

# *Legal Cases of Legal Capacity Restoration and the Use of Support in Decision Making*

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## **1 Introduction**

One of the goals of our organization is to help people choose where and with whom to live, i. e. - to name but a few examples - make decisions according to their own will and preferences and perform legal acts. This is often obstructed by denial of legal capacity and "substitute decision making" performed by the guardian.

In accordance with Article 12 of the Convention on the Rights of Persons with Disabilities (the "Convention") we are trying to contribute to changing the obsolete model of protection of people with mental disabilities based on restricting their legal capacity. We do so by means of the following:

- 1) Providing individual assistance to people in their efforts to restore or maintain legal capacity, using less restrictive measures and a structured system of support.
- 2) Generalizing experiences and exerting efforts to introduce system changes that promote the right of the individual to independent living according to his/her own will.

We began to work systematically using the above mentioned approach in 2009 when participating in the project *Quality of Life as a Goal*<sup>1</sup> funded by the European Social Fund. Since January 2012, the work has continued thanks to the *Black and White*<sup>2</sup> project whose implementation is supported by the Open Society Fund. Actual work with people with disabilities is also financed by social service subsidies but sometimes we use our own resources.

Having completed the third phase of the *Black and White project* in March 2017, we have felt the need to evaluate our work on strategic court cases, generalize the results and use them in a follow-up. We have focused on cases involving legal aid in court proceedings with particular reference to legal capacity or the application of tools for support in decision-making. We are interested in the results of court proceedings, their duration, and appeals against the court's decision (Chapter 4.1). We pay particular attention to the role of expert opinions (chapter 4.2) and causes of failure - why some people failed to reach the initial goal (Chapter 4.3). In Chapter 5, we focus on summarizing the factors of success and failure of court cases, and the conclusions drawn from the analysis are included in Chapter 7.

In the following chapter, we briefly describe the principles we adhere to when providing individual assistance aimed at maintaining or restoring legal capacity.

## **2 Socio-legal Support in Decision-Making and Exercising Legal Capacity of Persons with Disability**

### **2.1 Casework of lawyers and social workers**

In our work, we are fully aware that we are replacing the system of restricting legal capacity with a system of supported decision-making and exercising legal capacity. In practice, this means that

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<sup>1</sup> Information about the project: <http://www.kvalitavpraxi.cz/projekty/ukoncene-projekty/kvalita-zivota-jako-cil/>

<sup>2</sup> Information about the project: <http://www.kvalitavpraxi.cz/projekty/probihajici-projekty/cerna-a-bila/>

when preparing legal argumentation for the courts we cannot do without clear articulation of what kind of support in decision-making and exercising legal capacity a person needs in order to eliminate excessive risks, and how this support will be ensured within the proposed legal solution. Therefore, the lawyer always closely cooperates, within reasonable limits, with the natural social environment of the individual (with family and other people that are close to him). In most cases<sup>3</sup>, he follows up the work of social workers whose primary task is to map out the necessary support and its possible resources, i.e. persons in the natural social environment of the individual and professional services. Social work is particularly important in situations where there are no or insufficient resources of support in decision making and exercising legal capacity at the time of the commencement of collaboration, and they need to be located, strengthened or organized; this means that we need to primarily mobilise persons from the natural community. In the monitored cases we have engaged our own or external social workers.

To map the needs for support and its resources we have successfully used the tool "Supports Intensity Scale" (Thompson, et al., 2004) or some other tools of person centred thinking and planning, especially "circles of friends", or "sorting what is important to and for the person" (for more information see e.g. the publication Person Centred Thinking (Sanderson & Goodwin, 2010)). Apart from that we use person centred planning to provide support in decision making regarding the content of our collaboration.

Since the establishment of two-way communication is key to identifying a person's will and preferences, we frequently employ an expert in augmentative and alternative communication. In cases of people with mental illness, we usually work with mental health services or psychiatrists. Engaging professionals is another responsibility of social workers. Considering the coordinative nature of social work and since our assistance is partly provided as a registered social service, case management is always the task of a social worker, with the exception of very rare situations when a lawyer works directly with the individual and his or her relatives.

It is standard practice for lawyers to prepare documentation for the court having dealt with the individual, his relatives, and/or having cooperated with social services or other professionals. In the vast majority of cases, which are discussed in this document, lawyers were authorized by the individual to represent them in court proceedings.

In cases where an appeal is lodged with the Supreme Court, we cooperate with a law firm, as only a registered lawyer can file an appeal.

## 2.1 Preparation of a legal solution

The mapping of the necessary and available support is crucial for contemplating the choice of an adequate legal solution. Without this information, it is not clear what problem we are to react to. Any legal intervention is usually preceded by social work or the description of the support, which is available in the natural social environment of the person. Any unwillingness to cooperate in the mapping of the necessary support and its resources by the person who wants to have his legal

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<sup>3</sup> Only in 4 out of the 33 cases included in this analysis the lawyer worked with the individual and his/her natural surroundings (family and other close acquaintances) to prepare all documentation for the court. In other cases, the mapping of support and its resources was coordinated by social workers.

capacity restored is, in our view, an obstruction to collaboration. Should we fail to establish a relationship based on trust with the person<sup>4</sup> well in advance, he does not accept this condition and the collaboration stops.

There was only one case, in which the description of any available support was missing from the legal documentation. However, it was established that in this case there was no need for specific support in exercising legal capacity. The legal argumentation in court was in fact based on the finding that support was not needed.

Legal argumentation is always based on the mapping of all available support to the person, which is primarily used by them in decision making and exercising legal capacity, but also in other areas of life. Under the new Civil Code, a court may restrict legal capacity only if there is a risk of serious harm to the individual. Well delineated support is therefore the main argument for claiming that there is no risk of the person suffering serious harm while performing a legal act. Support as an alternative to restricting legal capacity was recognized in the Czech Republic by the ruling of the Constitutional Court in 2009<sup>5</sup>. Since 2010, the Convention<sup>6</sup> and its Article 12, which enshrine the right to full legal capacity, are part of our legal system. Lastly, the new Civil Code of January 1, 2014<sup>7</sup> made a specific provision for the possibility to use new measures to perform legal acts, which are based on full legal capacity. All these resources have since been used in various legal proceedings.

Only argumentation based on these principles has enabled us to successfully counteract the influence of physicians' – psychiatrists' expert opinion on the outcome of legal proceedings. This was achieved despite the fact that our argumentation was frequently in apparent contradiction with the conclusions of experts.

## **2.2 Transformation of Legal Environment and its Impact on Socio-legal Support**

As the legal environment has been recently evolving, legal solutions prepared by our team have been based on the opportunities provided for by the currently effective legislation. Article 12 of the Convention has become an important common basis used as part of our legislation since its publication in the Collection of International Treaties in February 2010. In the context of the old Civil Code, which was in force up to the end of 2013, we had sought to use the regime of guardianship without restriction on legal capacity more widely or minimize such restriction. In the given period, guardianship without restriction on exercising legal capacity (according to § 29 of the Civil Code) was the only option for support in performing legal acts which preserved full legal capacity. Since the new Civil Code came into force, the range of usable tools has expanded considerably, and people have focused on the possibility of using new alternatives instead of restricting legal capacity. The proceedings thus involved either the restoration of legal capacity and the application of new options or, if in the past their legal capacity had not been restricted, they only focused on the use of some of the new options<sup>8</sup>. Where quality support was available, it was possible to choose (taking into

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<sup>4</sup> This situation occurred in case of several persons with mental illness

<sup>5</sup> Judgement of the Constitutional Court 557/09 (from 18/08/2009)

<sup>6</sup> The Convention was ratified in CR in 2009, published in the Coll. of International Treaties in 2010

<sup>7</sup> Act No. 89/2012 Coll, Civil Code, in force from 2012, effective from 1/1/ 2014 (hereinafter CC)

<sup>8</sup> See Annex 2

account specific circumstances) between support in decision making, optimally provided by several support persons, and guardianship without restriction on legal capacity. Guardianship was applied in cases where it was practical to retain the possibility of representation, which is not allowed by the agreement on support in decision making (ASD), or where there were no suitable persons with whom to make an agreement on support in decision making (e.g., where only a public guardian could have been appointed because there were no persons who the person would trust). The last available alternative provided for by the Civil Code is representation by members of the household. We applied this measure only at the very end of the reviewed period. The reason why we have made little use of it is that there are too many statutory restrictions, which is why it is not practical for most people interested in using the new measures (enumerative list of possible representatives, inability to manage accounts or pay larger amounts, etc.). One reason why we have not used it, for example, is that of all the new measures available to persons with full legal capacity, this one pays the least regard for the will of the represented individual, both at the inception, and during the application of the measure.

Most people seeking to restore legal capacity or to avert its restriction were also interested in appointing a guardian without restriction on their legal capacity or approving an ASD. In one case, the appointment of a guardian was proposed (without restriction) in combination with the ASD.

### **2.3 Collaborating Providers of Social Services**

In many cases, we have worked not only with people (and their families) who were trying to restore or maintain their legal capacity or formally establish support in exercising legal capacity but - where relevant - also with the providers of registered social services who were currently providing support to our clients in various areas of life, including decision making and exercising legal capacity.

In the beginning, i.e. in the context of the old Civil Code, two large institutions were involved as partners in the above mentioned project *Quality of Life as a Goal*: one of them ran a home for people with disabilities /DOZP/ (which later also provided sheltered housing), and the other offered a "special regime home" /DZR/ service. We started to work with the institutions in the area of legal capacity through a questionnaire which aimed at obtaining information about the "*real status of legally relevant decision making of individuals that could be compared with their legal status - i.e. Information about the extent of the existing intervention in their legal capacity*" (Strnad, Kořínková & John, 2011).

Persons whose real and legal status differed most, and for whom the restoration of legal capacity was, at least to a certain extent, of the greatest importance, were selected in collaboration with the staff of the institutions and their clients on the basis of a survey. Some residents of the institution signed up themselves as a result of the seminars which we had conducted on the subject of legal capacity in both institutions. The nature of the work in the two institutions differed considerably:

The main target group of the Home for Persons with Disability (94 residents in total) with a base in a municipality with extended competence were people with learning difficulties (so called mental disability). The facility participated in an ongoing project of transformation of institutional care, which established small group housing units scattered in several smaller and larger municipalities in the vicinity of the organization's headquarters. Well before the launch of the project *Quality of Life as a Goal* the facility had submitted several proposals to initiate legal proceedings in order to restore

legal capacity to its clients. These efforts, however, did not lead to corresponding changes in sentencing. (Strnad, Kořínková, & Johnová, 2011)

As part of the implementation of the project, eight proposals were prepared for full restoration of legal capacity on condition of appointing a guardian without restriction on legal capacity. At that time, this was the only measure offered by the Civil Code for support in performing legal acts without depriving the individual of his legal capacity. The facility both supported its clients in social inclusion and also fully supported the clients' proposals in court. The staff of the facility were able to provide support which facilitated such a solution: they actively supported their clients in court proceedings, took an active part in them (they prepared expert opinions on clients' skills, gave evidence in court, helped the people find guardians among private individuals to replace their public guardians, turned to the guardians for support in having their legal capacity restored, etc.).

