THESHINE

The Shine – Association for Social Affirmation of People with Psychosocial Disabilities

National legislation and Article 12 of the UN Convention on Rights of Persons with Disabilities

Croatia Country Report – EU-PERSON

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PERSON

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1. Introduction/ Background

The Republic of Croatia was one of the first countries to ratify UN Convention on Rights of Persons with Disabilities (hereinafter referred to as 'UN CRPD') in March 2007.[1] In June of the same year the National Strategy for Equalization of Opportunities for People with Disabilities 2007-2015 (hereinafter referred to as: 'National Strategy') was enacted by the Government on the basis of UN CRPD. The aim of National Strategy[2] was to affirm state obligation in developing conditions for active inclusion and participation of person with disabilities in society with special attention devoted to social solidarity and prohibition of discrimination.

The obligation to implement CRPD requirements applies through the whole system – legislation, government and judiciary, special authorites of the Constitutional Court of the Republic of Croatia, People's Ombudsman, Disability Ombudsman and civil society.

Besides the Constitution of the Republic of Croatia, the highest legal act that guarantees equality before the law as well as special care of the state devoted to 'incapacitated persons' and protection at workplace, the basic law regulating capacity to act (acquiring, deprivation, restoration of capacity to act and its legal effects) is the *Family Act*. Provisons of the *Family Act* will be analysed in details in this report. Furthermore, at the time of preparation of this report, the Government of the Republic of Croatia is developing a new Family Bill which will bring important novelties to the protection of rights of persons with disablities in the context of Article 12 of the UN CRPD, which will also be addressed by this analysis.

This report will also analyse legislation other than the *Family Act* which regulates rights connected with capacity to act and legal effects of deprivation of capacity to act.

Finally, it is noteworthy that the majority of regulations analyzed in this report were implemented into legislation before the UN CRPD was adopted by the United Nations and ratified by Croatian Parliament. Taking into account the fact that protection of adults who are not able to take care for their needs and interests is set out in family legislation by deprivation of capacity to act, we can generally conclude that Croatian legal system is not in line with the UN CRPD requirements on rights of persons with disablities, principles of autonomy, self-determination and supported decision making.

1.1. Statistical data on capacity to act

As of December 31, 2013 the total number of **18.470** persons have been deprived of capacity to act in the Republic of Croatia. In this chapter we provide statistical analysis of the situation regarding guardianship for adults in the period od 2003-2013 that is based on the data publicly provided by the Ministry of Social Policies and Youth.

We note that untill 2003 the legislation did not contain mechanism of partial deprivation of capacity to act. Probably because that, there is no exact data on the numbers of persons partially deprived of capacity to act untill 2007.

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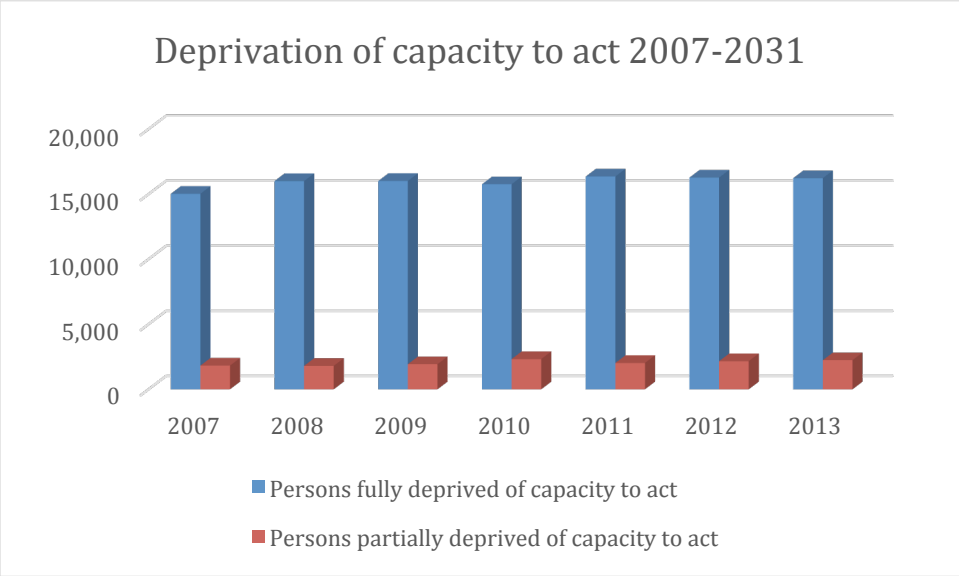
[1] UN CRPD and Optional Protocol are adopted by the Resolution of the UN General Assembly 61/106 of December 13, 2006. The Croatian translation of the Convention was published by Act of Ratification of the UN CRPD and Optional Protocol, Official Gazette – International Contracts nos. 6/2007, 3/2008, 5/2008. Both UN CRPD and Optional Protocil came into force on May 3, 2008 respectively.

[2] The National Strategy covers fifteen different areas (health, social welfare, pension insurance, rehabilitation and employment, education, sport and recreation, participation in cultural life, community living, family, legal protection, accessibility, political and social participation, association of persons with disabilities).

The analysis conducted shows that vast majority of cases refers to people **fully deprived of capacity to act**, with **more than 90%**. Although partial deprivation of capacity to act was an option as an less restrictive alternative, courts rarely used that option which led to widespread practice. The following table shows exact numbers of persons fully deprived of capacity to act vs. persons partially deprived of such capacity.

