in possession of information regarding the exact number of incapacitated persons residing in the administrative-territorial unit in which they activate and the identities of the appointed guardians. Thus, the guardianship authorities are not able to monitor the extent to which the rights and freedoms of the incapacitated person are observed and the way in which the guardians fulfil their obligations.
- There are no official statistics at the national level on the persons declared incapacitated and their guardians. This situation makes it difficult to develop and implement support programs and services for people with intellectual and psychosocial disabilities declared incapacitated or who risk to be declared incapacitated.
- The legal procedure and practices of incapacitation and placement under guardianship evidently run afoul of international human rights law and standards, in particular as set out under Article 12 of the CRPD Convention. They put persons declared incapacitated in a situation of excessive vulnerability. The most serious problems identified concern: failure to inform the person to be declared incapacitated about the trial and his or her fair trial rights; non-participation of the person to be declared incapacitated at the trial; lack of effective legal representation (the formality of appointing the lawyer and his or her lack of involvement in defending the person's rights); placing the person declared incapacitated in the residential institutions at the initiative of his or her guardian or other social or medical institutions; lack of genuine monitoring by the guardianship authority of appointed guardians; loss of control over their financial resources and real estate (if they exist); deprivation of standing before courts, including lack of standing to apply to restore the legal capacity of the person declared incapacitated; lack of periodic review in practice by a competent authority of the necessity of prolongation of the incapacity (permanent and irreversible aspect of the guardianship); automatic loss of rights in important areas such as marriage or divorce, employment, voting, freedom of movement/circulation, management of personal resource and income, lack of rights to choose or refuse medication, as well as rights in other areas.
- The guardianship system implies the substitution of the individual's decision, namely by handing over the decision making power to the guardian. This evidently does not comply with CRPD Article 12, as well as potentially also with other human rights law provisions.
- The number of incapacity cases in the Republic of Moldova has recorded a sudden increase since 2009. One of the factors invoked by the interviewed experts is the implementation of the Regulation on the payment of pensions established in the system of public social insurance and social allowances (GD No. 929 of 15.08.2006, item 40), which appears to have created an incentive or pressure to have persons placed under guardianship.
- As a result of the interviews with the specialists involved in the process of declaring the incapacity of a person we found that the declaration of incapacity and placement under guardianship are most often caused by various factors including: the guardian's access to the social benefits granted to the people with severe disabilities; management of the patrimonial assets of the person with severe

disabilities by the guardian; placement of a person with severe disabilities or otherwise unwilling to consent in a residential institution.

- Establishing guardianship often favours the abuses upon the person, although the interviewed guardians perceive guardianship as a measure of protection, in a way that a personal assistant or carer would do but with full

control over the person's material assets and financial resources and power of decision-making, rather than enabling the person to exercise their capacity and offering required support in reaching autonomous decisions.

- There is a reluctance or refusal by public notaries to authenticate the powers of attorney issued by persons with psycho-social and intellectual disabilities.

I. METHODOLOGY

The purpose of the study: to analyse the functioning of guardianship as a measure of protection of the incapacitated person in the Republic of Moldova from the human rights perspective;

The objectives of the study:

- i. to analyse the procedures and practices of declaring the incapacity of a person and establishing guardianship;
- ii. to determine the profile and the situation of the persons declared incapacitated;
- iii. to examine the knowledge and performance of the guardians with respect to their obligations to protect the rights and represent the interests of the incapacitated persons;

Stages of the study:

1. Analysis of the provisions of the Civil Code, the Code of Civil Procedure, jurisprudence of the Supreme Court, as well as other relevant domestic rule on declaring the incapacity of a person and establishing guardianship (procedural matters);
2. Analysis of the statistics on the incapacitated persons. To this end, the following requests have been done:
 - a) to the Ministry of Justice/Department of Judicial Administration - the total number of the persons declared incapacitated at the national level and the number of persons declared incapacitated by districts/cities of origin in the years 2009, 2010 and 2011;
 - b) to the guardianship authorities (the territorial structure of social assistance) - total number of persons declared incapacitated in the district/city; the number of persons declared incapacitated in the district/city for the years 2009, 2010 and 2011; total number of persons declared incapacitated living in the community with the guardians and the total number of the persons declared incapacitated who were institutionalized;

- c) to the Ministry of Labour, Social Protection and Family - number of persons declared incapacitated placed in the subordinated residential institutions;

3. Develop interview guides for different categories of respondents (legal experts - forensic psychiatry experts, judges, representatives of the guardianship authority, representatives of the residential institutions in which the persons who were declared incapacitated are placed, guardians, persons declared incapacitated);
4. Analyse the case files of persons who are at different stages in the process of being deprived of legal capacity (preparation of the case for judicial process, forensic psychiatric expertise, etc.);
5. Interviews with the target groups of respondents;
6. Processing of data and information obtained as a result of the interviews;
7. Preparation of the report.

Study period: August-September 2012

Study hypotheses:

- The applications for declaring a person incapacitated are most often filed by a family member and aim at preserving the assets of the person or depriving the persons with disabilities of their patrimonial assets;
- The applications for declaring the incapacity of a person are most often filed by the family members and aim at gaining access over the pension or social allowance entitled to the persons with disabilities;
- The applications for declaring the incapacity of a person are aimed at securing institutionalization in residential institutions for persons with disabilities and are filed by the respective institutions;

- Establishing guardianship most often favours abuses against the person, even though guardianship is perceived as one of protection.

Selecting the target groups of respondents:

The target groups of respondents were selected on the criteria of the presence or absence of the psychiatric institutions in the district/city and, accordingly, social residential institutions. Thus, the target groups of respondents were selected from:

- One city where there is a residential social institution for persons with disabilities and a psychiatric institution – Balti City;
- One city where there is only a psychiatric institution – Chisinau City;
- Two districts where there is only a residential social institution for people with disabilities - Soroca District (an institution for adults, neurological-psychiatric profile) and Hancesti District (institution for children with mental disabilities, where 55% of the beneficiaries are adults);
- One district where there is neither a residential social institution for people with disabilities, nor a psychiatric institution - Ceadar-Lunga District (the district with the highest incidence of mental illnesses in the Autonomous Territorial Unit of Gagauzia (Gagauz Yeri).

Overall, 30 people were interviewed, of whom:

- Three qualified legal experts in forensic psychiatry expertise;
- Three judges with extensive experience in adjudicating cases of declaration of incapacity;
- Three representatives of the guardianship authorities;
- Three representatives of the social residential institutions for persons with disabilities;

- Five guardians;
- Thirteen incapacitated persons (10 from the residential institutions and 3 from the community).

Analysis of case files of people being deprived of legal capacity:

We analysed all the case files to be examined by the forensic psychiatric commission during the visit to the Chisinau Psychiatric Hospital (a total of 17 cases). The analysis focused on aspects such as:

- the kinship between the person applying for the declaration of incapacity (petitioner) and the person to be declared incapacitated;
- the reasons for asking the declaration of the incapacity submitted by the petitioner;
- the medical diagnosis of the person to be declared incapacitated;
- the age of the person to be declared incapacitated;
- the questions formulated by the judges when requesting the psychiatric expertise, which must be answered by the experts from the psychiatric hospital;
- the report of the psychiatric expertise.