The Special Regime Home (110 residents in total) was situated in a secluded area in a small village with the population of under 600. The main target group were people with mental illness. For technical reasons (replacement of the original partner of the project), we started to collaborate with this facility at a later stage. The home did not participate in the transformation of institutional care, nor did its management envisage such an involvement in the future. None of the clients were actively supported in their efforts to have legal capacity restored, not even in part. According to the project's records, the staff members were not prepared to appear in court in person, their approach to collaboration was very formal, and one member of the institution's senior management even expressed concern that if an inmate should have his legal capacity restored, *he would "drop out of the target group, which in accordance with then current legislation would mean that the institution would no longer be obliged to provide for him"*. Moreover, none of the residents of the institution came from the small village and thus had no natural ties with the community, which they could use as support in decision making and performing legal acts. (Strnad, Kořínková, & Johnová, 2011)<sup>9</sup>. Five proposals were submitted under the auspices of the project, of which four focused on partial restoration of legal capacity and one proposed a replacement of the guardian.

We have subsequently worked with several other providers of community-based social services who had been seeking to improve the legal status of their clients over a long period of time, namely Rytmus<sup>10</sup>, Portus<sup>11</sup>, Fokus Praha<sup>12</sup> "Naplno Sheltered Living"<sup>13</sup>, or Mental Health Care<sup>14</sup>, Jičín. These service providers supported their clients in their efforts to achieve the restoration of legal capacity and get support in decision making and performing legal acts; they assisted their clients in establishing contact with our organization and they took an active part in their clients' court proceedings.

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<sup>9</sup> Our research showed (besides other things) that more than 50 % of the residents in both institutions were deprived of legal capacity and the rulings were dated 44 years back (DZR) and 30 years back (DOZP)

<sup>10</sup> Rytmus o. p. sec. - <http://www.rytmus.org/>

<sup>11</sup> PORTUS PRAHA, z. ú. - <http://www.portus.cz/>

<sup>12</sup> Fokus Praha, z. ú - <http://www.fokus-praha.cz>

<sup>13</sup> Centrum sociálních služeb J. Hradec, Chráněné bydlení Naplno – [www.domovpistina.cz](http://www.domovpistina.cz)

<sup>14</sup> Péče o duševní zdraví, z. s., Středisko Jičín – <http://www.pdz.cz/pobocka-jicin.html>

### **3 Methodology**

The analysis covers our organisation's work during the eight-year period from April 2009 to March 2017. The first court proceedings were initiated in February 2010. The last case so far was closed in March 2017. The cases where the proceedings are still pending are not reflected in the analysis.

The analysis covers 33 cases involving people we worked with in the long term where court proceedings were initiated. The cooperation included preparation of materials for the court or representation of the person in the court proceedings concerning legal capacity and formal (judicial) establishment of support in decision-making and exercise of legal capacity. Of that, in 27 cases we represented a person with disability and in one case a service provider in the court proceedings. The list of all the cases of cooperation is given in Annex 1.

Furthermore, we were engaged in the cases of additional twenty people who also needed to have their situation resolved as far as their legal capacity was concerned. In these instances, however, our involvement was significantly smaller. We did not represent these clients and have no information about the result in a number of cases. Our assistance mostly consisted of support provided as part of our social services, or on the contrary of consultations provided to other organisations in addressing various situations their clients found themselves in. In some cases court proceedings were initiated, while in others not, in dependence on the situation.

From the perspective of regional distribution, the said 33 cases were within the competence of twelve district courts<sup>15</sup>, or five regional courts<sup>16</sup> of the total number of eight regional courts. We filed an appeal only with three regional courts.<sup>17</sup> In two cases, our petitions were awarded only after an application for an appeal review on the point of law was filed with the Supreme Court.

Below please find three analytical steps: a summary of the results of the court proceedings (Chapter 4.1), a section focusing on the issue of expert opinions (Chapter 4.2), and a description and interpretation of several unsuccessful court proceedings (Chapter 4.3).

As far as the level of success in the court proceedings is concerned, we distinguish between three categories: success, failure and compromise. We view as successful such cases where the original objective agreed on with the respective person was accomplished. Compromise is where the person achieved his or her objective in part only. We failed when the original objective was not achieved at all for any reason whatsoever. As regards the two latter situations (compromise and failure), it needs to be added that the person concerned might have decided of his or her own will to settle for a partial success or to give up his or her original intention fully. Quite often, however, the person "settled for" the partial success or failure to accomplish the objective in regard of unfavourable circumstances. As an example, the person might have known that, without support or even to spite of the people surrounding him, he or she had no chance to accomplish the objective. A similar analysis regarding the cases which failed is given in Chapter 4.3.

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<sup>15</sup> The District Courts of Beroun, Cheb, Chomutov, Jindřichův Hradec, Karlovy Vary, Kladno, Kolín, Olomouc, Prague 6, 8 and 10, Prague-East and Prague-West.

<sup>16</sup> The Municipal Court of Prague, the Regional Courts of Prague, Ostrava, Ústí nad Labem, Pilsen.

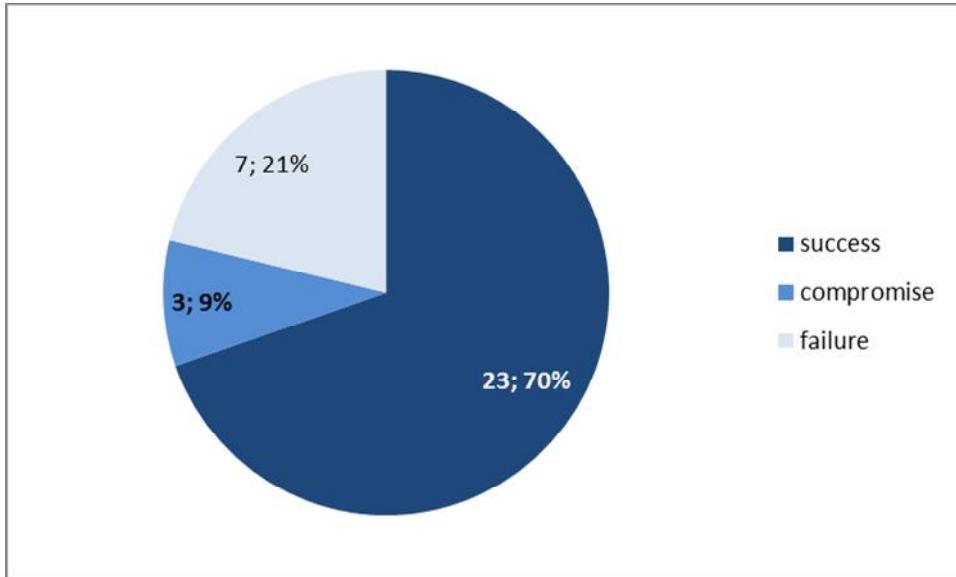
<sup>17</sup> The Regional Courts of Prague, Ostrava, Pilsen.

## 4 Findings

### 4.1 Results of court proceedings

Of the total number of 33 court proceedings, 23 cases (70%) were fully successful. A compromise solution was achieved in another three cases. In seven cases, the original objective was not achieved.

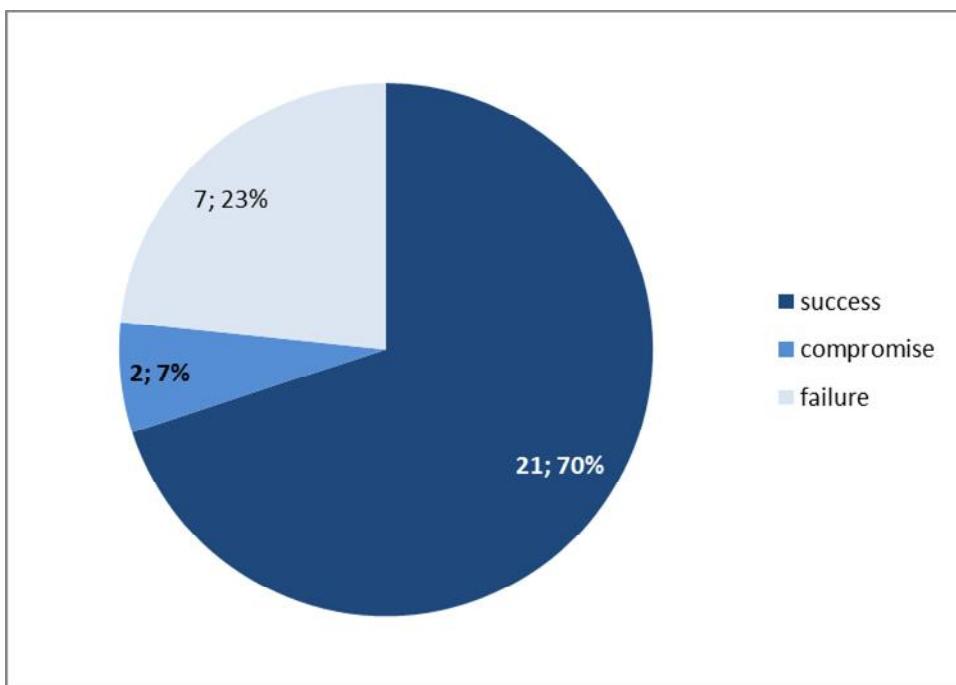
A brief description of the cases where the people failed completely or in part (compromise) is given in Chapter 4.3.



**Picture 1 Court proceedings success rate**

#### 4.1.1 Legal capacity

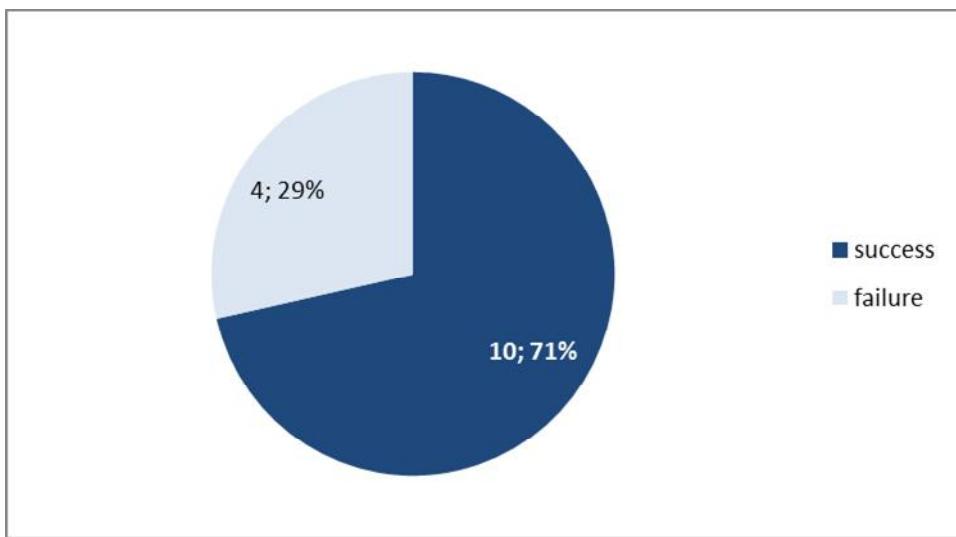
Of the total number of 33 court proceedings, 29 persons were seeking full or partial restoration of legal capacity or that restriction of legal capacity be averted. 21 persons (70%) were fully successful in what they requested. A compromise, i.e. partial award of what they were seeking, was achieved in two cases (7%). In seven cases, the petition failed completely.