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Persons fully deprived of capacity to act	N/A	N/A	N/A	N/A	15.023	16.006	16.011	15.761	16.355	16.274	16.230
Persons partially deprived of capacity to act	N/A	N/A	N/A	N/A	1.822	1.804	1.931	2.326	2.027	2.165	2.240
TOTAL	**13.310**	**13.875**	**15.220**	**16.230**	**16.845**	**17.810**	**17.942**	**18.087**	**18.382**	**18.439**	**18.470**



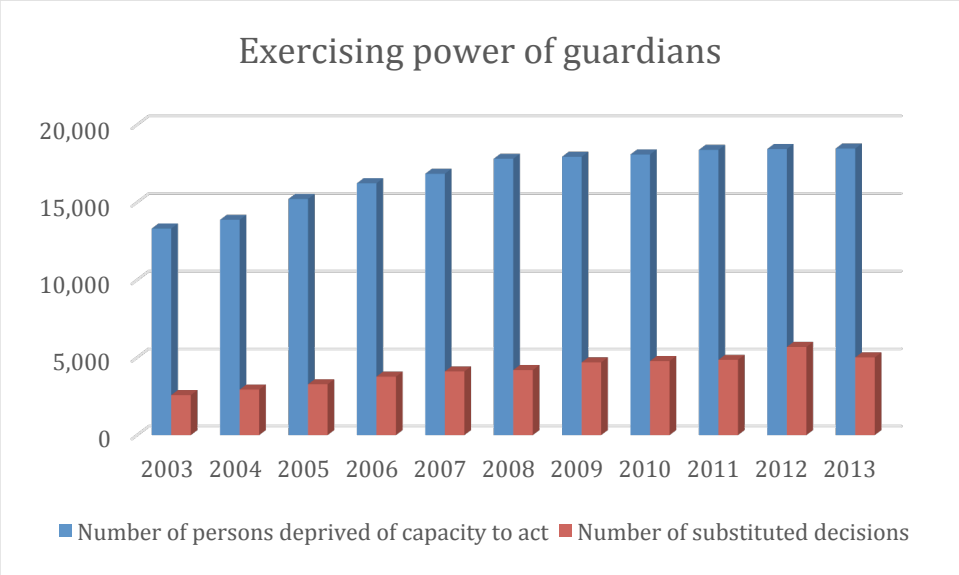
The **strinkigly small number of restorations** of capacity to act appeared in the analyzed ten year period, with **less than 70 cases per year**, as it could be seen from the following table:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Persons who restored legal capacity	25	33	30	45	20	35	49	54	62	53	55

The statistical data also show **close connection between deprivation of capacity to act and placement into residential institutions**: although vast majority of persons deprived of capacity to act lived in ther natural families, the next living scheme refers to institutional placement. The following table represents exact data on this situation:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Natural family	7.067	7.124	7.573	8.455	8.680	9.023	9.430	8.728	8.630	8.856	8.448
Family of relatives	1.301	1.671	1.830	1.803	1.655	1.881	2.081	1.864	1.819	1.782	1.403
Foster care for adults	849	998	1.123	1.184	1.121	1.119	1.097	1.155	1.243	1.232	1.160
Residential institution	3.392	3.590	3.865	4.257	4.392	4.866	4.836	4.853	4.842	5.077	4.646
Hospital	509	558	551	542	534	500	500	392	373	399	339

Although guardianship is commonly seen as a protective mechanism, the analysis showed that the **power of guardians is used in less than 30% of cases**, which leaves majority of persons deprived of capacity to act **with no actual need for substitute decision making** in their cases. People are rather prevented from exercising their rights than protected by actions of their guardians.



Among substituted decisions made by guardians, in the period of 10 years there have been **45.859 decisions** made in two areas: (a) important measures for proteges' welfare and (b) selling or mortgaging proteges' property. The guardians decided about property of proteges in 68% of situations which makes the use of guardianship, when powers are excersised, mostly applicable in regards to proteges' property. The following table shows exact data on this situation per year:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Important measures for protege's welfare	839	1.052	845	1.074	1.136	1.271	1.232	1.598	1.687	2.177	1.759
Selling or mortgaging protege's property	1.741	1.882	2.431	2.696	2.969	2.923	3.456	3.175	3.164	3.504	3.248
TOTAL	**2.580**	**2.934**	**3.276**	**3.770**	**4.105**	**4.194**	**4.688**	**4.773**	**4.851**	**5.681**	**5.007**

2. Current law on legal capacity

2.1 The Constitution of the Republic of Croatia[3]

The Constitution of the Republic of Croatia is the highest legal source that contains provisions applicable to persons with disabilities. Article 63/3 of the constitution states:

> *'Children with physical and mental impairments, as well as socially neglected children, have right to special care, education and welfare.'*

Article 64/1 states:

> '*Everyone is obliged to protect children and incapacitated parents.'*

Article 64/3 provides for persons with disabilities to have right to special protection at workplace. It states:

> '*Youth, mothers and disabled persons have right to special protection in the workplace.'*

Article 64 mentions protection of '*incapacitated parents'* which could cover parents under guardianship. This would primarily refer to the nurture and care of elderly parents provided by their adult children, and for the application of an institution of financial support (uzdržavanje) provided by adult children. In the broader context, we can understand this constitutional provision as a basis for protection of incapacitated adults, especially incapacitated elderly in the sense of protection from elder abuse.[4]

In the context of protecting persons with disabilities, we emphasize Article 14 of the Croatian Constitution, which sets forth that everyone in the Republic of Croatia shall have equal rights regardless race, skin color, gender, and others, with last reference to *'other characteristics*.' Although Article 14 of the Constitution does not directly mention health condition and disability, these characteristics, as well as old age, can be interpreted as 'other caracteristics' in the sense of Constitution. Furthermore, Article 14/2 of the Constitution emphasizes that everyone is equal before the law.

The restrictions of rights are regulated by Article 16 of the Constitution, which ensures that freedoms and rights can be restricted only by the law to protect: 1. freedom and rights of other people, 2. legal system, 3. public morality and 4. health. Any such restriction must be *'proportionate to the nature of the need for restriction in every single case.'* Further, Article 50 of the Constitution allows for restricting financial decision-making and property rights for the protection of interests and safety of the Republic of Croatia, nature, human environment and health of people.