Limits of the study: Given the absence of statistics at the national level on the number of incapacitated persons and their guardians, it was impossible to select a representative sample to achieve a quantitative research. Data presented by the territorial social structures includes a number of errors and discrepancies that do not allow for full conclusions on the situation at the national level to be drawn. Thus, this study is a qualitative or empirical research focused on the procedures and practices of declaring the incapacity of a person and placement under guardianship based on the analysis of the legal framework and interviews with the experienced actors involved in these procedures.

II. STUDY RESULTS

1. Statistics on incapacitated persons

In the Republic of Moldova, there are no official statistics on the persons declared incapacitated through a court decision and their guardians, which would reflect:

- The total number of incapacitated persons per country, district/city/guardianship authority;
- The annual number of new cases of declaration of incapacity per country, district/ city/ guardianship authority;
- The relationship between the incapacitated person and the guardian (guardian appointed from within the family members, a guardian outside the family, exercise of guardianship by the social or psychiatric institutions);
- The annual number of cases when the legal capacity is recovered;
- Gender and age of the incapacitated persons;

The Department of Judicial Administration of the Ministry of Justice provided the research team with data on the annual accounts of the number of adjudicated cases and the cases pending for consideration as regards Chapter XXVIII of the Code of Civil Procedure (Limitation in legal capacity or declaration of incapacity) - Annex 1. We note that the total number of cases includes the following court proceedings:

- Limitation of the legal capacity;
- Declaration of incapacity;
- Cancelling the limitation of the person's legal capacity;
- Restoration of the full legal the capacity of the "healed" person;

According to these data, in 2005, there were 111 such actions admitted, in 2009 - 345 actions, in 2010 - 345 actions, in 2011 - 336 actions.

From the interviews with the judges, the forensic psychiatric experts, and from the data provided by

the local public authorities, we could conclude that the number of cases on the limitation of legal capacity is significantly smaller than the number of cases of declaration of incapacity. Cases of restoration of the full legal capacity of the "healed" person (restoration of legal capacity) are rare or non-existent.

The Ministry of Labour, Social Protection and Family provided the research team with data on the records of persons who were deprived of their legal capacity and limited in their legal capacity, placed in the subordinated residential institutions - Annex 2. According to this data, there were 1690 adults placed in the 4 mixed psycho-neurological boarding houses as of 01.08.2012, of whom 407 were deprived of their legal capacity (24.1%) and 3 persons were limited in the exercise of their legal capacity (0.2%). 366 adults were placed in the 2 gender separated boarding homes for children with mental disabilities, of whom 157 were deprived of legal capacity (42%) and nobody had limited legal capacity (0%). While all available data is not disaggregated by gender for all the institutions, in institutions for children we could notice a major discrepancy between the number of girls and boys, accordingly, which were incapacitated. Thus, in the girls' boarding house for children with mental disabilities, 153 girls were declared incapacitated and other 25 girls were in the process of having their legal capacity assessed. In the boys' boarding house for mentally disabled children only 4 boys have been incapacitated, while other 184 boys did not have their legal capacity status determined.

In total, as of 01.08.2012, **564 incapacitated persons were placed in residential institutions subordinated to the Ministry of Labour, Social Protection and Family**. Upon the request of the Ministry of Labour, Social Protection and Family, the territorial structures of social assistance presented the statistics on the persons declared incapacitated within their territorial range - Annex 3. According to this data, on 01.09.2012, **the territorial social assistance structures throughout the country (except the districts on the left bank of the Nistru River) were keeping record of 3267 incapacitated persons, of whom: 2434 people lived with the guardians, 593 persons lived alone and 240 persons were in residential institutions.**

Following the triangulation using 2 data collection channels – one directly from the residential institutions and the second upon a Ministry of Labour, Social Protection and Family request to local public authorities -- we see a discrepancy between the data presented by the administration of the residential institutions and that presented by the territorial social assistance units (LPA). It follows that over 300 incapacitated persons who were institutionalized were not being registered by the guardianship authorities. Also, a series of errors and inconsistencies between the data provided by the territorial social assistance structures for the years 2009-2012 (September 1) and the disaggregated data on the residence of the persons declared incapacitated in the same district/city could be noticed.

The analysis of the data reveals that in districts such as Anenii Noi, Causeni, Hancesti and Sangerei, the number of incapacitated persons who were not appointed a legal representative is by several times higher than the number of incapacitated persons for which a legal representative (guardian) was appointed. At the same time, these districts have a smaller number of incapacitated persons who were institutionalized compared to the number of people living with their guardians. In these cases, the situation of the persons deprived of their legal capacities which were neither institutionalized nor living with the guardians, remains unclear.

2. Procedures and practices to declare the incapacity for a natural person and establish guardianship

2.1 The request for declaring the incapacity

Chapter XXVIII of the Code of Civil Procedure regulates the special procedure for declaring the incapacity of the natural person which is to be held in front of the ordinary courts. Article 302, paragraph 2 stipulates “The proceedings on declaring the incapacity of a person due to a mental disorder (mental illness or mental deficiency) may be started upon the request of the person’s family members, close relatives (parents, children, brothers, sisters, grandparents), regardless of whether they live or not together with this person, or upon the request of the guardianship body, of the institution of psychiatry (psycho-neurology), of the prosecutor”.

After the analysis of the 17 cases in the process of psychiatric examination (at the stage of preparation of the case for judicial debates), it was revealed that all the applications were lodged by the relatives (mother - 6 cases, son/daughter - 5 cases, sister - 3 cases, niece - 1 case, aunt - 1 case, grandmother - 1 case). From the interviews with psychiatric experts, we note that the applications lodged by the prosecutor are, in fact, initiated at the request of the residential institutions or by the relatives of persons

who wish to be exempted from paying the expertise fee (1024 lei). For example, the judicial expert within the Forensic Psychiatric Expertise Chisinau claims that during the last year (2011), he received 94 applications for declaring the incapacity of the persons placed in the boarding house for mentally disabled children (Hancesti), filed through the prosecutor. The judicial expert within the Forensic Psychiatric Expertise Balti also claims that in 2011 he had for examination 101 cases submitted by the Psycho-Neurological Boarding House from Branzeni and other 57 cases submitted by the same institution - in 2012 (until August).

The judges of the Chisinau Center Court and Soroca Court confirmed the fact that the cases lodged by the prosecutor are initiators most often in the interest of the relatives of the person or of the residential institution. The judge of the Balti Court explained that in his experience, the majority of the cases of declaring the incapacity of the person were initiated at the request of the guardianship authority.

Excerpt from the interview - Judge, Balti Court

“The applications come most often from the Department of Social Assistance. Seldom do the family members address directly to the court. But they still have to go to the Department of Social Assistance to prepare the necessary set of documents.”

The Psychiatric Hospital initiates the procedure for declaration of incapacity only in unique cases and usually when it comes to the discharge of the persons who were confined for coercive treatment at the time when there are no family members who would accept them back and help with their community inclusion.