**Picture 2 Success rate in actions for the restoration and maintaining of legal capacity**

#### **4.1.2 Appointment of a guardian without restriction**

Of the total number of 14 cases, the objective was achieved in 10 cases (71%); four cases failed.



**Picture 3 Success rate in actions for the appointment of a guardian without restriction**

#### **4.1.3 Agreement on support in decision making (ASD)**

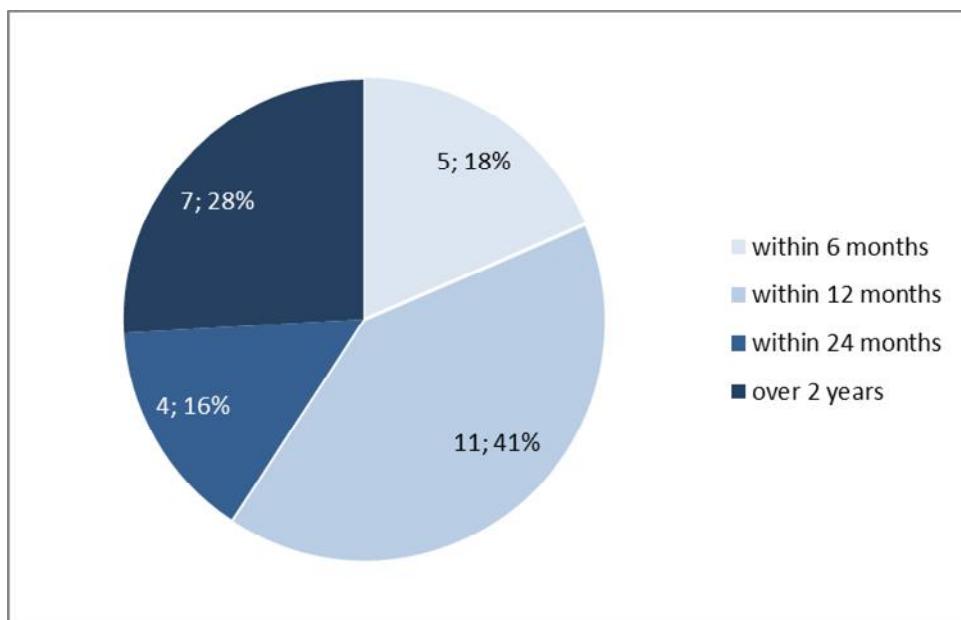
Of the total number of eight ASDs, the proposed agreement was approved in seven cases. In one case, the agreement was not approved.

#### **4.1.4 Preliminary declaration**

In one case, a preliminary declaration of the person's will to have his or her matters managed in a certain manner by a certain person or by a guardian was filed with the court as a less restrictive measure; it was a case of a woman with a mental disease who was seeking full restoration of legal capacity. The court admitted the declaration in evidence and the woman's legal capacity.

#### **4.1.5 Court proceedings duration**

We could assess the duration of 27 court proceedings in regard of which we possess information on the dates of initiation and ending of the court proceedings and where the person concerned did not withdraw before the first-instance court rendered its decision.



**Picture 4 Court proceedings duration**

As a rule, the court proceedings went on for six up to twelve months. The average duration was 17 months. The shortest proceedings took four months (two cases) and five months (one case), all those being successful. In these cases, the people were seeking restoration of legal capacity or that restriction of legal capacity be averted, but also less restrictive measures such as approval of ASD or appointment of a guardian without restriction (see the table given in the Annex).

In almost fifty percent of the cases (13), the duration of the proceedings exceeded one year even though there was no appeal filed with higher courts. Except for one exceptional case where the proceedings were longer than 27 months although the decision was not appealed, two appeals were filed in those proceedings which lasted for a period exceeding two years<sup>18</sup>; an application for appeal review on the point of law was filed in two cases. Because of the application for appeal review

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<sup>18</sup> After the decision of the first-instance court had been quashed and the case had been referred back for a new hearing, the court rendered a decision which was appealed again.

on the point of law, the proceedings took over 46 months (almost four years!), yet the objective was achieved in full.

#### **4.1.6 *Appeal***

An appeal was filed in a total number of ten cases. In three cases only the decision which the person was seeking was not achieved even though an appeal was filed with a higher court. Mr. N. T. accepted a compromise. In two cases<sup>19</sup> the persons (Mrs. K. R. and Mr. E. L.) were not willing to continue with the proceedings, that is, to file another appeal or an application for appeal review on the point of law. In the case of Mr. E. L. the reason was the complete exhaustion of the entire family; Mrs. K. R. was not supported in her efforts by the guardian. For further details, see the description of lost cases in Chapter 4.3.

### **4.2 *Expert opinions***

In the proceedings regarding legal capacity as conceived by the current Civil Code as well as in the proceedings on other “support measures” the court needs to ascertain whether the person has a “mental disorder”. The mental disorder is a reason for applying one of such measures. So that the court could restrict a person in his or her legal capacity a condition must be fulfilled that “otherwise the person would be endangered with serious harm and a more moderate and less restrictive measure does not suffice in regard of the person’s interests”.<sup>20</sup> That the person is not endangered with serious harm in exercising his or her legal capacity can be ensured by a good support system. A less restrictive measure means any of the measures which do not involve restriction of legal capacity.<sup>21</sup> If the condition was met of the person’s being endangered with serious harm, the court would investigate whether and how the “mental disorder” limits the person’s capability of making legal acts.<sup>22</sup> The extent of the restriction would further depend on the assessment of “the extent and level of the incapability of taking care of one’s matters”.<sup>23</sup> We were interested in how an expert opinion made by a physician can contribute to such determination and whether it is replaceable in any respect.

In the proceedings regarding restriction of legal capacity the court must adduce evidence in the form of an expert opinion, and the expert must be heard. Where a court decides on an application for the restoration of legal capacity or extension of restriction of legal capacity, it may waive the expert opinion since February 2017 if obvious that the person’s health condition has not changed against an expert assessment made previously. Where more moderate measures (ASD, guardianship without restriction and representation by a household member) are decided on, the law does not require that an expert opinion be made.

In those proceedings regarding legal capacity where we were representing our clients, 22 expert opinions were made by physicians, or sometimes psychologists. These expert opinions are being analysed below. All the expert opinions contained a statement concerning the diagnosis and, based on that, answers to questions as to whether and how the person concerned is or is not capable

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<sup>19</sup> Restoration or retaining of legal capacity and application of less restrictive measures.

<sup>20</sup> See CC, sec. 57 (2).

<sup>21</sup> Support in decision-making, guardianship without restriction of legal capacity, or representation by a household member.

<sup>22</sup> See CC, sec. 57 (1).

<sup>23</sup> See CC sec. 55 (1).

of handling various life situations. Some of the expert opinions dealt also with such areas which not related to the exercise of legal capacity, either in cases where it was requested by the court or on the initiative of the expert. In some cases, the expert opinion contained a recommendation for a legal solution, that is, in which areas or to what extent the person should be restricted, that a guardian should be appointed, etc.

#### **4.2.1 *Diagnosis***

An opinion of a physician is irreplaceable in determining the diagnosis. However, in our experience the current diagnosis (existence of a “mental disorder”) could have been determined from the report made by a competent treating physician (general practitioner or specialist) as all the persons had such a physician. In 19 cases, an expert opinion had been made previously. (What is more, as regards people with learning difficulties<sup>24</sup> the diagnosis is known to remain unchanged for all the person’s life). In all the cases, the diagnosis had been determined and well known before the expert opinion was made. There were no doubts concerning the diagnosis in any of the cases; it was not challenged by our clients, either. All the cases were filed in order to seek restoration, but not restriction, of legal capacity. Therefore, from our perspective there was no need to determine the diagnosis by way of an expert opinion as a special form of determination thereof which is lengthy (normally it takes several months) and expensive.

#### **4.2.2 *Conclusions regarding a person’s functioning in normal life, made by an expert on the basis of a medical examination and written information***

In this respect, the expert’s conclusions departed largely from the person’s real life in 21 out of 22 cases. The expert opinions were much more negative. The primary reason was that the expert’s conclusions were made on the basis of what the person is capable of if having to handle the situation alone, without anyone’s assistance. However, none of the “examined persons”<sup>25</sup> was living without other people’s help. All those who were providing the support (family, close persons, or professional providers of social services) were aware of all the needs of support and potential risks, they were took into account in working with the people with and the support was provided in those areas where it was needed.

In a number of cases, the experts’ conclusions were influenced also by the fact that during the time given for the examination the experts were not capable of establishing such contact with the persons to be examined that would allow them to demonstrate their real capabilities. According to the information of some of the experts, or people who accompanied the “examined person” to the expert, the time for the examination was in the range from 20 minutes to two hours. Only exceptionally did the expert visit the person in his or her own environment. Sometimes the examined persons did not answer the expert’s questions for reasons other than not knowing how to answer (shyness, fear, distrust, unknown environment, difficulties in verbal communication), or the expert did not know how to communicate with the person with regard to his or her individual needs so that the person would understand the questions correctly. The person then answered wrongly. In one case, the examined person refused to communicate with the physician because the physician’s

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<sup>24</sup> So called mental disabilities.

<sup>25</sup> The term „examined person“ was used by the law and in the expert opinions. The term was used by the previous Civil Code, or the Code of Civil Procedure. The new law uses the term „assessed person“.

behaviour was inappropriate (the physician did not greet the examined person, addressed only the accompanying person during the examination, and made inappropriate comments on the examined person and her mother). The expert opinion gave the impression that the examined person is not capable of answering anything or does not react, there being only an inconspicuous remark in the conclusion that no communication was established really. As an example, the expert says: "From the perspective of a psychiatrist, the examined person is incapable of expressing her will without any doubts as to what she wanted to say. Whatever she says is largely instinctive." In fact, verbal communication is very difficult for the examined woman because of neurological reasons. However, she understands and communicates in four languages at least.