In relation to the 'need for restriction', or, the principle of neccessity, Article 17 of the Croatian Constitution allows for the restriction of individual freedoms and rights guaranteed by the Constitution in the situation of war or imminent danger for independence and unity of

[3] The consolidated text published in "Narodne novine" (the Official Gazette), No. 41/01 of May 7, 2001 together with its corrections published in "Narodne novine" No. 55 of June 15, 2001.
[4] See Act on Protection from Domestic Violence, Official Gazette no. 116/03.

the state. However, the scope of restriction must be proportionate to nature of danger. Such restriction shall not be discriminatory on the basis of race, gender, skin color, language, religion or social origin. Further, Paragraph 3 of the same article guarantees that necessity cannot provide grounds to suspend provisions from the Constitution regulating right to life, prohibition of torture, cruel, inhumane, degrading treatment or punishment, legal determination of criminal offences and sanctions and freedom of thought, conscience and religion.

2.2 The Term "legal capacity"

In the Croatian legislation there are two separate terms regulating legal capacity both of which can be translated into English as "capacity to act." For better understanding of terminology, therefore, we use two different terms in English: 1. '"legal capacity" and 2. 'capacity to act.'

Traditionally, the terms of '"legal capacity" and 'capacity to act' are both regulated in Croatian legislation by the provisions of common civil law (in the *Act on Obligatory Relations*). Acquiring 'capacity to act,' deprivation and restoration of that capacity is regulated by the *Family Act*.

The *Act on Obligatory Relations* (hereinafter referred to as: AOR) defines legal capacity and capacity to act:

> ***Legal capacity***
>
> *Article 17*
>
> *(1) Every natural and legal person is capable to hold rights and obligations.*
>
> *(2) Whenever being in its interests, it is considered that conceived child was born, under a condition of being born alive.*
>
> *(3) It is considered that child was born alive if not proven othervise.*
>
> *(4) In doubt on time of death of number of persons, it is considered that all persons died at the same time, if not proven that some person died before other one.*
>
> *(5) Legal person acquires legal capacity on the date of coming into existence according to special legislation.*[5]
>
> ***Capacity to act***
>
> *Article 18*
>
> *(1) Person with capacity to act can produce legal effects by own expression of will.*
>
> *(2) Natural person acquires capacity to act at the age of maturity, while legal person on the date of coming into existence if not otherwise proscribed by the law.*
>
> *(3) Person who is under age of maturity can produce only those legal effects that are proscribed by law.*

[5] (emphasis added)

(4) In behalf of person with no capacity to act, her legal representative or guardian shall express his will.

(5) For legal person, will is expressed by its bodies in legal matters and procedures undertaken in such capacity.

(6) In doubt whether person from Paragraph 5 of this Article had capacity of body of legal person, it shall be construed as it had, if third party did not know or did not have enough reason under the circumstances to place in doubth the capacity of that person.

2.3 Family Act[6]

As of September 1, 2014 the new Family Act (hereinafter referet to as "FA") entered into force. By this Act, the legislator implemented significant changes when it comes to capacity to act, which bring another perspective to rights of persons with psychosocial disabilities. Although not implementing any system of supports in decision making, most important change was abolishing plenary guardianship and setting-up partial guardianship as a last resort. In this report we reflect the current situation of capacity to act legislation from the substantive and procedural aspect as contained in current Family Act.

2.3.1 Acquiring capacity to act

The capacity to act is acquired by entering into the age of maturity, which is 18 years of age in Croatia. [7] No legal act is required for acquiring capacity to act. However, the *Family Act* describes one exception allowing acquiring full capacity to act before entering into age of maturity; if a minor enters a marriage. The minor is, before concluding the marriage, required to seek permission of the court in non-contentious proceeding to marry. Minor who got approval from the court to marry will gain full capacity to act by the act of entering into a marriage. The competent court will approve entering into marriage to a person at age of 16 who is mentally and physicaly capable to marry and if marriage is in the interest of that person.[8] Although the Croatian legislation allows for registered civil partnership of same-sex unions, this is not extended to children older than 16 and, therefore, does not representing basis for acquiring capacity to act.

Few exceptions also refer to capacity of a minor to decide about issues concerning work and health. The child at the age of 15, who earns income from work, is capable to autonomously undertake legal actions concerning the amount of money which earns with the condition that such decisions do not endanger child's lilelihood. Only if mentioned legal actions have significant influence upon the personal and property rights of a child, child needs a parental or other legal guardian's approval.[9]

Parents and other persons who take care for a child are obliged to respect child's opinion in accordance with his/her age and maturity. In all proceedings where child's right or interest is decided, the child has right to be appropriately informed about the circumstances of the case, get advice, express opinion and be informed about possible consequences of compling to thaz opinion.[10]

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[6] Official Gazette no. NN 75/14, 83/14.
[7] Art 117(2) FA.
[8] Art 25(2) FA.
[9] Art 85 FA.
[10] Art 86 FA.

The child, at the age of 14, has capacity to act to autonomously decide on chosing or changing personal religious views.[11]

The significant change in the family legislation is done when it comes to informed consent of the chilid for medical treatment. The exception for substituted decision making comes for decisions on preventive, diagnostic and therapeutical procedure in relation to health and treatment, for child at age of 16 who is found by the doctor of medicine as a person mature enough to bring such decisions. In practical terms, that would mean that child at age of 16 has right to decide autonomously on HIV or other sexually transmissible diseases testing with no need to seek consent from his/her parents or to involve parents in any kind of process concerning such procedure.[12] However, when it comes to medical procedure that is connected with severe risks for physical or mental health of a child, with the consent of the child the consent of the parent or other legal guardian is required.[13] When it comes to the conflict of opinions between parents and children of some medical procedure, the decision is finally done by the court in the non-contentious proceeding.[14] Practically, this means that child can be capable to refuse some kind of treatment (e.g. if being terminally ill) and if being in a conflict of opinion with his/her parent, the court will make final decision on the issue concerned.

capacity to actcapacity to actcapacity to act

Regardless of how a person acquires the capacity to act, once acquired, they retain that capacity to act until eventually deprived of that capacity. As well as every other adult person, even minors who acquired capacity to act before entering age of maturity can be deprived of that capacity while they are still minors. In such cases, after entering age of maturity, the capacity to act is not acquired; such persons remain deprived of capacity to act until an eventual judicial decision restores that capacity.