Excerpt from the interview - judicial expert, Forensic psychiatric expertise Balti

“When the condition of the person confined to coercive treatment stabilizes, he/she is discharged and may go home. As a rule, the relatives are called to take him/her home. If the patients have no relatives, then the hospital authorities initiate the proceedings for the declaration of incapacity to place him/her in a psycho-neurological boarding house. We have to resort to this method, because the boarding houses do not accept for placement the persons without them being declared incapacitated. Previously we had 6-7 such cases per year, however, these cases happen less often now because there are no available places in the boarding houses.”

As for the number of applications for the declaration of incapacity, the interviewed actors (psychiatric experts, representatives of the authorities, representatives of the residential institutions) argue that the number of cases of incapacitation have in-

creased since 2009. The interviewed actors argued that this phenomenon is due in particular to the delayed implementation of the Governmental Decision No. 929 of 15.08.2006 approving the Regulation on the payment of pensions established in the public system of the state social insurance and state social allowances. In Section 5 of the act it is stated that the pensions or social allowances shall be paid personally to the beneficiary, their representative, or to the guardian/trustee, upon presentation of the documents confirming their identity. Section 40 of the same document stipulates that *“As regards the persons who suffer from mental illness (regardless of age), who were judicially deprived of their capacity and hospitalized in the psychiatric hospitals and those who live in the community together with their guardian, their pension or social allowances shall be paid to the guardian, the adopter or the trustee at their place of residence.”*

According to statements made by the interviewed persons, as of 2009, relatives who looked after people with disabilities were able to address to the territorial offices of the Moldovan Post Office, the state enterprise through which the payment of pensions and social allowances are made, and would receive the amounts entitled to people with disabilities without having to present any documents that would confirm their guardianship. Since 2009, however, persons who are providing persons with disabilities with support are confined to present certificates through which they have been appointed guardians.

Another reason for the increase in persons declared incapacitated and placed under guardianship appears as result of a request submitted by the Centre for Human Rights of Moldova on ensuring the right to vote including those placed in the residential institutions. This had a reverse effect on the institutions, which resorted to the practice of declaring the incapacity of the persons placed within their facilities in order to be absolved from the responsibility to guarantee equal electoral rights for persons with psycho-social and intellectual disabilities.

Excerpt from the interview - representative of the residential institution for children with mental disabilities, Hancesti (over half of the residents are adults)

“How to allow them to elect a President? How to allow them to leave the institution? I am responsible for them.”

2.2 The purpose of establishing the guardianship

According to Articles 166 and 303, the Code of Civil Procedure, the request for declaring the incapacity of a person does not have to include explanations of the purpose for which deprivation of legal capacity

is sought. The applicant is only bound to provide evidence of the circumstances certifying that the person indeed suffers from a mental disorder which impairs their ability to understand and control their actions. An analysis of the 17 cases in the process of psychiatric examination shows that only in two cases the relatives mentioned a specific reason for requesting the incapacitation: *“receiving the pension from the Territorial House of Social Insurance”* and *“to benefit from the social insurance and rationally administer the heritage of the person.”* In other cases, the applicants used a standard formulation regarding the necessity of incapacitation of the person” due to a health condition and the need for protection.” As for the opinion of the specialists involved in the process to establish guardianship, the following excerpt is very illustrative:

Excerpt from the interview - Forensic psychiatric expertise Chisinau

“80% of the relatives of persons within the first or second degree of disability request the incapacitation for the purpose of managing the person’s pension. This cannot be done through a mandate because notaries refuse to conclude mandates for persons with severe disabilities. In other 20% of the cases the relatives have issues related to the administration of the real estate (e.g. accessing certain housing utilities), which requires the owner to sign specific contracts. If the owner is a person with severe disabilities, he/she cannot sign and the notary cannot authorize a mandate for them. Here we can also mention the management of real estate (land, apartment, house etc.) received as a donation or inheritance. Another cause for requesting the incapacitation is the placement of the persons with psycho-social and intellectual disabilities in residential institutions”.

The interviewed judges mentioned the following reasons from which the necessity of establishing guardianship results:

- Inheritance issues;
- Enjoyment of social benefits entitled to persons with disabilities;
- Signing contracts, especially “real estate transactions in the name of the person psycho-social and intellectual disabilities without having the necessity to request his or her consent or signature”.

Two representatives of the guardianship authorities mentioned the “management of the pension” as the main reason for which incapacitation is sought and one representative added also *“the placement of the incapacitated person in a boarding house at the guardian’s request.”*

When asked “What are the most frequent situations when you are asked to sign documents instead of

the person whose guardian you are?” all the interviewed guardians said: “*when receiving the pension, the transport allowance, the compensation,*” “*when receiving free drugs.*” This confirms the specialists’ statements about the fact that the guardians have access to social/health benefits, which the person with severe disabilities cannot access personally.

2.3 Preparation of the case for judicial debates

Before proceeding to the examination of the merits of the case on deprivation of legal capacity, the judge has to order the execution of a forensic psychiatric expertise of the person whose legal capacity is questioned (Article 305, the Code of Civil Procedure). The judge has a broad discretion at deciding whether there is enough evidence to order a psychiatric expertise, and once it has been ordered the person has no legal possibilities to challenge it. In some instances, when the person subjected to psychiatric examination does not comply with the order, the police involvement is sought for bringing the person before the commission of doctors empowered to carry out the assessment. The Supreme Court of Justice, issued an explanatory judgement on the practice of examination by the courts of the cases of deprivation of legal capacity, No.17 of 31.05.2004, in which it was stipulated that: “The questions formulated by the judge, when the forensic psychiatric expertise is ordered, must be concise and clear, and free of ambiguities. For this purpose the recommended questions to be addressed to the experts are the following:

- a. Did or does the person suffer from any mental illness, if so, what mental illness? and
- b. Is the person found to be suffering from mental illness able to understand and control his/her actions?”

In each separate case other questions can be also formulated. The court cannot require the conclusion of the expertise on the necessity of appointing a guardian to the person since, according to Article 36 of the Civil Code, the matter lies within the competence of the guardianship authority. In the cases under examination of the psychiatric expertise analysed as part of this study, in addition to the two questions noted above, questions such as the following also appeared:

- a. *What is the person’s legal capacity at this moment?*
- b. *Is the person responsible or not?*
- c. *Is it necessary to recognize the lack of legal capacity?*
- d. *Is it necessary to institute a guardian/trustee?*
- e. *Is it necessary to send the person to a special asylum for persons with disabilities?*

When asked “Do the judges have the necessary qualification to understand the link between the medical diagnosis (the phrase ‘the mental illness from which the person suffers’) and the person’s ability to exercise their rights/make decisions?”, the expert psychiatrist considered the following:

Excerpt from the interview – judicial expert, Balti Forensic Psychiatric Expertise

“Judges do not have the necessary qualification to understand the ways in which a medical diagnosis affects the decisions making capacity or the ability to take care of himself/herself of a person. Despite the fact that judges are not competent to interpret the medical diagnosis, because they are not specialised in psychiatry, the experts are not invited to the trial or are invited only in very rare cases.”