The experts even went as far in their conclusions as making an erroneous presumption that the examined person lacks everyday life competencies in general. As an example of how a conclusion derived from the diagnosis can distort the reality of life, an expert opinion can be referred to which asserted that "Due to the disorder the examined person cannot determine the value of money, does not know the prices of basic foods, clothes, the cost of housing, etc. However, the person can handle small amounts for which she could buy small things of everyday life (coffee, sweets, and the like). The person is capable of everyday actions related to her own hygiene, eating and dressing. Supervision of a caregiver is however necessary." When being heard by the court, the expert gave even more details of her negative conclusions. In fact, Mrs. R. H. lives in a rental apartment which she shares with her female friend. They make use of the support provided by social services only for a few hours per week. Mrs. R. H. knows the prices of basic foods, buys all that she needs, furnished her flat, cooks her meals, takes care of her household, and has a boyfriend. She needs no supervision in caring for herself. The court restored her legal capacity on the basis of the well-functioning support having been proved, irrespective of the explicit opinion of the expert.

In some cases, the experts did not even take into consideration the facts that were made available to them. For example when saying: "The examined person is incapable of understanding the consequences of entering into any agreement..." and "... is incapable of any job whatsoever." Actually, Mrs. M. T. had a standard employment contract which fact she confirmed during the examination. After having received an explanation concerning the employment contract, she understands clearly what obligations she has. She follows the rules of the standard operation in the environment with strict hygienic norms and the obligations toward her employer (regular attendance, annual leave and sickness rules, etc.). Another conclusion of the expert opinion was as follows: "The examined person is incapable of any valuable rational act." "The cognitive and self-control skills are permanently nonexistent." In fact, Mrs. M. T. has diabetes; she measures her sugar levels alone, adapts the amount of food to the results of the measurements, and injects herself with insulin. She awakened her neighbours in the sheltered housing and accompanied them to work. She lived with a partner with whom she got engaged. Now she lives in a rental flat. She takes care of all her matters and makes use of the support only for several hours per week. Similarly to the preceding case, the court restored her legal capacity in spite of the expert opinion which was largely negative.

Therefore, as far as the conclusions of the experts - physicians are concerned in how the diagnosis which was determined influences everyday life of the examined persons, in our experience the validity of such conclusions is disputable to a large extent. Sometimes the assessment more or less reflects the person's real life; sometimes the assessment deviates from the same significantly; sometimes it is even misleading.

#### **4.2.3 Determination and provision of sensitive information unrelated to the exercise of legal capacity**

In nine cases out of 22, the courts asked questions about areas unrelated to the exercise of legal capacity such as "Is the examined person capable of taking care of himself?" In some cases, the experts mentioned such matters on their own initiative, either in the expert opinion or when being heard. These questions related to areas such as personal hygiene. Alternatively, the experts quoted information from an examination by a gynaecologist, urologist, etc. One expert opinion contained a text as follows: "Both the mother and the daughter are greatly interested in sex." None of them had an idea what the physician was referring to and they felt very much aggrieved.

Such sensitive information, which was of no use in assessing legal capacity, was then mentioned for instance in the expert opinion, or during the hearing (which is public) when the person concerned was examined, or referred to in the reasons for the judgment. In the case of restriction of legal capacity, the guardian frequently has to present the judgment, including the reasons, to third parties of an unspecified number with whom the guarding deals when proving his or her right to represent the person. We have even encountered situations where a bank or the Czech Post made copies of the entire judgment, this being the institution's condition for providing its services.

#### **4.2.4 Court's questions concerning questions of law; recommendation for a legal solution made by a health-care expert**

Giving answers to the questions of law constituting the subject-matter of the court proceedings is a sole and exclusive authority of a court. Qualifications in medicine do not cover legal education. Therefore, a physician cannot provide a relevant answer, for example, to a question as to whether or not the person examined by the physician understands the legal consequences of contracts (and what kinds of contracts) or the concept of paternity, it being unclear to what extent the expert – physician's idea of the legal consequences is accurate<sup>26</sup>.

In 12 cases, the courts asked the expert about a question of law such as: "To what extent does the mental illness or disorder limit the person in his or her legal capacity?" or "Whether the person can handle finances and assets and of what value?", "Should the court decision be served upon the examined person?", "Is the assessed person capable of understanding the implications of entering into an agreement (purchase agreement, agreement on donation, and the like)?". In one case, the court asked: "Is the assessed person capable of understanding the meaning and implications of the concept of paternity, its purpose and denial?"

In 11 cases, the experts provided the answer to the question of law in a way such as: "The expert recommends that the person be allowed to handle independently amounts of up to CZK 400 per week." "The expert recommends that in entering into agreements (purchase contract, agreement on

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<sup>26</sup> The topic of the role of a court and expert was addressed, for example, by the Constitutional Court in its Judgment No. II. ÚS 2630/07 of 13 December 2007 as follows: „The courts' steps in the case being considered have the features typical of how courts proceed in such matters. They are characterised by a formal, schematic view of the case being considered, without any effort to take an individual approach to each single case, and by entirely acceptance, lacking any criticism, of the conclusions given in the expert opinions which often give answers to the courts' questions going beyond the scope of an expert assessment and interfering with the courts' decision-making by giving direct guidance as to how the court ought to decide. Such decision by a court is not a decision of an independent court, it is a decision of a court-appointed expert.“

donation, and the like) the assessed person be represented by a statutory representative." or "The condition of the examined person is so serious that having considered the case as an expert I have decided to recommend that the court decide on her full incapacitation." (This was the case mentioned above where the lady who speaks four languages could not answer the expert's questions because she did not consider the demeaning way in which the expert communicated with her worth of the effort she needs to make when communicating verbally.)

Only two experts made an objection when being heard that they are not competent to comment on questions of law because it is not a matter within their expertise. As regards the questions of law asked by the court not before the hearing, there were also other experts that commented on the same in addition to the 12 cases mentioned above.

#### **4.2.5 Assessment of the capacity to vote and be elected**

The question of a person's capacity to vote, and accordingly the restriction of the right to vote and be elected, has been considered by the courts in greater frequency after Judgment No. IV.ÚS 3102/08 was rendered by the Constitutional Court on 12 July 2010. On a more regular basis the courts have dealt with the matter since the new Civil Code became effective. In nine cases, the experts made comments on a person's capability to vote and be elected. In six cases, they claimed that the persons concerned could not understand the meaning, purpose and consequences of elections, including the possibility of voting and being elected. In two cases, the experts said that the assessed person had the capability of exercising the right to vote and be elected; in one case that the person had the capability to exercise the right to vote, but not the right to be elected. In some cases, there was a need in the hearing or in the appellate proceedings to defend the right to vote and be elected with reference to Article 29 of the Convention. The court has finally not restricted expressly the right to vote and be elected in any of the cases.

In all the cases being analysed, the people were actually capable of voting and being elected. However, important is whether they have appropriate support. We possess information in regard of some of those people that they participate in elections, or intend to participate in the next Czech presidential election. Others have not exercised their right to vote and be elected, the reason being, for example, that they have not had the appropriate support.

#### **4.2.6 Terminology used in the expert opinions**

The obsolete medical terminology ("debility, imbecility, idiocy") was changed by the 10<sup>th</sup> revision of the *International Classification of Diseases* of the World Health Organisation (WHO) back in 1994. These terms were replaced with the term "mental retardation". Similarly, the term "inmate" was cancelled together with the old legal regulation on "institutional social care". Institutional social care was replaced with the provision of support via social services where the user is an equal contracting party, but not "an object" of the care.<sup>27</sup>

In several opinions the obsolete terminology was still used such as: "Intellect in the range of imbecility." "I have examined the person: Imbecility dominates her image." "As far as the intellectual defect is concerned, it is necessary to say that with the lack of cooperation on the part of the examined person the measurement of intellect is impossible. ...One cannot but make

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<sup>27</sup> See Act No. 108/2006 Sb., on social services

assumptions... While morons have poorer results..., imbeciles have bad results..., idiots are fully educable." Or: "... major mental defect at the level of imbecility." Sometimes, the experts still used the term "inmates" in regard of the users of social services.

There were cases where the expert opinion contained the formulations concerning the examined persons or their family members as follows: "... All that in spite of the mother's merciful self-deception... The parents of disabled children succumb to such self-deception quite frequently, ... it is the child's later life that convinces the parents of the profound defect." Or: "a big tragedy", "she is stuck in the wheelchair", "the mental insufficiency of the examined person is profound". In regard of a lady that lives in a sheltered housing, has a standard employment contract and needs assistance of only a small extent, the expert wrote that the person "is incapable of an autonomous extramural existence."

#### ***4.2.7 How were the expert opinions reflected in the judgments***

In all the cases, the experts' conclusions concerning the diagnosis brought only basic information, which was already known from previous assessments or reports of other physicians. The conclusions as to how the determined diagnosis can affect a person's capability of looking after his or her own matters and how it affects such person's life were more or less departing from the persons' real life in all the cases but one. Sometimes the conclusions were significantly different from how the person's situation was described, documented and assessed by the persons providing him or her with long-term support in everyday life.

In one case concerning a woman with a mental disease, the conclusions of the expert opinion corresponded with reality. This expert said that the diagnosis had no influence on the woman's capability of looking after her matters. Because the conclusions were in accordance also with other evidence, the court took them in consideration in making the decision and restored the person's legal capacity. In no less than 10 cases, the conclusions of the expert opinion were indicative of "the person's incapability of looking after his or her matters independently" and that "in making legal acts the person is endangered with severe harm"<sup>28</sup>, but the court relied in its decision (on the restoration or retaining of legal capacity) on other evidence showing that the person was not endangered with severe harm, the danger being balanced out appropriately by the provided support. There was a single case where the judge said specifically that he/she requested that an expert opinion be made in order to determine whether the person might be placed in jeopardy due to the diagnosis, to be able to consider whether the alleged (and proved) support compensates for the risk sufficiently.

In seven cases, the first-instance courts relied in principle only on the conclusions of the expert opinions. They did not take into account that the need of support had been assessed in such cases (mostly by specialists), the support had been provided in the long term and used by the person successfully. That is, measures were taken to ensure that the person could look after his or her matters without being endangered with severe harm. Thus, based only on the conclusions

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<sup>28</sup> See CC, sec. 55 which defines the conditions for incapacitation:

- (1) Legal capacity may be restricted only where it is in the interest of the person concerned, after having seen the person, while recognising fully his or her rights and his or her personal uniqueness. In doing so, the extent and level of the person's incapability to look after his or her own matters need to be considered thoroughly.
- (2) Legal capacity may be restricted only if the person would otherwise be endangered with severe harm and a more moderate and less restrictive measure does not suffice in regard of the person's interests.

of the expert opinion, the courts decided to restrict legal capacity. Of that, in six cases we have subsequently achieved rectification of the situation by higher courts which regarded the support being provided as decisive and restored the persons' legal capacity.

It can be said that if the court took into consideration the well documented evidence of a well prepared and well functioning support, it concluded that there was no need to restrict the legal capacity because it would be sufficient to apply one of the measures without restricting legal capacity, even if the expert opinion indicated that the person was not able to control his matters as a result of his mental disability.