2.3.2. Guardianship for adults – form of protection of (adult) persons with disabilities

The *Family Act* defines guardianship as a form of protection of children with no parental care (guardianship for minors), adults who are not able to care for their needs or interests or who endanger the rights and interests of others (guardianship for adults), and persons who for other reasons are not able to take care for their rights and interests (special guardianship). As provided for by the *Family Act*, the guardianship for adults is applied in principle to persons deprived of capacity to act.

The legal basis for deprivation of capacity to act is described by Article 234(1) of the *Family Act*:

> *"The Court shall, in non contentious proceeding, partially deprive person of capacity to act if she is no capable to take care of her personal needs, interests or rights or who endangers rights or interests of other persons for whom she is obliged to take care, due to mental health problems or other causes."*

[11] Art 87 FA.
[12] Art 88(1) FA.

[13] Art 88(2) FA. It should also be noted that provision refers only to the „medical procedure" which is different from „medical treatment" in terms that medical procedure would commonly refer to invasive treatment such surgery is. Medical treatment would commonly refer to taking medications.

[14] Art 88(3) FA.

Evidently, the deprivation of capacity to actcapacity to act is based on either a mental health problem or another cause (most often alcohol and/or drug dependence), which creates for the person an inability to take care of oneself, including taking care of one's rights and interests, or which leads to the endangering of the rights and interests of persons for whom she is oblige to take care (e.g. children). In these circumstances, there is a partial deprivation of capacity to actcapacity to act. The full deprivation of capacity to act is no longer possible by the law.[15]

Persons who were fully deprived of capacity to act until September 2014, remain deprived of such capacity in full scope until capacity being fully or partially restored. However, after September 2014, no new full deprivations of capacity to act is possible. These persons who are still fully deprived of capacity to act are in principle unable to undertake legal actions.

Person's partially deprived of capacity to act receive a specific list of legal actions which they are not able to undertake (e.g. housing, finances, lifestyle decisions, and so on). A guardian is appointed to the person partially deprived of capacity to act to make decisions in these specific matters, while in other legal areas person concerned can exercise capacity to act.

The *FA* prescribes the obligations of everyone to inform the centre for social welfare on the need to provide protection to persons whose capacity to act is at the question.[16] Upon the request of centre for social welfare or *ex officio*, healthcare institutions are obliged to bring information to the centre for social welfare whether some of their patients need to be deprived of capacity to act. However, such information cannot be provided with no consent of persons concerned. [17,18]

2.3.2.1. Proceeding for deprivation of capacity to act and guardian ad litem

The proceeding for capacity to actdeprivation of capacity to act may be instituted *ex officio* (by the Court) or at the proposition of the centre for social welfare, husband or wife, children or parents or siblings.[19] However, in practice, almost 100% of cases were initiated by the centre for social welfare.

The earlier practice showed that the same boy which initiated the proceedind ended up in appointing the guardian ad litem, who was often an employee of the same body. With no doubt, such situation amounted to conflict of interest, usually depriving persons concerned of their right to fair trial. Although in principle such guardian's obligations should be legal representation of the person concerned in the proceeding, in practice, denial of capacity to act is presumed and authorities of the guardian *ad litem* are extended to be that of an individual guardian.

However, after September 1, 2014 significant legislative changes entered into force. First of all, the guardian ad litem will be appointed to person fow whom the proceeding is instituted only if that person did not appoint her/his representative.[20] The representative may be a lawyer, but also a close family member of person concerned according to the relevant

[15] Art 234(2) FA.

[16] Art 235(1) FA.

[17] Art 235(2)(3) FA.

[18] The healthcare institutions are most prominent in informing centres for social welfare about need to deprive capacity of act to some of their patients, which can be seen from the official statistical data of the Ministry of Social Policies and Youth (see Section 1.1).

[19] Art 496(1) FA.

[20] Art 236(2) FA.

provisions of the Civil Proceedings' Act. Also, the person concerned may express her/his wish in the form of advanced directive about person of possible guardian ad litem, but the centre for social welfare is not bound to respect that wish if proposed person does not meet legal requirements for guardian ad litem.[21]

In a case where guardian ad litem needs to be appointed ex officio, the conflict of interest is excluded. Only the person with relevant legal expertise, an employee of the special state-based body – Centre for Guardianship Ad-litem – can be appointed as a guardian ad litem. Neither the employee of the centre for social welfare or other person who instituted proceeding for deprivation of capacity to act can no longer be appointed as a guardian ad litem to the person concerned.[22]

During the judicial proceeding the court is obliged to hear the person concerned as a matter of principle.[23] However, exceptionally the court may not hear the person if her health condition does not allow for such hearing; when concluding about this circumstance the Court is obliged to take a special note that will be included in the case file.[24]

Prior recent legislative changes entered into force the court did not have to deliver the deicison on deprivation of capacity to act to person concerned, and the case law showed that some persons even did not know that they were deprived of their capacity to act. Now, court is obliged to deliver decision on the deprivation of capacity to act to person concerned regardless her status of mental health or other health-related condition.[25]

From a human rights perspective, or with reference to the possibility of violations, one of the most troubling provisions of the previous version of the *Family Act* refers was the power to place the person concerned in a psychiatric institution for the purpose of determining his or her state of health and decision-making capacity or needs, rights, and interests.[26] Such possibility is not completely excluded and person concerned cannot be subjected to forced psychiatric supervision and deprived of liberty for the purpose of collecting evidence in the proceeding for deprivatio of capacity to act.