The interviewed expert from the Forensic Psychiatric Expertise Chisinau, stated: “As a rule, in Chisinau, the judges summon us to the hearings, but we are addressed only one question ‘*Do you support the conclusion presented in the report?*’” When asked “How is a person’s decision making capacity and ability to exercise certain rights assessed?” the experts said:

Excerpt from the interview – judicial expert, Forensic Psychiatric Expertise Chisinau

“The main criteria in assessing the capacity are: memory, thinking, comprehension, social adaptation - if the person can predict the consequences of his/her actions, if he/she can manage the money, if he/she can self-serve”.

Excerpt from the interview – judicial expert, Forensic Psychiatric Expertise Balti

“We examine the patients through discussions, in which we try to evaluate the person’s thinking pattern. We involve the psychologist, who uses special methods and tests to assess the logic. There is no methodology for determining capacity. Capacity means the ability to act correctly in each separate case: to work, to self-serve, to manage the money, make useful decisions that would not harm the person or the others.”

We note that of the two institutions authorized to conduct forensic psychiatric expertise in the country (Psychiatric Hospital Chisinau and Psychiatric Hospital Balti) only the Balti institution has a psychologist as a member of their staff.

The report of the forensic psychiatric expertise, presented to the court, contains the following information:

- diagnostic;
- anamnesis (illness history);
- diagnostic reasoning from the medical perspective;

- the conclusion that the person, due to his/her health condition, does not realize and does not control his/her actions and needs to be placed under guardianship.

None of the analysed reports contained information on the degree of functionality of the person in different areas of life.

After having analysed the cases under the psychiatric expertise examination and conducting interviews with the psychiatric experts, it was revealed that only people with intellectual and psychosocial disabilities risk having their legal capacity removed from them.

Excerpt from the interview – judicial expert, Forensic psychiatric Expertise Chisinau

“As for the persons with brain traumas/stroke there is no necessity for declaring the incapacity of the person, because there is a special post-mortem intervention to which relatives can resort in cases of real estate problems. Most cases of incapacitation are related to the age of majority (18 years)”.

According to the experts, if the person received inpatient treatment for a longer period and has a voluminous medical file, **on average, the examination of the person to be declared incapable lasts approximately for one hour.** More time, however, is required for the examination of the medical records of the person. If the person has never been hospitalized in a psychiatric health care facility then the psychiatric experts will order the hospitalization of the person in order to conduct the required investigations. In this case no immediate decisions on the necessity of guardianship could be made. As for bedridden persons, the expert psychiatric commission can issue the report, as an exception, without seeing the person, solely on the basis of the medical documentation presented by the family doctor and the local psychiatrist.

2.4 Judicial examination of the incapacitation request

According to Article 306 paragraph (2), the Code of Civil Procedure, “The examination of the request for declaring the legal incapacity of a person must take place with the mandatory participation of the representative of the guardianship body and the petitioner. The issue of summoning the person whose legal capacity is questioned is solved in each case separately depending on his/her health condition.”

Of the 13 persons deprived of legal capacity interviewed for this study, only one person participated in the trial. The other persons did not know when the court hearing took place and were informed about that post-factum. We quote some common answers of the persons:

- *“I did not know that the trial took place. My mother went to the court. I learned later of the existence of a court decision on the deprivation of legal capacity.”*
- *“I did not know when the trial took place. I found out when the police came to take me from home. The judges do not need us, schizophrenic persons in the court hearing. They take the decision by themselves.”*
- *“I did not know about the trial. I found later on about it. It was not even necessary for me to participate.”*
- *“I was not there, I did not know about the trial.”*
- *“I do not know about the trial, I cannot tell you anything.”*

As for the attitude of the judges concerning the participation of the person whose legal capacity is examined in the judicial trial, the answers to the questions “Is the participation of the person whose legal capacity is questioned at each stage of the trial compulsory and important or not? Give reasons. Did you have cases when you declared a person incapacitated in his/her absence?” are quoted below.

Excerpt from the interview – judge, Balti Court

“The participation is not compulsory. For example, if the person stays in the hospital, he/she cannot come. In most cases, the person to be declared incapacitated is not invited. The person came once and I regretted that. I invited him because I wanted to be convinced as regards his condition; I had some doubts whether I was misled by the one who filed the application. The person was in a state of frustration. He looked very surprised. It was an unusual environment for him. He first stood up, and then he sat, then again, he stood up. He was not answering properly to the questions. I was afraid. If he has a crisis, what shall I do? I did not know how to react.”

Excerpt from the interview – judge, Soroca Court

“I think that the person’s participation is neither necessary nor useful because we speak about people who are mentally inadequate. They just would hinder the proper conduct of the trial. Do you think they might behave in a civilized manner in the courtroom? Their presence in the courtroom is not necessary; the relatives talk for them, while the conclusion is based on the report of the psychiatric expertise.”

Excerpt from the interview – judge, Chisinau-Centre Court

“We had only one case when the concerned person took part in the trial, but the person had an aggressive behaviour and after the meeting I left with a deep sense of fear. I was afraid to come home from work. I believe that the person’s participation is not necessary. Their presence in the courtroom is not necessary. The court may determine the circumstances of the case and the need to declare the incapacity bases on the testimonies made by the relatives, the petitioner and the conclusion of the psychiatric report. The lawyer always talks on behalf of the concerned person.”

According to Article 304 paragraph (1), of the Code of Civil Procedure, if the person whose legal capacity is examined is not assisted by a lawyer of her choice, the court is required to appoint a lawyer ex officio through the National Council for State Guaranteed Legal Aid, which will represent the interests of this person. ***None of those incapacitated persons who were interviewed knew about their right to be represented by a lawyer. The incapacitated person who had attended the trial said that he had not talked to a lawyer.***

We quote further on the judges' opinion on the lawyer's role:

Excerpt from the interview – judge, Chisinau-Centre Court

"All persons are required to be represented by a lawyer. I cannot say anything about the way the lawyers fulfil their obligations".

Excerpt from the interview – judge, Soroca Court

"All persons are represented by a lawyer. I do not think that the lawyer has meetings with the person, the materials of the case are enough for her."

Excerpt from the interview – judge, Balti Court

"As of 2010, these persons have the right to a lawyer ex officio. I appoint a lawyer ex officio who represents them. Most often, the lawyer does not meet the person. Usually, the lawyer has a very passive, formal role, during the hearing. In the best case, the lawyer talks to the co-interested person. But there are few exceptions, lawyers who love their job and work well."

As for the relationship between the representative of the guardianship authority and the person whose legal capacity is under examination, taking into account the conducted interviews, we selected the following quotations:

Excerpt from the interview – representative of the guardianship authority Balti

"I meet the person during the court hearing if he or she is present. If she does not come to the hearing, then we do not meet."

Excerpt from the interview – representative of the guardianship authority Balti

"No ... we do not always meet the person for whom guardianship is to be established. As a rule, the persons do not come to the courtrooms. Usually, we learn about the person from the information provided by their representative, lawyer or psychiatrist. When summoned to participate in the court hearing on the deprivation of legal capacity, we have to prepare and present a brief on the current situation of the person. However, we go and check the situation on the ground only when the person who has requested the incapacitation is not a family member. But when they are close relatives, such as: brother, sister, mother, father, we have no reason to think that the situation of the person would worsen if placed under guardianship. We are sure that they will care for the person."