#### ***4.2.8 In/disponsability of expert opinions***

As mentioned above, a physician is essential to determine the diagnosis defining the "mental disorder". The persons knew their diagnoses from their general practitioners, specialist, or previous expert opinions.

How the person lives, how he or she acts in everyday life and whether in doing so the person is endangered with severe harm could be ascertained on the basis of the testimony of the person alone and, above all, the testimonies of the people being in close contact with the person in his or her everyday life, and, as the case may be, of the statements given by specialists such as workers of the social services used by the person or municipality social workers. One of the key roles of a social service is to identify the risks, which the person faces, to assess the same and develop a plan for making sure that the person is not endangered beyond the scope of standard risks we all are facing. At the time of the court proceedings, all our clients were surrounded by people who knew them well from everyday life, and all our clients were making use of a social service of some kind. The courts could, and mostly did, ascertain all the necessary information from the testimonies of these people and the statements made by specialists such as social workers and special educators. The information was detailed, accurate, coming from multiple sources, and given from different perspectives. There was a possibility to use the documents that the social service had worked with (such as assessment of the extent of the necessary support and assessment of risks). Mostly it was not necessary to develop the same specifically for the court proceedings. To obtain and provide such information was no burden for the person concerned.

On the other hand, the information regarding the impacts of the diagnosis on the everyday life as given in the expert opinions was incomplete, much less accurate, or sometimes even misleading. To determine such information, the expert opinion based on a one-off examination of the health condition and the documents in the file proved to be an unreliable source. What is more, for all the persons the examination by the expert was largely stressful and unpleasant. The information given in the expert opinion and read out during the hearing caused, sometimes severe, suffering to the persons and sometimes also to the persons related to them.

## **4.3 Failure in legal proceedings: a set of case studies**

In the following case studies, we sought to summarize the important aspects of court proceedings<sup>29</sup>, which resulted in only partial success or failure, with the aim of reflecting on the causes of failure and drawing conclusions for our further work.

### **4.3.1 Mrs. K.R.**

By the time the proceedings were initiated, K. R. lived in a social housing facility (sheltered housing). She was restricted on her legal capacity and allowed to handle cash of no more than CZK 200. She claimed from the court to restore her legal capacity and to appoint a guardian with no restrictions. The proceedings were conducted in the context of the old Civil Code. Her permanent guardian (a private person) supported, to a certain extent, her efforts to extend her own competences. The social service, too, was supportive of K.R.'s goals and cooperated to achieve them.

The court proceedings were commenced in March 2011. The Court was provided with a description of the day-to-day support in the sheltered housing, and with the opinion of social workers and a special educator who had been working with K.R. for a long time. The recital argued the proposal was based on the role and effectiveness of this support in safeguarding her interests. The court requested an expert's report. The expert pointed at the permanence of K.R.'s health status and was very restrictive in assessing her competences, which was inconsistent with the long-term practical experience of her surroundings.

The District Court decided to maintain the restriction on her legal capacity, however, it raised the amount that K. R. could freely dispose of to CZK 800. The argument behind the decision was that, since the previous ruling on the restriction of legal capacity no major changes occurred. K.R. decided to file an appeal to the Regional Court, which, in July 2013, amended the original negative ruling of the District Court. In fact, it was just another moderate increase in the financial value of transactions the lady could do by herself.

The guardian was reluctant to make any further steps and considered the decision to be appropriate. Failing his support K.R. did not wish to further spend the efforts required to achieve the pursued goal and decided not to appeal to the Supreme Court. She had the feeling that without the support of her guardian she had no chance to succeed. Yet, there were favourable conditions for an appeal and the likelihood of obtaining a less restrictive decision was relatively high. Therefore, we evaluate the outcome as a failure even though the original decision was corrected.

### **4.3.2 Mr. E.L.**

E.L. lives with his parents who, before he reached the age of majority, requested a court to appoint a guardian to represent him in legal actions. They were not aware of the possibility of guardianship with no restriction on legal capacity. They requested however the least possible restriction. The Court deprived E. L.'s of legal capacity entirely.

The parents were very disappointed by the court decision and turned to us. We filed an appeal and proposed to retain legal capacity and guardianship under Section 29 of the old Civil Code in

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<sup>29</sup> The only case that constitutes an anomaly and its analysis goes beyond the scope of the submitted text is not included.

the context of which proceedings were conducted. The appeal was pending since December 2009. The reasoning for the restoration of legal capacity was that E.L. was enjoying a high quality support from the family, which meets all his needs. In addition, he was using a number of other support services and, when supported, he engaged in community-based activities. The expert's opinion described just what E. L. was unable to take care of by himself. We succeeded partially in the Appeal Court - the judgment was set aside and the case was referred back to the District Court to complete the evidence. On the basis of the additional evidence, the District Court deprived E.L. of his legal capacity again. An additional appeal was filed. This time, the Regional Court confirmed the ruling. (May 2011).

This is a failure because the objectives were not reached in the first and second instance courts. The family was tired and disgusted by the trials. By that time, probably out of the stress from the courts, E.L.'s health status seriously deteriorated. Therefore, the family decided to relinquish another possible step - submitting a plea to the Supreme Court.

#### **4.3.3 *Mrs. N. I.***

N.I. addressed us, through a residential social service (a home for people with disability = DOZP) which she was using, with a request for assistance. The aim was to revise the old decision on the restriction of her legal capacity in handling financial amounts in excess of CZK 100. N.I. wished to restore her legal capacity. The municipality had been appointed her guardian (public guardian). The support which N.I. needed included handling her money, and it was provided by the residential social service and the guardian. The submission for the court was drafted using the documents provided by the residential service. The arguments for the restoration of legal capacity were based on the fact that no serious harm for N.I. could possibly be related to her legal capacity and therefore there was no reason for further restrictions thereof. Submitting a request for restoring legal capacity and retaining the support by the public guardian seemed to be the optimal solution.

The reason for maintaining guardianship was the vulnerability of N.I. if she had her full legal capacity restored her only supporter in all areas of life would be the residential service which she depended on for her subsistence. The proceedings were conducted in the context of the old Civil Code. This solution, however, failed to get support from the public guardian. Also, as documents for the court were being prepared, N.I. realized that restoring her legal capacity would not mean that she would have more money since she was mainly limited by her income, not by the restriction on her legal capacity. N.I.'s public guardian talked her out of her original intention (to restore her legal capacity) and, based on their joint motion, the court suspended the proceedings right at the outset without any procedural steps.

We measure the result as a failure. Although she has given up her intention to restore her legal capacity "all by herself", it was mainly because she would have no chance to succeed against the will of the public guardian. Her original situation remained unchanged. This is not a compromise.

#### **4.3.4 *C.K.***

At the time of our cooperation, Mr. C.K. lived in a residential social service facility - a home with a special regime (DZR). He was deprived of his legal capacity and his guardian was the municipality represented by the mayor in the exercise of guardianship. The deprival seemed disproportionate to his situation and capabilities. The proceedings were conducted in the context of the old Civil Code. C.K. himself showed interest in changing the situation. During a personal meeting with our lawyer, it

was agreed to narrow down the restrictions on just property issues worth more than his monthly income (there was no sense in striving for more in a situation where he had no practical option allowing to leave the facility). The opinion of the facility staff gradually boiled down to "it's not worth it, it does not improve".

The documentation for the court was prepared in cooperation with our social worker and a psychiatrist collaborating in the project. The proposal was filed in October 2011. The legal argumentation pointed to the disproportion of the current restriction with regard to C. K.'s capabilities and the real risks.

In March 2012, Mr. C.K. expressed his wish not to carry on with the proceedings. In contrast to his original intention and desire to change, his attitude towards addressing his own situation came closer to the view of the social care service - it makes no sense, things won't improve. The benefit of a potential change of the decision would not, as he believed, outweigh the complications and stress associated with the necessity of going through an expert examination. Quip's lawyer therefore, in accordance with his wish, withdrew the application. We evaluate the result as a failure, since, while it corresponded to the current manifestation of C. K.'s will, it was completely contrary to his original conviction while nothing had changed in his actual situation.

#### **4.3.5 Mrs. I.R.**

The field social service, which was used by I.R., turned to us with the request for cooperation. I.R. was restricted on her legal capacity, with her mother as her guardian, very rigid in deciding about her affairs. I.R. had problems to cope with her mother's, on the other hand, she was very nervous and feared a conflict with her. The aim of I.R. was to restore her legal capacity and to negotiate and approve an agreement on decision-making support. The mother did not want any change.

The proceedings were initiated by the court in June 2014, in the context of the new Civil Code as a review. The request for assistance and consultation came just days before the scheduled proceeding. The cooperation was supposed to help explain the situation and provide information on the possibility of representation. Among I.R.'s friends was an experienced attorney, whom I.R. charged with representing. The essential legal argument for restoring her legal capacity was that the restrictions and guardianship were not, to this time, necessary, since the support I.R. was enjoying was sufficient to help her handle her affairs without being exposed to undue risk.

Both the proceedings and the trial itself were very stressful for I.R. In the imminent conflict, she would give way and confirm the statements of her mother - the guardian. Eventually, I. R. withdrew her proposal and the restriction remained unchanged. I. R. did not achieve her goal and therefore we consider the result to be a failure. It would not have been possible to go ahead with the proceedings and to put through her own ways, or at least to have her guardian replaced, without a conflict that would complicate their coexistence.

#### **4.3.6 Mrs. K.V.**

She was restricted on her legal capacity, the municipality was established as guardian. K.V. used the residential social service facility (DOZP) as well as our social rehabilitation service recommended by the social service in order to develop her social ties. Proceedings were initiated by the court in the context of the new Civil Code in July 2015, as a review. Upon consultations with the social rehabilitation staff, K.V. decided to use the situation for restoring her legal capacity and appointing

a guardian with no restriction. Neither her guardian nor the service were interested in any changes, K.V. had no support in her surroundings to help her achieve less restrictive measures.

A hearing took place with the participation of our lawyer and a social worker. We explained to K.V. the options available through the review procedure and offered her representation in the proceedings, which K.V. decided to accept. The social worker started preparing the documents needed for drafting a proposal of a suitable legal arrangement, especially a description of the necessary and accessible support in decision-making and legal actions. For this purpose, meetings with her public guardian and the service provider were arranged.

Eventually, the proposal was not drafted, as K.V. decided to discontinue the cooperation with our service. Therefore, our lawyer renounced the authorization to represent. We have no further reports on the progress or outcome of the proceedings. The result is considered to be a failure as we have no grounds to assume that the proceedings seeking to obtain less restrictive measures were pursued without our involvement.

#### **4.3.7 Mr. N.T.**

A social service (DOZP) turned to us for help. The reason was that a new guardian of their client, a brother-in-law who replaced the aging parents of N.T., did not discharge his guardianship duties properly. Over long periods of time he did not pay the subsistence costs nor other payments on behalf of N.T. When he was summoned by the court to pay the debt, it turned out that he no longer had N.T.'s money and was unable to explain where it had gone. Debt had to be paid in instalments. The new guardian attempted to solve the conflict with the residential service provider, especially with regard to payments, by giving notice to the service on N.T.'s behalf arguing he would take him to his home as the service was not working properly. However, N.T. had a very bad experience with visits to his guardian.