2.3.2.2. The guardian

The person deprived of capacity to act will be placed under guardianship by the center for social welfare within 30 days after judicial decision became final. The guardian ad litem will serve as a guardian until person placed under guardianship.[27]

The previous legislation also allowed for the centre for social welfare to decide that parents of persons deprived of capacity to act (either fully or partially) get a status of prolonged parental care after the age of maturity. Powers, rights and obligations of such parents are similar to those competencies of a guardian for minors. Such situation amounted to circumstances that even did not correspond to the real life of persons under guardianship. Namely, powers of guardians for minors were different on the basis of minor's chronologica age and such a

[21] Art 236(5) FA in conjunction with Art 248 FA.

[22] Art 236(7) FA.

[23] Art 498(3) FA.
[24] Art 498(4) FA.
[25] Art 501(1) FA.
[26] Članak 327. st. 3. Obiteljskog zakona. Article 327(3) FA-earlier version.
[27] Art 237 FA.

difference could not be applicaple to persons older than 18. Furthermore, the legisaltion produced unaccpetable situation that adults persons, regardless their chronological age, were legally treated as children. Still, although the recent changes into the legislation abandoned such a mechanism and equalized parents with other guardians that can be appointed to adult persons, in principle parents will have priority in determining guardian if being capable for guardianship.[28]

The changes to the Family Act also brought new mechanisms when it comes to the number of guardians. Therefore, the centre for social welfare may appoint more than one guardian and decide whether these guardians will be obliged to joinlty bring some substituted decisions in belahf of their protege.[29] Also, substitute guardians can be appointed as well.[30]

Similar as it is the case with the guardian ad litem, person deprived of capacity to act may express wish on person of guardian to be appointed by the centre for social welfare in the form of advanced directive.[31] However, the center for social welfare is not bound to that advanced directive if person proposed for a guardian does not meet legal requirements to be appointed as such.[32]

By its decision to appoint a guardian(s), the center for social welfare determines its (their) own duties and rights. Since the content of the scope of a guardian(s) depends on the court's decision on deprivation of capacity to act, the scope of a guardian(s) powers is defined to distinct areas of life. For example, the centre for social welfare cannot determine that a guardian takes care of the property rights of the person concerned if a person is only deprived of capacity to act in relation to decisions about health, placement in hospital, etc.

However, although the content of the decision of a center for social welfare on the duties and rights of guardians is limited by the court's decision on deprivation of capacity to act, the center for social welfare, according to the provisions of Art. 241 FA limit the powers of the guardian and designate another person to carry out such duties. This may be an employee of the social welfare center or any other person. For example, it may be a lawyer, when it comes to representation or care about individual property rights of the person concerned. This is often the case when an individual does not need a guardian, but typically needs only specific expertise to exercise some rights or perform duties. In such situations, the content of his/her limitations has not changed, from the viewpoint of a protege; it is the kind of distribution of duties and rights of guardians to another person, whether it is an employee of the centre for social welfare or some other person with a specific expertise.

The meaning of limiting and determining the role of a guardian on the basis of Art. 241 is to take care of certain legal actions of a protege for which an individual guardian does not have sufficient expertise (e.g. legal representation, taking care of property relations, especially when it comes to assets of greater value, and for example, shares in joint stock companies and property funds). The purpose of appointing a guardian ad litem under the provision of Art.

[28] Asr 247(2) FA.
[29] Art 247(3) FA.
[30] Art 247(4) FA.
[31] Art 247(5) FA.
[32] Art 248 FA.

168 is also a protection of certain personal and property rights and interests. When it comes to the conflict of interests between guardian and protege, appointing guardian and litem to make decisions in behalf of the protege is a situation that represents so called „collision guardianship".

The basic duties of a guardian and a guardian for persons deprived of their capacity to act are regulated by the provisions of Art . 252 of the Family Act The general purpose of the guardianship is of protective nature, so the guardian must undertake all the appropriate measures to protect personal or property rights or to fullfil obligations of protege in his/her behalf. The guardian is obliged to take into account opinions, wishes or feelings of the protege except if that would be contrary to the proteges' welfare. .

As it could be seen from abovementioned paragraph on statistical data, the most common decisions of the guardians concerns property of their proteges. Tha lack of legislative safeguards, vulnerability of persons deprived of capacity to act, conflicts of interests between guardians and their proteges, formed a „grey zone" of guarsinship where property rights of proteges could easily be abused. The substitute decisions on property rights are usually connected with institutionalization of persons with disabilities since the property, commonly real estate, is sold or mortgaged for the purpose of covering costs of placement and living of persons with disabilities in residential mental health facilities (social care homes) or other forms of care (foster care families for adults). The novel legislation places better safeguards when it comes to property rights of persons under guardianship by stating that in principle no more than 2/3 of total protege's property can be sold or mortgaged.[33] Such safeguard should lead to prevention of poverty caused by the actions of the guardians when it comes to property of persons placed under guardianship. The second safeguard refers to the guardian's responsibility. The guardian is responsible for the damage inflicted by his actions or damage that is result of the abuse of power.[34]

In some situations, the guardian would require a permission of the centre for social welfare to make some legal actions in behalf of the protege. That would apply to more important measures on person, personal conditions, health or property of the protege.[35] The law now defines what is more important measue on person or personal condition: placement into residential institution, foster care, change of residence, change of personal name, and other measures that can have significant effect on the situation of the protege. The more important measure would also refer to decisions on invasive and exceptional medical procedures.[36]

2.*3.2.3. Excluded decisions*

There is a list of decisions that can be made only by a protege and no influence whatsoever is on the side of the guardian.[37] These decisions are:

[33] Art 261(4) FA.