Excerpt from the interview – representative of the guardianship authority Soroca

"The person does not participate in the hearing or participates only in 10% of cases. We meet first the relatives to prepare all required certificates."

2.5 Establishing the guardianship

After the examination of the case during a court hearing, the judge issues a Court Decision on declaring the legal incapacity of the person, according to the requirements of Article 241 of the Code of Civil Procedure. The court is not entitled to order the establishment of a guardian, because according to

Article 36 of the Civil Code, this task lies in the competence of the guardianship authority:

- "(1) The guardianship authority is required to decide on the establishment of a guardian within one month since the receipt of information about the necessity to do so.
- (2) Until the appointment of a guardian or trustee, their powers are exercised by the guardianship authority".

According to Article 113, paragraph (2) of the Family Code, the divisions (departments) of social assistance (administrative-territorial units of the second) and the mayor's offices (administrative units of the first level) are vested with the exercise of the functions of the guardianship authority.

During the interviews with the representatives of the guardianship authorities, we tried to clarify what happens to the person declared legally incapacitated during this month, since the court decision on declaring the incapacity and until establishing the guardianship. Some of the answers we received follow here:

Excerpt from the interview – representative of the guardianship authority Chisinau-Centre

"Prior to establishing the guardianship, the person is protected by the person who took care of him or her before, including financially."

Excerpt from the interview – representative of the guardianship authority Balti

"A case file of the person which needs to be placed under guardianship is prepared and examined during the meeting of the City Council. I think that it would be good if a social assistant would also go check the person's situation at home."

Excerpt from the interview – representative of the guardianship authority Soroca

"The Social Assistance Department files an application and the guardianship is established through a Mayor's Office Decision. It is done easily."

2.6 Practical exercise of the guardianship

The basic obligations of the guardian are established in Articles 40 and 41 of the Civil Code.

According to Article 40, paragraph (1), the guardian shall:

- a) live together with the person under guardianship and communicate to the guardianship authority if the place of residence changes;
- b) take care of the subsistence of the person under guardianship;
- c) protect the rights and the interests of the person under guardianship.

According to Civil Code Article 41:

- (1) The guardian manages and disposes effectively of the property of the person under guardianship, in his or her name, if a property manager is not appointed.
- (2) On appointment, the guardian, in the presence of the representative of the guardianship authority, inventories the goods of the persons under guardianship and presents the inventory to the guardianship authority for approval.
- (3) The sums due to the persons under guardianship, under the form of pension, support, alimony and other current revenues are received and spent by the guardian for the subsistence of the person under guardianship.
- (4) If the current revenues or the financial means of the person under guardianship are not sufficient to cover all the necessary expenses, they can be covered on the account of his/her goods, with the consent of the guardianship authority.
- (5) The guardian has to prepare and submit annually to the guardianship authority, within 30 days after the end of the calendar year, a report on the way he/she took care of the person under guardianship and about the management and disposition of his/her property.

From the discussions with the interviewed guardians, we tried to identify the way they perceive their obligations towards the person declared incapacitated. Thus, we found the following **perceptions of the guardian's role**:

1. *"I am a mother, I take care of him";*
2. *"I am the mother and I protect the interests of my son";*
3. *"We fulfil the obligations of a parent, we protect him from dangers";*
4. *"Role of caretaker";*
5. *"My obligations are to take care of him (food, drugs, washing), to permanently accompany him wherever he goes."*

When asked "Have you been in the position to give consent as regards certain rights of the person whose guardians you are (e.g. to marriage, to work, to vote, to medical treatment, to the sale/purchase of goods of high or low value etc.)?", three guardians answered that they only gave consent to treatment and two guard-

ians stated that they did not give consent to the exercise of such rights ever. The interviews also revealed that **none of the interviewed guardians had been ever asked by anyone about the way he or she performed his or her duties as a guardian and had never presented to anyone a report on spending the money of the person whose guardian he/she was (pension, allowance, other revenues).**

When answering our question, "To what extent do the guardians fulfil their duties diligently and do not abuse the persons declared legally incapacitated?" the interviewed representatives of the guardianship authority provided the following answers:

Excerpt from the interview – representative of the guardianship authority Chisinau-Centre

"Overall, there have not been instances when the guardians did not fulfil their obligations. According to the Civil Code, the guardians are required to submit an annual report to the guardianship body. The report includes information relevant to the way in which the person was taken care of. When the annual report is presented, the person's situation, problems he/she faces etc. are discussed with the guardian. The guardians are rarely subject to verification. Unfortunately, we do not have enough staff members to perform monthly or even biannual monitoring visits."

Excerpt from the interview – representative of the guardianship authority Balti

"The guardians are verified by the fact that they submit a report".

Excerpt from the interview – representative of the guardianship authority Soroca

"The guardians are not verified. They perform their obligations in the same manner as they did before their appointment as legal guardians."

With specific reference to the management of property/money of the incapacitated person by their guardian, the representatives of the guardianship authority noted:

Excerpt from the interview – representative of the guardianship authority Chisinau-Centre

The guardian presents annually, no later than 30 days after the end of the calendar year, an annual report on the administration of property/money of the incapacitated person. Notaries do not allow the pledging, selling, renting of properties in which the person has a share. These actions may take place only with our consent. Before providing consent, we place conditions and aim to ensure that the share of the incapacitated person will be reinvested in a new property."

Excerpt from the interview – representative of the guardianship authority Balti

"In certain situations the guardian comes to the guardianship authority and requests the authorization for depriving the person placed under his guardianship of their property. I issue these authorizations. I talk to the guardian, ask him what he/she wants to do next, if he/she intends to buy another apartment, so that the person under guardianship would not remain on the street. We do not verify the actual conditions in which the person under guardianship lives. With this authorization the guardian goes to the notary. In reality, there is no way to verify if the guardians have kept true to their word or not. It would be good to have the possibility to check, to ask for some confirmation documents, to be able to request cancellation after the transaction, if the guardian did not keep true to their word. In Russia, the law states that both transactions of selling an apartment and buying another shall be concluded simultaneously at the same notary. I think such a provision would be a good idea for Moldova too."

Excerpt from the interview – representative of the guardianship authority Soroca

"We do not know the way the guardians manage the goods of the person. We ask for no reports."

Article 38, paragraph (2) of the Civil Code provides that "The powers of guardian upon the person admitted to an institution of social assistance, education, treatment or to a similar institution are performed by the directors of these institutions, unless the person has a guardian in the community". When asked "Do you have cases in the district/city when the incapacitated person has a guardian in the community, but lives in a residential institution and not with the guardian?" and "Who supervises the relationship between the guardian and the person under guardianship in these cases?" the guardianship authorities responded:

Excerpt from the interview – representative of the guardianship authority Chisinau-Centre

"There are cases when the guardian does not live with the incapacitated person. Most often these people are institutionalized in psycho-neurological institutions, because they represent a danger to the others, or they cannot be kept at home because of the financial problems. The guardian visits the person on Saturdays or Sundays. There are cases when the guardian is a parent, then the person may be taken home on holidays or during the days off."