He would end up hiding from his guardian in the attic and threatening to jump down, and had to be rescued by ambulance. At no cost would he consent to living with him. Besides, he did not want to leave the place where he had been living so far and was used to and content. The guardian also sought to convert N. T. to his church, even though the latter wanted to remain in the church of his parents he was accustomed to. Basically, N. T. disagreed with whatever steps taken by his new guardian, perceived them as a great threat, sometimes even a restriction, to his personal freedom and integrity. He was scared of his guardian, trying to avoid any contact with him. The guardian never asked about what N. T. wanted, in the better case deciding without consulting him, or indeed against his clearly expressed will and interest.

Following to an unsuccessful dialogue with the guardian, the service turned to a court in January 2012 with an application for interim measures to prevent the guardian from terminating N.T.'s contract on residency service and with a proposal to replace the guardian. The proceedings were conducted in the context of the old Civil Code. The District Court upheld only the application for interim measures – it annulled the contract termination submitted by the guardian. Also, it took steps to improve the poor exercise of guardianship, but it dismissed the proposal to replace the guardian. The social service provider decided to appeal in this case, and in June 2012, he asked us to help with the preparation of the appeal.

Our argumentation was based on a detailed description and attest of the guardian's conduct, which was inconsistent with the proper exercise of guardianship and of all the rights of N.T. which were being violated or disregarded. The Regional Court acknowledged our arguments, annulled the decision of the District Court and referred the case back for reconsideration. However, the District Court did not comply with the Regional Court's ruling and, in November 2012, it decided just like for the first time. We started preparing a second appeal, which had a great chance to succeed as it coincided with the views and arguments of the Appeal Court. This time, the Court of Appeal would probably have decided on its own.

Meanwhile, the basic financial irregularities of the guardianship had been corrected and rules were set with the involvement of the District Court to ensure its proper discharge in the future. However, in the meantime the guardian developed a considerable initiative to consolidate his position. E.g., he exerted pressure on a family friend of N.T. and his parents, willing to assume the guardianship which N.T. strongly desired. The lady got scared by the pressure and withdrew her offer. Also, the guardian published a large article in local press, where he informed about the situation in a manipulative and even false manner (i.e., claiming that the parents of N.T. "hired a brilliant Jehovah's Witnesses lawyer" as they were members of the Church. However, this was our lawyer and had been solicited by N.T.'s residence provider. In this situation, the social service agreed with N.T. that they would not carry on with the proceedings, although N.T. desired to have a different guardian who he could trust, would like to be in contact with, and he could, above all, rely on for acting in his interest, even without the service provider keeping an eye on the situation.

We see the outcome as a compromise, because N.T.'s situation has improved. The guardian found himself under the scrutiny of the court, and the court made sure N.T.'s finance was properly handled, and the residence contract was not terminated. However, no change in the guardianship and no protection of other rights and interests of N.T. have been achieved.

#### **4.3.8 Mr. N. T. II**

N.T. was deprived of his legal capacity, and the municipality was appointed as guardian. The whole procedure was carried out in the context of the old Civil Code.

The deprival appeared to be grossly inappropriate for his situation, capabilities and health which had long been stabilized. He had once requested unsuccessfully to have his legal capacity restored. When he asked for cooperation, he lived in a home with a special regime but wanted to go to another facility with greater opportunities for social contacts outside. N.T., after talking to our lawyer, decided to seek to reduce his legal incapacitation to just financial issues in excess of the total of his monthly income (it was in this area that he needed help). N.T. was determined to pursue the goal, if need be by recourse to higher instances. The proposal to the court was drafted by our lawyer in cooperation with our social worker and psychiatrist involved in the ongoing project. The co-operation with the residential facility was good just thanks to a helpful key person.

The legal argument behind the proposal was that the current restrictions were inadequate to his capabilities and to real risks. The expert opinion requested by the Court seemed very unfavourable, but in the context of evidence, its conclusions were also confronted with a significantly different expert opinion of the psychiatrist. The findings of the expert were further challenged by the findings and the impression the Court acquired from N.T.'s hearing. The poor validity of the former opinion

was subsequently attested by hearing the expert, who admitted that a part of her conclusions did not rely on serious examinations, but rather on frequently used customary wordings.

The court did not fully uphold the proposal to restore the legal capacity but significantly increased the financial limit. In line with the proposal, it also formulated the entire statement in a negative way (by listing exhaustively where the restrictions would be placed), so even in other respects the disproportionate interference with N.T.'s rights was removed. Although we evaluate the outcome of the proceedings as a compromise, N.T. himself was satisfied with it and did not want to appeal.

#### **4.3.9 Mr. N.A.**

N.A. had long been deprived of legal capacity. Since the new Civil Code came into effect, he has been given an opportunity to perform legal acts in everyday matters. His primary goal was to change the currently used service, the "special regime home", where he no longer wished to stay in the long run. However, the guardian (his cousin) and the service provider consistently ignored his will. Having full legal capacity restored seemed to be a solution, which would help him return to his hometown.

The court initiated legal proceedings in the form of an appellate review in accordance with the new Civil Code. Our social worker began working with N.A. to help him find another social service, develop skills and map out the necessary support. We had been expecting further developments, such as a court order of an expert opinion. We regarded the lack of progress in the proceedings as a manifestation of the court's inactivity since the prolonged duration of the case did not exceed the usual delays. In May 2015, we finally sent a letter with a detailed description of N.A.'s situation, explaining that the guardian and the residential facility staff had been obstructing N.A.'s search for a new service, and that they did not respect N.A.'s wish to change his life. By return of post, we learned that the proceedings had already been closed and that the hearing had taken place in N.A.'s absence. For obscure reasons, a written authorisation of our lawyer to represent N.A. in court was missing from the file (despite verification that it had been sent). The court's decision retained restriction on legal capacity and confirmed the cousin as Mr. N.A.'s guardian. At the same time, the court ordered a re-examination of new information at a hearing under non-standard conditions<sup>30</sup>. A member of staff of the residential facility who had been summoned did not attend and N.A.'s attendance was not secured either.

The next hearing took place in the residential facility with the participation of our lawyer and a social worker, N.A., the guardian and the staff of the home. The judge was shocked by the state of affairs, by the lack of information from both the residential facility and the guardian, and the revelation that even basic documentation had not been passed on to N.A., and by the fact that his will and wishes had been ignored. The judge informed the guardian that a proxy is allowed to lodge an appeal in the matter of legal capacity, and urged her to take active steps towards addressing N.A.'s life situation, and cooperate with our staff. The judge also ruled out doubts as to the validity of the contract on provision of social service (social rehabilitation) which N.A. had concluded with us separately and against the will of the guardian.

The key finding that the judgment had not been passed on to N.A. (together with a number of other messages and documents) established the grounds for an additional appeal. N.A. eventually decided

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<sup>30</sup> Special type of informal hearing that can be held whenever it is necessary.

not to use this option. The abolition of restriction on legal capacity was not his priority. After a discussion with the judge, he had an impression that his main goal to leave the existing residential facility was realistic. Simultaneously, N.A. did not want to openly oppose the will of the guardian - his only relative, whose favour he did not want to lose. Moreover, the prospect of having legal capacity successfully restored were in the current regime of support minimal, given the inaccessibility of support in decision-making and performing legal acts - the cousin had categorically refused all contact with N.A. should he seek to leave the institution and the institution itself did not offer any support either. Hence, we see the result as a compromise: we managed to mobilize the court, which began to put pressure on both the guardian and the service provider to pass on information and take an active part in addressing N.A.'s life situation.

## **5 Discussion: factors of success and failure of court proceedings**

In order to evaluate our work, we consider it important to determine what we regard as a successful outcome, what as a failure, or what is in fact a compromise (see Chapter 3), always with reference to the legal cases in which we have assisted our clients. Bearing in mind this perspective, we then evaluate the causes and the main factors, which led to the given results.

### **5.1 Factors of success**

The following factors have been found to have played a crucial role in asserting the right to legal capacity and the application of support in performing legal acts, and has helped to overcome barriers in society and in court.

#### **5.1.1 Securing support and collaboration of close persons from natural environment**

The most intimate environment of the individual usually includes family members and other close persons as well as the social workers whose services the individual uses to manage his everyday life. The attitude of those most intimately associated with the individual was absolutely crucial in two ways. It is above all these most intimately related persons, the staff of community based centres and forward looking residential facilities that can create conditions for success in the individual's decision making and exercising legal capacity. In addition, these people can take an active part in legal proceedings and considerably facilitate success through their testimonies, expert opinions, etc. We have always sought to be in contact with these people and, if possible, to convince them to support a solution chosen by our client. This has proved to be a very important factor – the basis for success.

#### **5.1.2 Quality proposal for the court prepared by social worker and lawyer in collaboration**

Further, we needed to develop a well founded proposal for the court, supported by good legal arguments, which would be based on a safely functioning system of support (see Section 2.2.), which had by then been established. The courts should, of course, act on their own initiative (governed by the "investigation" principle), which is why the quality of the proposal should not be decisive for the outcome of the proceedings. However, our experience has unambiguously shown the opposite. In some cases, the service provider or family had started the proceedings without our collaboration and it was immediately obvious that the case was heading for disaster. Once they had turned to us

for help, we began to collaborate and, having jointly prepared solid legal and factual arguments for submission to court, we managed to completely overturn the course of the proceedings.

### 5.1.3 *Appeals*

Appeals to courts of higher instance sometimes played an equally decisive role in achieving the desired goal. The courts didn't prove to be an insurmountable obstacle provided the person was able and willing to bring the matter to a close - in two cases it took almost four years. This primarily depended on whether the person was receiving support from his natural surroundings and whether his health condition permitted it. Even Mr. E.L., whose case is described in the previous chapter, eventually succeeded in having legal capacity restored in the new proceedings launched under the new Civil Code (all it took was one appeal to the regional court). In two cases, we only succeeded after appealing to the Supreme Court.

## 5.2 *Factors of failure*

What we regard as a failure, is not only losing the case in court but losing it for the following reasons - failure to make use of the potential to improve the legal status of the people, although such potential was factually and legally available. In this regard, we have identified the following factors:

### 5.2.1 *Lack of support and adjustment of the person's attitude to the opinion of close persons in his natural environment who disapprove of his efforts*

In the case studies described in chap. 4.3, it is possible to trace the person's change in approach to solutions of his own situation which was clearly in line with the opinion of his family, his guardian or the staff of the residential facility whose services he used.