[34] Art 265 FA.

[35] Art 259(1) FA.

[36] Art 259(2)(3) FA.

[37] Art 258 FA.

1. recognizing paternity;
2. giving permission to recognize paternity (given by mother of the child);
3. consent to marry;
4. consent to dissolve marriage;
5. consent to form living unions with persons of different or same sex and decisions on dissolving such unions;
6. consent for adoption, except in cases when consent is substituted by a judicial decision;
7. other decisions concerning strictly personal situations, except when proscribed differently by the law.

There are, however, certain limitations. The right to consent to form living unions in Section 5 would refer only to extra-marital or informal same-sex unions. Namely, conditions to enter into a marriage or formal same-sex civil union are still connected with need of person deprived of capacity to act to get judicial permission.[38] Also, the substitute decision making by the court is possible as it coudl be seen from Section 6 when it comes to consent for adoption. That can happen if a parent is *„incapable in such an extent that not being permanently able to have any aspect of parental care and there is no chance that child would be raised by close relatives, while adoption will be for the child's welfare.“*[39]

2.3.2.4. Judicial decisions on health matters

Certain decisions on health matters of the protégé can be made only by the courts:[40]

1. termination of pregnancy;
2. sterilization;
3. organ and tissue donation;
4. participation in biomedical research;
5. measures of life support.

These decisions can be done only by the civil courts of higher profile (county courts in the composition of three judgeds) while the appeal is possible to the Supreme Court (in the composition of five judges).[41]

The provision will not be applied if person concerned, prior being deprived of capacity to act, made advanced directive on such decisions.[42] This brings serious concerns when it comes to measures of life support because person who made advanced directive would not be able to revoke the directive if changing his/her mind after being deprived of capacity to act.

Certain exceptions also exist when it comes to persons with metal health problems or psychosocial disabilities. Rights of those persons are regulated by the Act on Protection of Persons with Mental Health Conditions and that Act is considered as a *lex specialis* to the Family Act. This Act, that will enter into force as of January 1, 2015, has more progressive safeguards when it comes to persons deprived of capacity to act and it prohibits in absolute terms substitute decision making for participation in biomedical research, so that even the

[38] Art 26(3) FA and Art 9(3) of the Same-Sex Civil Partnership Act.

[39] Art 190(3) FA.
[40] Art 260(1) FA.
[41] Art 506 FA.
[42] Art 260(2) FA.

courts are not able to make such decision.[43] Furthermore, castration with purpose of sterilization is fully prohibited when it comes to persons with mental healdt conditions.[44]

2.4 Restoration of Capacity to Act Under the Family Act

As it was described earlier, the concept of full deprivation of capacity to act no longer exists. It is anticipated that till 2020 capacity to act will be at least partially restored to all persons who were fully deprived of that capacity prior September 1, 2014.

The restoration of capacity to act is possible always when reasons for its deprivation cease to exist. The capacity can be restored fully, or the court may decide to shorten the list of decisions covered by the partial deprivation of capacity to act.[45]

The court may reject proposal for restoration of capacity to act and determine that the party is not able to institute new proceeding for restoration in the period of one year at maximum.[46] Important aspect of the proceeding for restoration of capacity to act is that expert evidence on mental or other health condition cannot be provided by the same medical expert who previously determined that person neds to be deprived of capacity to act.[47]

The proceeding for restoration of capacity to act can be instituted by the court *ex officio*, centre for social welfare, spouse or close relative, or person concerned.[48]

3. Improvements in mental health legislation

The following section will discuss improvements in mental health legislation that were done in 2013 and early 2014 in the Act on Protection of Persons with Mental Health Difficulties. Both authors of this analysis have actively participated in the work of the Taskforce established by the Ministry of Justice to draft new legislation. Although importance of the CRPD was stressed out many times at the meetings of the Taskforce, only partial changes were accepted by the majority that are in line with the CPRD. As an alternative to highest standards proscribed by the CRPD, the Taskforce rather relied to lower ECHR standards in preparing draft legislation. Here we summarize most significant changes introduced into the legislation when it comes to capacity to act or forced treatment.

1. The test of mental capacity was formally introduced to the law (provision adapted from UK Mental Capacity Act 2005). The ratio for such change was that in practice, when person would refuse to provide a consent for medical treatment, psychiatrists were automatically, with no additional assesment, presume that person was not

[43] Art 20(2) of the Act on Protection of Persons with Mental Health Conditions.
[44] Art 17 of the Act on Protection of Persons with Mental Health Conditions.
[45] Art 502 FA.
[46] Art 503(1) FA.
[47] Art 503(4) FA.
[48] Art 496(2) FA.

capable to make a proper decision. Introducting the test of mental capacity would at least induce medical professionals to make additional assesments before proclaiming that some person is not capable to make decisions.

2. As a matter of general principle: *'Person who is deprived of capacity to act cannot be held as person inable to give a consent and, therefore, mental capacity has to be assesed even when it comes to those persons.'* This would allow, if person determined as capable at the time of application of medical treatment, would have to be legally recognized as such regardless of previous deprivation of capacity to act.

3. In existing legislation, persons deprived of capacity to act could of be „voluntarily" admitted to a psychiatric hospital upon a decision of their guardians, even if these persons were opposing to admission. In line with Article 5 ECHR and well developed case law of the European Court on Human Rights, special judicial assesment for the purpose of the deprivation of liberty would be accesible to persons deprived of capacity to act by the new law.

4. Person deprived of capacity to act would have right to locus standi in the abovementioned judicial proceeding related to deprivation of liberty.

5. The special judicial proceeding for assesing the use of forced treatment will be enabled for all persons, including those deprived of capacity to act.

6. The advanced directive will be available as a model to all persons regardless of disability who can decide that person of their trust make decisions on healthcare issues when they become incapable of doing so.