Excerpt from the interview – representative of the guardianship authority Balti

"There are no such cases. It may only be that the guardian and the person under guardianship live close to each other and the guardian visits him/her."

We note that according to the statistics provided by the Department of Social Assistance and Family Protection of Balti, three incapacitated persons are placed in the residential institutions and another fourteen persons live alone.

Excerpt from the interview – representative of the guardianship authority Soroca

"Yes, we have such cases, when the incapacitated person resides in an institution, while the guardian in the community, but anyway the guardianship is not cancelled"

In Soroca, a representative of the guardianship authority told us that there was a case when the social worker was appointed as a guardian to be able to prepare the set of documents required for placing the person in a residential institution.

In case an institution performs the duties of a guardian, we found that the representatives of these institutions consider that they only have the obligation to care for the vital needs of the person, without protecting their rights or representing their interests. Thus, to our question "How does your institution perform the protection of the rights of the incapacitated persons and which are the rights you have to protect?" the representatives of the institutions reported:

Excerpt from the interview – representative of the institution from Balti

"We take care of them: we feed them, we clothe them. We do not get involved in defending their rights, because we do not want any additional problems. For this reason, we never issue authorization for the alienation of the individual's property. We tell them to go to the social assistance departments."

Excerpt from the interview – representative of the institution from Hancesti

"We feed them, we cure them, according to the Regulation. All have the same rights."

Excerpt from the interview – representative of the institution from Badiceni

Did not answer the question.

From the interviews with the representatives of the residential institutions it was revealed that they find that the property administration of their wards is a burdensome process. For this reason, even if appointed as *de iure* guardians, they prefer not to get involved into the protection of the patrimonial rights, leaving this obligation with the family members of the person. It was revealed that the persons who are subjected to the highest risk of losing their property are those who are placed in a residential institution and at the same time have a guardian in the community. An example of this is the following:

Excerpt from the interview – representative of the institution from Balti

"We do not know the situation because we do not keep account of this; the guardian takes care of the property. However, there are big problems. There are cases when the persons deprived of legal capacity remain without property and then seek to recover it. We do not take care of their property; we do not represent their interests before the authorities. If problems arise, we go to the territorial Department of Social Assistance to ask for help. Because nobody verifies or keeps record, there is the risk that the people lose their property."

There is a major difference in the way persons deprived of legal capacity perceive their guardians. The interviewed persons placed under the guardianship of the institution, five in total, have never heard the term “guardian”, while eight other persons who had a guardian and lived in the community knew who their guardians were and could communicate useful information on their relationship with the respective guardians.

When asked: “Has anyone ever asked you how well the staffs of the boarding house fulfil their obligations concerning you?” – in the case of the institutionalized persons, and “Has anyone ever asked you how well does your guardian fulfil his/her obligations concerning you?” – in the case of the persons living in the community, all thirteen interviewed persons answered “No”.

The opinions and practices presented above illustrate the actual vulnerability to abuse of the persons that are placed under guardianship and, as such, the inadequacy of the guardianship system. The lack of specific rules (laws) on the interaction between the guardianship authority, guardian, incapacitated person, residential institution with the powers of guardian, leaves room for abuses directed against the person deprived of legal capacity. There are no established procedures for the selection and evaluation of the guardian. There is also evidently little case management concerning the persons placed under guardianship. Guarantees for securing the property and preventing the alienation of the person’s property by the guardian are evidently ineffective.

2.7 Cancelling the judicial declaration of incapacity

According to Article 24, paragraph (3) of the Civil Code, “If the grounds on which the person was declared legally incapacitated disappeared, the court declares the restoration of the person’s legal capacity. Based on the judgment of the court, the guardianship is cancelled”. The legal capacity is restored by the court, upon the request of the guardian, the family members of the person, institution of psychiatry (psycho-neurology), the guardianship authority or the prosecutor (Article 308, paragraph (2) of the Code of Civil Procedure). From the interviews with the actors involved in the process of legal capacity deprivation, we concluded that such cases are very rare or virtually non-existent. We quote below the opinions of the interviewed experts:

Excerpt from the interview – judge, Chisinau – Centre Court

“Based on my experience, I believe that the declaration of legal incapacity is permanent.” - The same answer was formulated also by the other two interviewed judges.

Excerpt from the interview – representative of the guardianship authority Balti

“Guardianship is permanent. It ceases only in case of the death of the person under guardianship. I do not know cases of restoration of legal capacity.” – The representative of the Soroca guardianship authority also believes that the guardianship is permanent.

Excerpt from the interview – representative of the guardianship authority Chisinau -Centre

“Basically, for a period of six years, there was only one case of restoration of the legal capacity and cancellation of the guardianship”.

Some of the interviewed persons which were placed under guardianship confessed that they would want the guardianship to cease.

Excerpt from the interview - the person declared incapacitated placed in the psycho-neurological boarding house

“Yes, I would like the guardianship to cease, but if the guardianship ceases, I will not be able to stay in the institution anymore. Where shall I go? The relationship with my father is tense, but he is my guardian...”

3. Consequences of establishing the guardianship regime

While trying to elucidate which are, in the opinion of the respondents, the consequences of guardianship, we have asked different types of questions. Thus, when asked “What are the consequences of the deprivation of legal capacity?” the judges have stated the following opinions:

Excerpt from the interview - Judge, Chisinau-Centre Court

“Deprivation of legal capacity means first of all the deprivation of contractual capacity and the inability to conclude any valid patrimonial transactions. Secondly, the medical interventions and treatment are performed without the need for the person’s consent.” I don’t think that the guardianship has a positive influence on the persons deprived of legal capacity or changes positively the quality of their life. With guardianship or without it, the person who cannot rationally judge is subjected to risks, but it is assumed that the guardian would be able to protect them somehow. Persons who really care about persons with psycho-social and intellectual disabilities do not need guardianship in order to provide support and help.”

Excerpt from the interview – judge, Balti Court

“The consequences are very severe indeed, the persons is seriously limited in their rights. In my opinion, there is no need for such a total limitation. It would be good if the judge, similarly to the case specified by Article 307 paragraph (2) of the Code of Civil Procedure, would expressly indicate in their decisions the areas for which the person is to be deprived of legal capacity, but not all of them.”

Excerpt from the interview – judge, Soroca Court

“These persons could be abused by their legal representatives. It would benefit the person if someone provided him/her with support.”

When asked “who draws benefits from the fact that the person is deprived of legal capacity and placed under guardianship?”, the groups of respondents had various opinions:

Representatives of the guardianship authorities: *“I think nobody has anything to gain. There would be an advantage for the guardian because he/she can receive and manage the pension.”* (Chisinau-Centre); *“The person under guardianship should benefit from the guardianship arrangements. He/she needs someone to go to the mayor’s office and other authorities instead of him/her.”* (Balti); *“It is in the advantage of the family, not the person under guardianship.”* (Soroca).