People often lacked support in their decisions, or they faced open disagreement of close or important people. For example, the permanent guardian of Mrs. K.R. did not want her to take further steps (appeal to the Supreme Court) and accepted the decision of the court as appropriate. K.R. decided not to continue because she felt she had no chance of success without her guardian's support. Mrs. N.I.'s public guardian dissuaded her from her initial intention to sue to have legal capacity restored. The staff of the facility gradually adopted a uniform opinion "there is no point, nothing will improve", and Mr. C.K. ceased to strive for a more significant reduction of restricted legal capacity. Ms I.R. kept yielding to the opinion of her mother/guardian during the proceedings, because insisting on the changes would have caused a conflict with her. Mrs. K.V. did not get any support from close people in her surroundings to secure a less restrictive regime. The staff of Mr. N.T.'s residential facility persuaded him to agree not to take the next step i.e. lodge an appeal at a time when his guardian started paying for his services, and the court overturned the guardian's dismissal. Mr. N.A. did not want to openly oppose the will of the guardian, who was his only relative, and hence he decided not to make use of the right to appeal.

It is understandable that people should adjust their attitude to fall in line with the wishes of close persons. The conflict that would arise should they insist on their original intention could create a long-standing conflict with these people, or even deprive them of key relationships or assistance in everyday life.

The atmosphere in the residential facility can have a decisive effect on clients' goals as demonstrated by comparing the experience of working with a traditional institution with that of working with

a progressive residential service (see Chapter 2.4). In the first two years of the period under review (i.e. before the new Civil Code came into effect), the DZR (Special Regime Home) residents were usually only interested in partial restoration of legal capacity. According to the project report, the DZR "*did not meet the prerequisites for seeking full restoration pursuant to § 29. In general, it is also difficult to establish the quality of support due to poor collaboration, and/or very limited (next to no) participation of the institution*" (Strnad, Kořínková, & Johnová, 2011). During the same period the residents of both the DOZP (Home for Persons with Disability) and the CHB (sheltered living) demanded - with the support of the staff of these facilities - restoration of legal capacity and appointment of a guardian without restriction.

Unfortunately, the situation of Mr. N.A. is a typical example of the predicament many people face. He encountered a strictly negative attitude on the part of his only relative who was also his guardian, and even the DZR did not provide him with support in his effort to restore legal capacity, the purpose of which was to fulfil his only wish - return to the town where he had spent his entire life before hospitalization. In a small, isolated village, there were no opportunities for the N.A. and DZR residents to establish new natural ties that they could use as support in decision-making and exercising legal capacity. Such people are thus trapped in a hopeless situation. They do not get the necessary support to lead an independent life but also lack support in their efforts to restore their legal capacity.

### **5.2.2 *Restricted ability to take decisions and exercise legal capacity, exclusion from natural environment***

Another factor that played a role in people's decision to curtail proceedings (e.g. forego the right to appeal), apart from the fear of losing social ties or support in everyday life, was the feeling that having legal capacity restored would bring no if any practical benefit. Living in a small village, which provided no opportunities to take part in any activities outside the residential facility and having no hope of returning to the town he came from, Mr. C.K. concluded that "there's no point, it won't make any difference in my life". Ms. N.I., a resident of another institution, realized that having legal capacity restored would bring her no financial benefit and thus gave up trying to improve her legal status. There were more people living in the above-mentioned residential facilities who had taken part in our project *Quality of Life as a Goal* who were of the same opinion.

In these cases, the potential practical benefit of partial or full restoration of legal capacity did not make up for the stress and discomfort involved in taking legal action.

### **5.2.3 *Stress caused by court proceedings***

All our clients except one experienced extreme anxiety during court proceedings. Sometimes the anxiety continued throughout the whole process, sometimes only in the early stages, provided their first experience with taking legal action was positive. Intense anxiety further severely affected their relatives and close persons as well as support persons from social services. The main source of anxiety was the need to appear in court in person, which made them feel as if they were being examined, and not knowing what to expect or how they might be viewed by those present (judges, prosecutors, experts, witnesses, guardians, court lawyers, etc.) was also deeply disturbing.

Some situations were clearly extremely uncomfortable or even demeaning (see, for example, chapter 4.2). If the proceedings took a long time, especially due to appeals, and if repeated oral hearings

were required, intense anxiety also led to health problems. This was the case of Mr. E.L., who received support in decision-making, taking legal action, and in the decision to defend his claim to have legal capacity restored in court. Nevertheless, after 27 months and two appeals, he and his family decided not to appeal to the Supreme Court. He eventually succeeded in having legal capacity restored in another trial, which commenced as an appellate suit conducted according to the new Civil Code, which lasted "only" 11 months and required only one appeal to the regional court.

Anxiety associated with court proceedings in combination with inadequate support was a major factor in at least three other people's decision to curtail legal action.

## 6 Conclusions

### 6.1 Our approach has brought success

Judging by the course, results, and overall success of individual court cases, we believe that our concept of individual assistance to people in their efforts to restore or maintain legal capacity has proved to be successful. The combination of legal aid and social work has made it possible to use the new support measures introduced by the new Civil Code, propped up by a structured system of support appropriate for the situation and needs of a particular person.

### 6.2 System barriers

Apart from the findings presented and discussed in previous chapters, we have also encountered a number of more general issues or circumstances that significantly affect a realistic chance for people to exercise their right to full legal capacity (i.e. the right to make and implement decisions with legal consequences). Such circumstances can occur in both stages of the process, i.e. both in maintaining or restoring legal capacity and in making decisions and implementing them.

If an approach based on respect for all human rights, will and wishes of an individual as embedded in the Convention and the new Civil Code is to succeed, it is essential that people have access to the support they need in their lives, both in decision-making and exercising legal capacity, and in implementing other, more general decisions. For the successful implementation of such decisions they also need a friendly social environment, with access to all social services available to the general public.

#### 6.2.1 Availability of support in decision making and in using the Civil Code instruments

During the court cases analyzed above we saw that people living in traditional residential facilities do not usually have the necessary support in decision making. This may be partly due to the fact that the chances of making decisions in conditions of institutional services can be very limited, which precludes making decisions about the most important things (where, with whom and how I want to live). Professional support provided in the institutional environment frequently acts as a substitute for individual decision-making instead of enhancing it. However, a person can also face similar circumstances while living in a home environment.

As long as people live in a residential setting over a long term, they do not usually have access to any source of natural support, i.e., relationships with close persons based on mutual trust. The residential setting considerably limits their choice of usable instruments of legal support offered by the new Civil

Code. The new measures, which are based on full legal capacity, assume that there are close persons who can provide support in performing legal acts; besides they rely on the involvement of more than one person, as is the case with guardianship. Involving more people is a major safeguard against abuse. Representation by a member of the household is only relevant for relatives and persons living in a common household. An agreement on support in decision making is designed for close persons, although it can also be made by a public guardian. However, we have as yet encountered no such case. Unless close persons are available, the only option left for people with disabilities is guardianship without restriction of legal capacity exercised by a public guardian. Nevertheless, we have come across a situation where a public guardian was afraid to take up such a position since he could not exercise the kind of control over the person which he would have in case of a person who has been deprived of legal capacity.

It would appear that the solution to the problem of lack of support in exercising legal capacity lies primarily in ending the ongoing systemic segregation and isolation of persons with disabilities by placing them in residential facilities, which is a practice that frequently causes a complete break with their natural environment and all natural ties. Furthermore, social workers should focus on supporting people in maintaining and developing natural relationships. Last but not least, we should encourage the establishment of organizations that can be the source of support for people who currently have no close relationships which are required if the new measures provided by the Civil Code are to be exploited as is the case in many countries. These are voluntary organizations whose services are paid for by public funds and who find support persons who can enter in agreements on support in decision making or guardianship without restriction of legal capacity.

### ***6.2.2 Opportunities and support for implementation of decisions and legal actions***

Natural or professional support needs to be available to a person not only to help him make a decision, but also to enable him its implementation. For example, if a person chooses to leave the residential facility for his own home in a place where he comes from, he needs to find support in the chosen place of residence. Secondly, he must be able to find suitable accommodation and have the kind of income that covers his basic living needs (e.g. disability pension) as declared in the Charter of Fundamental Rights and Freedoms<sup>31</sup>.

However, in our experience, these conditions are rarely met. People do not have access to adequate field services (especially support in finding independent housing or assistance) or the necessary financial means to pay rent and cover their basic living expenses. The amendment to the Social Services Act has already recognized the fact that users "object to being placed in residential facilities". However, leaving the matter within the competence of the courts is not a solution. What we need to do is provide the people with realistic alternatives. Neither the residential service provider, nor the guardian or the court will then have to deal with the question of a clearly expressed

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<sup>31</sup> See Art. 26 (3): Everybody has the right to acquire the means of his or her livelihood by work. The State shall provide appropriate material security to those citizens who are unable without their fault to exercise this right; the respective conditions shall be set by law; Art.30 (1): Citizens are entitled to material security in old age and during incapacitation for work, as well as in the case of loss of their provider.

will of a person not to live in a residential facility. There will be no need to involve the courts and no need to cover the related cost, as none will be incurred.

The absence of a practical option to make a decision followed by a legal action designed to implement the decision weakens the desire and will of the person and his close people to seek to restore or maintain his legal capacity. In such circumstances, the very motivation for both decision-making and providing support is lost. Such effort can only have a meaning for the person provided it can have a practical impact on his living conditions and enhance his ability to manage his own affairs. This clearly shows the interdependence of the right to control one's life (Article 12 of the Convention) and the right to independent living and integration into society (Article 19 of the Convention).

### **6.2.3 Attitudes of society**

A major obstacle to finding solutions in individual cases may lie in prevailing social attitudes. Rigid attitudes can be encountered among all stakeholders - service providers, authorities, families and courts. Unless social attitudes change, persons with disabilities will continue to remain without support and with restricted legal capacity.