4. Civil Procedure Act – procedural capacity in civil proceedings

The Civil Procedure Act (CPA) prescribes that a party in the proceeding can be every natural or legal person. Only a person with full capacity to act has procedural capacity, namely the capacity to independently participate in legal proceedings. An adult who is partially deprived of capacity to act is proceduraly capable only within the limits of her/his capacity. The party who does not have procedural capacity is represented by their legal representative.

The legal representative is authorized to undertake any legal actions on behalf of a party, with exceptions for some actions where special authorization is required by a special law. The legal representative must prove their legal position to the court. If the court finds that the legal representation of a person under guardianship is not paying due attention in their representation, it will inform the centre for social welfare. If a party under guardianship would suffer some damage during the proceeding while being represented by a negligent representative, the court will stay the proceeding until a new representative is appointed.

During the whole proceeding, the court shall, *ex officio*, pay due attention to whether a person has standing to be a party in the proceeding, whether is they have procedural capacity, whether a party who is not capable is represented by their legal representative, and whether

legal representative has or doesn't have all authorizations needed. If the court determines that a person cannot be a party in a proceeding, it will invite the party to change the petition or will undertake other measures to continue the proceeding with a person who can stand as a party in that proceeding. When the Court finds that a party does not have legal representative or if that legal representative is not authorized to act when necessary, it will ask the competent centre for social welfare to appoint a legal representative to a party or invite a legal representative to get the necessary authorization so that party can be properly represented.

If the process of appointing a new legal representative to the party in the judicial proceeding would be so long that it would endanger the position of any party, the court will appoint a representative *ad litem*.

5. Administrative Procedure Act (APA)

A number of provisions of the Administrative Procedure Act also treat persons deprived of capacity to act in the same way as the Civil Procedure Act:

1. People deprived of capacity to act need to have a legal representative.

2. Administrative bodies may, in cases where a person's health or other circumstance prevents him/her from participating in the proceeding, ask the centre for social welfare to institute guardianship.

3. The representative *ad litem* also can be appointed for the person concerned.

6. Social Welfare Act

The SWA determines the principles of social welfare, its financing, rights and services in the system of social welfare and procedures for obtaining such rights and services, users, content and implementation of services, professionals, registers, oversight and other issues relevant for the social welfare.

The Social Welfare Act defines the principle of participation in decision-making. Paragraph 3 states the right to participate and giving views of the child and persons deprived of their capacity to act. Social Welfare Act defines, in Article 2, paragraph 1. 7th person with a disability as a person who has "... long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder its full and effective participation in society on an equal basis with persons without disabilities. T. 8 defines a child with disabilities as: "... a child due to physical, sensory, communication or intellectual disabilities need additional support for learning and development in order to achieve the best possible outcome of development and social inclusion".

7. Labor Law, Law on Associations, the Law on Election of Members of the Croatian Parliament

The Labour Law stipulates that the union must be made up of at least ten persons with

capacity to act, and the Employers' Association requires three legal entities or natural persons capable of conducting business.

Similar provisions are contained in the Law on Associations, which specifies that for each business, a person who has capacity to act, or a legal entity, may become a member of the association, and that a person without capacity or with limited capacity to act may be members of the association, but without voting rights in the association's bodies.

The Law on the Election of Representatives to the Croatian Parliament stipulates that representatives are elected representatives into Parliament, on the basis of universal and equal suffrage. All Croatian citizens over 18 years of age, except those who have a final court decision depriving them of capacity to act, are able to vote.

Representatives shall end their role prior to the expiration of the period for which he was elected if, among other things, a final judicial decision is made about the capacity to act of the person concerned, which results in guardianship. However, Act on Register of Voters, does not contain assumption of capacity to act as a condition for enrolment in the voter's list, so that people deprived of capacity of act are able to vote at elections.

8. Campaign for capacity to act law reform in Croatia

In 2013, the Croatian Government announced that it will start reform of family legislation. SHINE and a number of other civil society organizations (CSOs), initiated a number of public discussions and instructed the Government to amend legislation in line with Article 12 of the CRPD. These discussions were held throughout 2013. Further, at the invitation of the Ministry of Justice, SHINE was directly involved in the preparation of the draft of the mental health law during 2013 and in early 2014, as mentioned above in section 6.

Other areas concerning capacity to act have also been publicly discussed, including the position of persons deprived of capacity to act in same-sex unions and the rights of persons who lack capacity to act to establish civil society organizations. SHINE also participated in these discussions, especially at the beginning of 2014.

In March 2014, SHINE organized an international conference on future concepts of capacity to act to present legal changes anticipated by the proposed legislation and to explore what kind of further steps at the national level can be done to improve overall legislation within the CRPD context.

The next steps at the national level will concern:

1) Removing exercise of rights in specific legislation from the concept of capacity to act;
2) Developing legislation to build a framework for legal recognition of supported decision making;
3) Developing legislation to introduce disability-neutral advance planning (advanced directives) at all levels.

SHINE will endeavor to be involved at each stage in the progress of these law reform activities.

8.1 Relevant Civil Society Organisations

SHINE is the association of persons with psychosocial disabilities and their family members. Other associations involved were those representing self-advocates and community-based service providers.

8.2 State-Level Allies for Capacity to act Law Reform

Both Disability Ombudswoman and People's Ombudswoman are valuable partners in reforms of legislation at the national level. Furthermore, the Ministry of Social Policies and Youth in inclined towards improvement of legal position of people under guardianship, although reluctant to fully comply to the CRPD standards.

8.3 Potential Organisations to Pilot Supported Decision–making Projects?

The most appropriate organisations to pilot supported decision-making projects are community-based service providers, with the assistance of associations who deal with human rights issues and legal matters, including self-advocates and family members. SHINE has developed alliances between community-based service providers, academics, government officials and self-advocate and family groups.