Experts psychiatrists: *“Only the relatives have something to gain, in some cases, the patient has only to suffer, because he can be sent to a residential institution.”* (Balti); *“Establishing guardianship gives the relatives or other interested persons the possibility to satisfy some personal interests.”* (Chisinau);

Guardians: *“The person under guardianship has something to gain because he/she is cared for and helped by the guardian”; “The person with problems, in my case the son, has the advantage that I take care of him”; “the sick person”; “In my case, the son has to gain, because he/she is not involved in all the bureaucracies. He does not have to be struggling to stand in line to receive his pension or medication.”*

We should mention that these answers belong to the guardians who live together with the incapacitated persons and are their close relatives. Unfortunately, the research team did not have access to the guardians who, after the guardianship was established, placed the incapacitated persons in residential institutions.

As for the persons declared legally incapacitated, we tried to see to what extent do they succeed, being under guardianship, to exercise certain rights to which people without disabilities normally have full access. During the interviews with the persons deprived of legal capacity, the persons made the following statements:

1. *“I did not know that the trial took place (the author’s note: to declare the legal incapacity). I found out later. I did not know anything about the lawyer”.*
2. *“If you cause any troubles, you are closed in section no. 2 with the severely ill persons. There is a ‘strict regime’ there. Last time, I went home without the permission of the administration and I stayed a week in section no. 2. Why is it bad there? You are not allowed to get out. There are persons with severe conditions, who cannot take care of themselves, 6-7 persons have to share the same room. There is a stench there.”*
3. *“I would like to live alone. I would like to stay by myself, to work. It would be necessary that my dad helped me during the first stage, to rent an apartment, until I find a job. I want to practice my profession, to have a salary.”*
4. *“I want to get married. I found my wife here and I do not want to leave. There is the risk that they could transfer me to the hospital in Cocieri, but I do not want this to happen. I would just go there along with my wife.”*
5. *“I wanted to be able to cook but I was not allowed to. Some residents in whom the administration has trust that they would not do anything wrong – that they would not start a fire -- are allowed to do this. It would be nice to have, at least on the hallway, a stove, a refrigerator, so that we could cook what we want, when there is a birthday for example, with the friends.”*
6. *“I did not vote. But I have my political preferences. During the 2011 elections I went to the polling station to vote. They looked at me and said: ‘This one has a court decision.’ But I know that there are people in a much worse condition than me who are also deprived of their legal capacity through a court decision. This court decision limits me. I would like to vote if I have the opportunity.”*

These statements show the consequences of the guardianship and, especially, of the institutionalization, upon the person’s possibility to fully enjoy and exercise their rights.

THE DREAM OF A PERSON DEPRIVED OF LEGAL CAPACITY:

“I would like to get out of here (from the psycho-neurological institution), to live with my family, but I’m afraid that my condition could get worse. I would need a job so that I could help my family. I worked as a physics teacher. I cannot work as a teacher anymore, but think I could work as laboratory assistant. I would like to work, to have an occupation, to become involved in society, to be useful.”

III. CONCLUSIONS AND RECOMMENDATIONS

- There are no official statistics on persons facing difficulties in exercising their legal capacity and/or are deprived of legal capacity, or on the situation with the guardians at the national level. In the absence of some reliable data it is difficult to plan support services for these persons at the local level. We urge the guardianship authorities to keep a strict record of the cases of persons which need support in exercising their legal capacity and of the appointed guardians, as well as to perform continuous monitoring of such cases.
- Following the interviews with the specialists involved in the process of legal capacity deprivation, we could conclude that all the study hypotheses were validated:
 - a) The requests of declaring the person legally incapacitated are most often filed by the family members with the scope to gain access to the pensions or the social allowances entitled to the person with disabilities, as well as for the preservation of inherited property or deprivation of the patrimonial goods;
 - b) In order to gain access to residential care services the institutions request or initiate the deprivation of legal capacity; in these cases, persons are deprived of legal capacity solely for the purposes of substituting missing genuine consent to be institutionalized.
 - c) Guardianship most often favours abuses directed against the person, although the interviewed guardians perceive the guardianship as a measure of protection. This may be due to the limitation that the interviewers had access only to the guardians who live with their wards and have not had the opportunity to talk to the guardians who placed their wards in the residential institutions.
- We note that the forensic psychiatric report is the basic document on grounds of which the deprivation of legal capacity is decided. At the same time, in practice, this document is limited to the description of the medical diagnosis, the diagnostic reasoning from the medical perspective and the conclusion that, due to their health condition, the person concerned is not aware and does control his/her actions and requires to be placed under guardianship. During the medical expertise there is no objective evaluation of decision making capacity in any way. In the context of the reform of the legal capacity system and the establishment of supported decision making we recommend that a comprehensive evaluation of the real support needs of the person is performed by a multidisciplinary team of specialists in order to provide the maximum possible to empower and add to the existing autonomy but not merely document a reason for absolute voiding of self-determination. The evaluation should be tailored to a specific situation and the person's circumstances as required by paragraph 4 of CRPD Article 12.
- Even if conceived as a system of protection, the procedures and practices of deprivation of legal capacity and placement under guardianship are deficient and put the person in a situation of excessive vulnerability to abuse. The most serious problems that were detected in the current framework are:
 - a) the person whose legal capacity is questioned is not informed about the initiated court procedure and his/her rights;
 - b) the person concerned does not participate in the trial; judges in the main do not even think that the participation of the person is necessary;
 - c) the lawyer who is obliged to represent the interests of the concerned person is appointed *ex officio* or elected by the petitioner (usually the relatives or other persons directly interested in declaring the incapacity); the lawyer generally does not meet the person concerned;
 - d) the concerned person is often placed, upon a request of the guardian, in a residential social institution, although according to the current legislation he/she should live together with the guardian in the community;

- e) persons who are institutionalized or who have no relatives are deprived of their legal capacity at the initiative of the residential institution, subsequently the institution performs the guardian's duties; the residential institutions generally perform the guardianship powers, without taking responsibility for respecting all the rights of the incapacitated persons;
 - f) there is no monitoring in practice of the guardians' activity by the guardianship authority or in the event that such monitoring exists - it is one that is purely formal;
 - g) the guardians perceive their obligations as "the duty to care" rather than the representation/protection of the person's rights and support in exercising rights;
 - h) persons deprived of legal capacity have virtually no control over their real estate, financial resources, etc.;
 - i) persons deprived of legal capacity cannot personally lodge a case on legal capacity restoration, which would result in cancellation of the guardianship;
 - j) the declaration of legal incapacity and guardianship are virtually permanent and irreversible; in the absence of periodic re-evaluation of the cases, a person deprived of legal capacity virtually never regains his/her rights;
 - k) incapacitated persons lose all the rights in important areas such as: marriage, employment, vote, freedom of movement/circulation, management of their own revenues, right to consent to medical treatment, etc.
- Guardianship, which is a substitution system, evidently conflicts with the provisions of Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), and limits and denies rather than protects and promotes the rights of persons with disabilities. In this context, as required by the UN Committee on the Rights of Persons with Disabilities in their concluding observations to reviewed countries, we emphasize the obligation of the state to focus all the efforts of the national and local authorities to create mechanisms for supported decision-making and exercising legal capacity for the persons with intellectual and psycho-social disabilities.
 - The number of cases of legal capacity deprivation has increased since 2009. One of the factors invoked by the interviewed experts is the implementation of the Regulations on the payment of pensions established in the system of state social insurance and state social allowances (GD No. 929 of 15.08.2006). We recommend that immediate amendments to this normative act are made, such that persons with disabilities can designate family members or other trust persons who would help them with the management of the financial resources and social benefits, under the supervision of the guardianship authority/community social worker, without a loss of legal capacity.
 - We find that although Ciadar-Lunga district, according to medical statistics has the highest incidence of mental illnesses in the Autonomous Territorial Unit of Gagauzia (Gagauz Yeri), the cases of deprivation of legal capacity are very low. The territorial department of social assistance failed to identify the person responsible for establishing guardianship. The representative of the court said that in total they have for examination one case of deprivation of legal capacity per year. Thus, it was difficult to identify a group of respondents in this district. Although individual persons are incapacitated in Gagauzia, the study did not find evidences of increased vulnerability and rights abuses for the people with mental disorders in this district. We recommend a detailed analysis of the situation in the district to understand the local practice on the protection of persons with severe intellectual and psycho-social disabilities. We suppose that the large distances between the residence of the potential petitioner and the psychiatric institutions and the residential social homes accordingly, demotivate them from initiating judicial proceedings for declaration of legal incapacity due to the high expenses for transportation and other factors.