## **7 Acknowledgments**

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## 9 Annex 1: Overview of all cases included in the analysis

Person's initials	Region	Year of commencement	Goal 1: legal capacity	Goal 2: less restrictive measure	Goal 3: other	Number of appeals	Outcome	Number of months
E. L. II	OI	2016	Restoration	Representation by household member		1	Success	11
J. D. II	HMP	2016		Guardianship		0	Success	4
C. T.	SK	2015	Restoration	Support		0	Success	6
P. V.	SK	2015	Restoration	Support		0	Success	4
B. M.	ÚK	2015	Restoration	Support		0	Success	10
K. V.	HMP	2015	Restoration			0	Failure	N
M. T.	SK	2014	Restoration	Support		1	Success	11
P. K.	SK	2014	Restoration	Support	Guardianship	0	Success	11
P. G.	SK	2014	Restoration	Support		0	Success	7
N. A.	SK	2014	Restoration		Resolution of conflict with guardian	0	compromise	N
I. R.	HMP	2014	Restoration	Support		0	Failure	N

J. H.	HMP	2014	Preventing restriction	Guardianship		0	Failure	8
J. K.	JČ	2013	Preventing restriction	Support	Help in applying non-liability for dismeneanour	0	Success	9
N. I.	SK	2013	Restoration	Guardianship		0	Failure	N
N. S.	HMP	2012	Preventing restriction	Guardianship		0	Success	5
J. D.	SK	2012	Restoration	Guardianship		2	Success	30
A. V.	HMP	2012	Restoration	Living well		0	Success	27
D. D.	OI	2012	Preventing restriction			0	Success	11
H. K.	SK	2012	Restoration	Guardianship		0	Success	21
J. K. II	SK	2012	Restoration	Guardianship		0	Success	20
M. V.	SK	2012	Restoration	Guardianship		2	Success	28
N. T.	SK	2012			Prevent abuse by guardian, replacement of guard.	1	compromise	12
M. K.	SK	2011	Restoration	Guardianship		2	Success	34
V. V.	SK	2011	Restoration	Guardianship		2+1	Success	46

L. K.	SK	2011	Partial restoration			0	Success	15
K. R.	SK	2011	Restoration	Guardianship		1	Failure	21
C. K.	SK	2011	Partial restoration			0	Failure	N
N. T. II	SK	2011	Partial restoration			0	compromise	8
R. H.	KV	2010	Restoration	Guardianship		2+1	Success	46
Š. T.	KV	2010	Restoration			0	Success	8
J. H. II	SK	2010	Partial restoration			0	Success	6
A. M.	SK	2010			Replacement of guardian	0	Success	N
E. L.	Ol	2009	Preventing restriction	Guardianship		2	Failure	27

## **10 Annex 2: New legal instruments applied in the described cases**

The new Civil Code established new measures<sup>32</sup> to serve people in the event of reduced ability to make decisions and to exercise legal capacity. These are measures that do not restrict a person's legal capacity. We use these tools or their combinations in our case work.

### **10.1 Preliminary Declaration**

The preliminary declaration<sup>33</sup> is a precautionary measure. It is a binding manifestation of an individual's will made in advance in case he was later unable to manage his own affairs due to inability to exercise legal capacity.

The preliminary declaration can be used, for example, by people who suffer from mental illness or some other kind of progressive dementia and realize that, due to their illness, they may suddenly encounter situations in which they will not be able to exercise legal capacity. However, the measures are otherwise intended for the general public and are commonly used abroad. They enable people to arrange their affairs in advance in case they should find themselves in such a situation, i.e. as a result of accident, stroke, etc. A person can make a preliminary declaration about: his property and the way it should be managed, and/or by whom, or, if need be, who should be appointed the person's guardian.

A preliminary declaration needs to be made either before a notary (in the form of a public instrument) or before two witnesses (in the form of a private deed) and with the use of the chosen method of communication<sup>34</sup>. A declaration of an appointment of a guardian drawn up in the form of a notarial deed is entered in the register maintained by the Chamber of Notaries. When deciding on the appointment of a guardian, the court is required to establish whether such a declaration is included in the register<sup>35</sup>.

Provided the form is kept, the manifested will with regard to the respective decision is binding. If a guardian is to be appointed, the court addresses the designated person while in other matters it decides whether the conditions specified in the declaration have been fulfilled. The court has the right to change or cancel the declaration only if there has been a material change in the circumstances compared to those in which the person found himself when he made the declaration, which would involve him in serious risk of harm to himself. On the other hand, though, provided there is no reason to doubt the will of the person, the court will take into account the otherwise invalid declaration or its abrogation<sup>36</sup>.

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<sup>32</sup> CC, sec. 38 - 54

<sup>33</sup> CC, sec. 38 – 44

<sup>33</sup> CC, sec. 39 and 40

<sup>34</sup> Act No. 292/2013 of Coll., On Special Court Proceedings (hereinafter ZZRS), sec. 47

<sup>33</sup> CC, sec. 43 – 44

The purpose of the new measures is to ensure that people are able to make decisions about their lives and guarantee security of performing legal acts even in situations in which they no longer have legal capacity.

## 10.2 Agreement on support in decision-making

Support in decision-making<sup>37</sup> is a fundamentally new measure that can be applied in cases of people whose legal capacity has been restricted. It is an agreement concluded by a supported person with one or several supporters.

The supported person is an individual whose mental state causes him difficulty in decision-making but there is no need to restrict his legal capacity. As stipulated in the agreement, the support person vows to assist the supported person in decision making, provide legal advice and information. Simply said, a person with a mental disorder continues to act on his own behalf, but since the supporter is involved in the decision making as stipulated in the agreement there is no reason to restrict the person's legal capacity. The support person is, in fact, a kind of "compensatory aid" for the supported person.

The agreement can describe in greater detail the circumstances and the manner of providing support so that it corresponds to the situation and the mutual arrangement of a particular person and his supporter. This is especially important if there are several support persons. On the other hand, though, a greater number of supporters is beneficial in terms of their interchangeability and mutual control. Unlike cases of guardianship, a social service provider is not excluded from acting as a support person. Such a solution is not optimal, but with a plurality of supporters, potential conflicts of interest can be ruled out in some situations<sup>38</sup> by agreement, alternatively you can resort to the terms of agreement if the person lacks natural social ties.

The support person acquires two very important powers. First of all, he has the right to be present during legal proceedings, provided the supported person agrees. Therefore, his presence is not an obligation but if the supported person gives consent, he can insist on it even against the will of the other party (for example a doctor, a bank, an official ...).

The second key element of protection is the right to demand in court the abrogation of a legal action of the supported person. Hence, should the supported person be damaged by taking legal action without participation of the stipulated support person or against his advice, the support person may request that the court declare the hearing void on general grounds for abrogation<sup>39</sup>.

The agreement comes into effect upon court approval, and the termination of support also occurs only with the knowledge of the court, i.e. upon the supporter's<sup>40</sup> dismissal.

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<sup>37</sup> CC, sec. 45 - 48

<sup>38</sup> E.g. conclusion of a contract on the provision of social service

<sup>39</sup> E.g. non-validity due to acting in mental disorder, profiteering etc. see CC, sec. 580 and subsequent. The most common reason would be acting in mental disorder whose presence is being identified in the process of approving the agreement on support in decision making.

<sup>40</sup> Be it dismissal proposed by the supported person, by the guardian himself or on the court's initiative in case of his failure.

### **10.3 Representation by a member of the household**

Representation<sup>41</sup> by a member of the household is a form of representation reserved for close persons<sup>42</sup> in a situation where the mental disorder prevents the adult from exercising legal capacity in ordinary matters.

Compared to guardianship, representation by a member of the household is narrower and is, however, agreed on by a simpler process. The court, which deliberates to approve the proposal, is always obliged to exert the necessary effort to establish the opinion of the represented person, and use the method of communication chosen by the person that is being assessed. The latter has the right to turn down representation as long as he has the ability to express such a wish.

The scope of representation is restricted to a range of ordinary matters. A representative may use all the necessary means to provide these, but has limited access to funds in the account. The definition of ordinary matters primarily depends on the living conditions of the represented person. The representative has absolutely no right to give consent to any interference in the physical or mental integrity of the represented person that may have permanent consequences<sup>43</sup>.

There can be several representatives, which is particularly practical when handling ordinary matters. The institute of representation serves as a substitute for the power of attorney whenever the existing mental disorder may cast doubt on its validity.

### **10.4 Guardianship without restriction of legal capacity**

The appointment of a guardian without restriction of legal capacity was provided for by the old Civil Code as well. Even before the new Civil Code came into effect, the courts could decide in accordance with the adopted Convention and thus help eliminate one of the obstacles faced by people with disabilities on their way to a full and satisfying life.

Within the range of the powers approved on his appointment, the guardian becomes a representative (proxy) of his legal ward. This means that he acts on behalf of and on account of his ward in a limited range of matters. The rights and obligations of the ward ensue directly from the legal acts performed by the guardian.

The Civil Code stipulates that a court shall appoint a guardian if the person's interest or public interest so requires and provides an exemplary list of the main reasons. These include situations in which a person's health condition causes him difficulties in managing his assets or defending his rights, and in which the court has restricted his legal capacity.

For a person to have a guardian appointed at all there must be grounds, i.e. a need to represent the person in a specific range of matters. Restricted legal capacity is an important reason but it is not necessary for a guardian to be appointed. On the contrary, the law gives priority to appointing

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<sup>41</sup> CC, sec. 49 - 54

<sup>42</sup> CC, sec. 49

<sup>43</sup> CC, sec. 52 (1). Even the authorization of the guardian does not suffice, such action would be subject to a proceeding court approval.

a guardian for a person without restricting his legal capacity<sup>44</sup>. The need to secure the required representation for a person is far more important and also more common than the need to establish the right to future abrogation of his legal actions by restricting his legal capacity, which rarely has a positive effect on his situation.

Therefore, there is only one guardianship as an institute, for the performance of which the same rules apply, irrespective of whether the ward's legal capacity is preserved or restricted<sup>45</sup>. The court may always appoint a guardian without restriction of legal capacity, and that even without a proposal. Special rules, which further enhance the ward's will and his control over the enforcement and the duration of the guardianship are then applied when the guardian is appointed on the ward's proposal and the court does not interfere in his legal capacity<sup>46</sup>.

## 10.5 *Board of guardians*

The new Civil Code introduces the possibility to set up a board of guardians<sup>47</sup> to enhance the protection of the rights and interests of a person represented by a guardian. The board of guardians can be made up of close persons from the immediate surroundings of the represented person, and it is supposed to supplement and balance the performance of the guardian. This makes the guardian's activity more transparent, allows for his activity to be checked, and provides a platform that gives the opportunity to a larger number of people who represent the person to air their views. This makes it possible both to take into consideration various interests of the represented person as well as prevent potential manipulation, for which considerable space is created if the individual is only represented by one person with comprehensive powers.

The law stipulates that the guardian is not allowed to take decisions on a number of important matters without the consent of the board of guardians. Such matters include a change of the ward's residence, his placement in a closed institution or similar facility, or consent to treatment, which may have potentially serious consequences. Similarly, without the board's consent, the guardian is not allowed to deal with the ward's property, whether it involves its acquisition or alienation, taking out or granting a loan, credit or principal whose value would exceed an amount stipulated by law. Should it be in the ward's interest, the board of guardians may determine which other decisions regarding the ward's affairs may lie within the realm of their competence. If the board of guardians cannot be set up for lack of interest on the part of a sufficient number of close persons or for other similar reasons, the court may rule that the powers of the board shall be exercised by one person<sup>48</sup> only.

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<sup>44</sup> CC, sec. 55 and ZZRS, sec. 39

<sup>45</sup> CC, 465 and subsequent sec.

<sup>46</sup> CC, sec. 469

<sup>47</sup> CC, 472 and subsequent sec.

<sup>48</sup> Comp.: Dobrá praxe opatrovnictví a poskytování podpory při právních úkonech a při rozhodování (Good Practice of Guardianship in Exercising Legal Capacity and Decision-making), MPSV, 2013, Team of authors: Dana Kořínková, Milena Johnová, Radka Čebišová, Rela Chábová, Veronika Škopová

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