8.4 Media reporting on capacity to act related issues

A small number of media reports concerning mental health legislation have appeared in Croatian news, but with no special reference to capacity to act issues. During the public discussion on Family Act reform, the media was more focused on other parts of the reform concerning family relations, more so than on capacity to act. There is a general misunderstanding in the media over importance of capacity to act for people with disabilities.

8.5 Capacity to act-Related Strategic Litigation

SHINE is currently working on 5 cases concerning capacity to act of persons with psychosocial or other disabilities. Cases are at different levels of administrative or judicial proceedings, where individual clients are represented by the legal experts chosen by the SHINE. For each case, strategic plan has been developed, so that outcome of the proceedings affect population at larger scale. The cases concern (1) right of person deprived of capacity to act to freedom and community living, (2,3,4) right of persons to preserve their capacity to act and (5) right of person deprived of capacity to act to have a locus standi in administrative proceeding. The latter case will be brought to the Constitutional Court of the Republic of Croatia and be prepared for litigation at the European Court on Human Rights if rejected at the national level. The developments on each case will be reported at the SHINE's website.

Furthermore, with the support of the CDLP under the PERSON project, SHINE prepared an amicus brief to the European Court on Human Rights in case of Ivinovic v. Croatia. Also,

both SHINE and CDLP submitted amicus brief to the same Court in case of M.S. v. Croatia concerning forced psychiatric treatment.

8.6 European Court of Human Rights Judgments

The following cases have been heard before the European Court of Human Rights, with judgments made to the Croatian Government:

- X v Croatia
- M.S. v. Croatia
- X and Y v. Croatia
- Krušković v. Croatia.

All of the judgments from these case have been used in amending family legislation. Furthermore, SHINE strongly relied to these decisions in the process of drafting new mental health legislation.

8.7 Proposal for Second Phase of the PERSON Project

Part of the campaign for capacity to act reform includes the second phase of the PERSON project, in which SHINE will monitor implementation of the changed legislation as well as advocate the importance for full implementation of the CRPD. Monitoring of the implementation will primarily refer to monitoring whether the number of new cases for deprivation of capacity to act have dropped, how many persons were partially or fully restored their capacity to act. Furthermore, monitoring would include how the procedural aspects of the improved legislation have been implemented, etc.

SHINE will use strategic litigation in order to advocate for CRPD implementation at the judicial level. SHINE will focus on the three areas of most importance when it comes to full implementation of the CRPD:

1. Disconnecting specific civil rights from the concept of disability-based deprivation of capacity to act. This would require reforms of specific laws where rights are regulated and conditioned by existence of capacity to act, e.g. laws concerning property, business, inheritance, medical treatments, procedural civil and criminal law, etc. Reform of legislation in 2012 and 2014 demonstrated that it was possible to disconnect rights from disability-based deprivation of capacity to act when it came to the right to vote and the right to consent on biomedical-research and electroconvulsive therapy in psychiatric treatment respectively. Therefore, a permanent Task Force will be established, composed of lawyers, policy makers, and civil society representatives, in order to research relevant legislation in which it is necessary to disconnect civil and political rights from disability-based deprivation is possible and will help develop an advocacy strategy for each law.

2. Removing capacity to act concept from the *Family Act* and developing disability-neutral legislation concerning capacity to act and legal framework to allow for supports

to be provided to the persons with disabilities. The permanent Taskforce as mentioned, would design an advocacy strategy, but the activity as a whole would also include lobbying political stakeholders.

3. Designing disability-neutral legislation for advanced directives covering more areas and more complex mechanisms (e.g. decisions on property). The specific law on advanced directives will be designed and proposed to political stakeholders.

SHINE estimates that it will take at least 20 years for the Croatian legal system to be fully compliant with CRPD requirements. During that time, SHINE will propose additional legal reforms, discuss reform proposals publicly, strategic litigation, and proposition reform to political decision makers. The proposals that SHINE proposes will also are dependent upon political circumstances, which are not always predictable (e.g. more conservative governments will be reluctant in making legislative more progressive and flexible) and could be affected by unforeseen obstacles.

SHINE hopes to minimize human rights violations with strategic litigation and monitoring of implementation existing litigation. Particularly, SHINE seeks to minimize the kind of violations where people are deprived of capacity to act, an area where Croatia is a leading country in the number of ECHR cases lost.

The permanent Taskforce will also design an advocacy strategy and lobby political stakeholders in an attempt to remove the capacity to act concept from the *Family Act* and try to develop disability-neutral legislation.

Additionally, SHINE will aim to achieve one of two possible outcomes for the third objective:

1. Creating a draft law for advance directives that is disability-neutral and extends to more complex, including decisions on property.

2. Proposing draft law to political stakeholders.

SHINE is reluctant to develop supported decision-making model with no existing legal framework concerning supports because the capacity to act concept relies on the law and formalities, which affects positions of persons with disabilities and the concern is that it does not matter what kind of supports are provided if that is not legally recognized. Prior to the installation of such a system, the law must be designated in a way to open the door for legal recognition of various forms (formal or informal) of supports in decision making.

Although SHINE is open to the possibility of developing a supported decision-making pilot in the context of advance directives, the *Family Act* would still be connected to the guardianship system. SHINE considers it necessary to be very cautious in order not to empower policy decision makers in "making-up" guardianship as a more developed and "supportive" which is still based on the model of substitute decision-making.

9. Concluding Recommendations Emerging from this Report

1. Harmonize legislation concerning people with disabilities with requirements of CPRD, especially Article 12 of the CRPD, and abolish all denials of capacity to act based on disability.

2. Transform the substitute decision making system into a system of supported decision making. Supports in decision making should be individualized and adapted to the needs of persons with disabilities. These supports must respect the autonomy, the preferences, and the will of persons with disabilities.

3. The disability neutral advance directive models must be regulated by special legislation.

4. Remove the notion about status rights of persons with disabilities from family legislation.