ANNEX 1

Source: Department of Judicial Administration, Ministry of Justice

File categories	Year	The remaining files at the beginning of the reported period	Files entered in the reported period	Cases concluded during the reported period						The remaining files at the end of the reported period	Of which pending before the court		
				delivered judgements	admission of the action	terminated trials	remove the application pending before the court	transmis după competență	transmitted by competence		more than 12 months	more than 24 months	more than 36 months
		1	2	3	4	5	6	7	8	9	10	11	12
Forced hospitalization	2005	0	36	31	1	1	0	1	33	3	1	0	0
	2009	1	45	35	35	4	5	0	44	2	0	0	0
	2010	2	65	47	47	8	6	0	61	6	0	0	0
	2011	6	48	43	39	4	2	0	49	5	1	0	0
Limiting the natural person in exercising legal capacity	2005	21	154	117	111	9	13	1	140	35	9	0	0
	2009	80	447	350	345	27	58	5	440	87	0	0	0
	2010	87	461	359	345	30	67	7	463	85	0	0	0
	2011	85	465	341	336	25	72	8	446	104	3	0	0

Note: Court proceedings included in the “Limiting the natural person in exercising the legal capacity” Category (Chap. XXVIII of the Code of Civil Procedure):

1. Limit the legal capacity
2. Declare incapacity
3. Cancel the limitation of the person’s legal capacity
4. Declare capacity for the healed person

ANNEX 2

Source: The Ministry of Labour, Social Protection and Family⁵

Persons declared incapacitated placed in the residential institutions under the Ministry of Labour, Social Protection and Family by 01/08/2012

1. Psycho-neurological boarding houses

Name of the institution	Beneficiaries with undetermined legal capacity, persons	Beneficiaries without legal capacity, persons	Beneficiaries with limited legal capacity, persons
1	2	3	4
Psycho-neurological boarding house from Branzeni Village, Edinet District	241	70	0
Psycho-neurological boarding house from Balti City	462	86	1
Psycho-neurological boarding house from Badiceni Village, Sorocea District	284	179	0
Psycho-neurological boarding house from Cocieri Village, Dubasari District	293	72	2
TOTAL	1280	407	3

2. Boarding houses for children with mental disabilities

Name of the institution	Of the total number of adult beneficiaries, persons		
	Beneficiaries with undetermined legal capacity	Beneficiaries without legal capacity	Beneficiaries without legal capacity
1	2	3	4
Boarding house for the children with mental disabilities (girls), Hancesti	25	153	0
Boarding house for the children with mental disabilities (boys), Orhei	184	4	0
TOTAL	209	157	0

⁵ Collected directly from administration of the 6 residential institutions for persons with psycho-social and intellectual disabilities under the administration of the Ministry of Labor, Social Protection and family

Source: Ministry of Labour, Social Protection and Family (collected at the request of the ministry from the Local Public Authorities, Departement of Social Protection)

DASPF/SASPF	YEAR												Of the total number									
	2009				2010				2011				9/1/2012				Of the total number					
	No. of the inca- pacitated persons		No. of persons limited in the legal capacity		No. of the inca- pacitated persons		No. of persons limited in the legal capacity		No. of the inca- pacitated persons		No. of persons limited in the legal capacity		No. of the inca- pacitated persons		No. of persons limited in the legal capacity		Of the total number					
	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	With a legal representative	Without a legal representative	Resides with the legal representative	Resides alone	Placed in a residential institution	Resides with the legal representative	Does not reside with the legal representative	Residing in a residential institution
Anenii-Noi	14	69	0	0	11	58	0	0	19	55	0	0	16	62	2	0	25	23	4	2	10	1
Balti	16	0	0	0	14	0	0	18	0	0	0	0	12	0	0	0	60	14	3	0	0	0
Basarabasca	9	1	0	0	7	1	0	0	8	1	0	0	5	0	0	0	21	8	3	0	0	0
Briceni	4	0	2	0	5	0	1	0	2	0	2	0	1	0	0	0	6	2	4	5	0	0
Cahul	7	0	3	0	20	0	13	0	12	0	7	0	10	0	8	0	48	1	0	31	0	2
Calarasi	0	1	1	0	0	2	0	2	0	2	0	1	0	0	0	0	0	3	0	0	1	2
Cantemir	2	0	0	0	5	0	0	0	8	0	0	0	11	0	0	0	25	1	3	0	0	0
Causeni	0	22	0	46	3	36	0	58	7	73	0	63	9	95	0	104	9	9	5	0	27	0
Chisinau	1150	45	20	67	1062	24	0	89	1082	12	0	81	1101	9	21	81	1101	120	9	21	52	0
Ciadar Lunga	9	0	9	0	2	0	1	0	1	0	1	0	0	0	0	0	8	0	4	8	0	4
Cimislia	3	0	0	0	2	0	0	0	8	0	0	0	3	0	0	0	14	1	1	0	0	0
Comrat	9	0	0	0	17	0	0	0	22	0	0	0	26	0	0	0	25	0	1	0	0	0
Criuleni	132	104	75	122	96	64	114	102	114	69	121	103	113	76	72	105	169	36	20	108	78	0
Donduseni	10	0	0	0	0	0	0	0	3	0	0	0	1	0	0	0	6	0	8	0	0	0
Drochia	5	0	2	0	3	0	0	0	12	2	1	0	2	0	2	0	18	3	3	2	0	3
Dubasari	49	11	20	7	12	1	1	0	5	2	0	1	3	0	5	1	68	15	1	26	8	1
Edinet	4	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	2	0	4	0	0	12
Falesti	29	10	0	0	10	2	0	0	8	2	0	0	10	4	0	0	41	23	11	0	0	0
Floresti	2	17	0	331	3	14	0	329	2	13	0	331	1	13	1	331	8	0	6	1	331	0

ANNEX 3

[illegible]