

11 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in the Republic of Finland

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Introductory remarks

Finland is a democratic state governed by the rule of law, with the Constitution (731/1999, in Finnish: *perustuslaki*) giving every individual strong protection for human dignity, self-determination and integrity, in addition to other fundamental rights. The rule of law is based on legislation that protects fundamental and human rights and is applied in independent courts and authorities. Finland is committed to complying with international human rights treaties and EU provisions on fundamental rights.¹

When a person is able to make decisions that affect his/her rights and duties, he/she is said to have a legal capacity and competence – i.e. to manage assets and enter into legal transactions (in Finnish: *oikeustoimikelpoisuus*). Competence and capacity of a person are deemed as cornerstones of a well-functioning democratic state that is governed by the rule of law. The main rule is that each has a right of exercising free will, and each person is respected as an autonomous rights-holding agent.

In Finland, the state's responsibility to promote welfare, health and security is rooted in the Constitution. This enshrines the right of everyone to income and to care, if they are unable to manage adequately.² Accordingly, the *Finnish legal system protects individuals in case they lose their ability to make sound decisions concerning their assets or personal issues. Guardianship services are part of the protection that society has organised for children, elderly and the disabled, and it is for those people who are without support and assistance unable to take care of their affairs.* The legislation on guardianship (in Finnish: *edunvalvontaoikeus*) defines provisions and principles according to which the matters of an individual in need of support (a ward, in Finnish: *päämies*) are taken care of.

The legislation on guardianship and the guardianship system were reformed in 1999. The previous Guardianship Services Act had been in force just one month shy of 100 years. It severely restricted the financial activities of the ward. He/she essentially lacked legal capacity, with the exception of certain very minor juristic acts. The old law clearly reflected substituted decision-making and not supported decision-making. *Ahti Saarenpää* has written that typical of the attitudes and practices associated with the previous act were the subjugated state of the ward and society's lack of interest in guardianship as an issue. As late as the 1970s, the Parliamentary Ombudsman was forced to conclude that guardianship was

1 See the webpages of a Finnish government, <https://valtioneuvosto.fi/en/marin/government-programme/safe-and-secure-finland-built-on-the-rule-of-law>.

2 <https://stm.fi/en/social-and-health-services/legislation>.

the area of public administration that was most poorly handled. The primary responsibility for guardianship at the time laid with the municipal guardianship boards. As Saarenpää has further noted, they were political boards, but not awakening interest in political parties. As the legislation was amended, the responsible official in guardianship is the Register Office. This is a government authority whose principal duties are registration-related matters. Since 2020 those offices have been parts of the Digital and Population Data Services Agency (www.dvv.fi).³

The provisions concerning the organisation of guardianship are included in the Guardianship Services Act (442/1999, in Finnish: *bolhoustoimilaki*).⁴ There is also a separate act dealing with the continuing power of attorney (648/2007, in Finnish: *laki edunvalvontavaltuutuksesta*).⁵ Naturally, the latter act is a part of the guardianship legislation as the continuing power of attorney can replace and complement the legal guardianship. Even though the continuing power of attorney is deemed as a civil law authorisation, its purpose and mainly also its legal effects are the same as the legal guardianship according to the Guardianship Services Act. Provisions of the Guardianship Services Act on personal matters are only few and for instance the status and rights of medical patients and clients of social services are protected by the Act on the Status and Rights of Patients (785/1992)⁶ and the Act on the Status and Rights of Social Welfare Clients (812/2000).⁷

Today the guardianship legislation can be deemed as a safeguard of autonomy and personal liberty. Here private law and human rights interconnect and share the aim of protecting vulnerable individuals and giving them a right to self-determination to a highest degree possible. Thus, the present Guardianship Services Act proceeds from essentially the opposite premise to its predecessor. Stigmatising concepts in guardianship legislation was decreased. *The ward is a principal, who should be served by a guardian.*

A concept of active legal capacity in Finland and organisation of guardianship services

I. Minors

A capacity of a minor is limited and it is not full until person reaches majority. If a person is under 18 years of age, he/she needs a legal representation in order to enter into binding legal transactions. Each child has a guardian whose duties include looking after the child's financial interests. The custodians (in Finnish: *huoltaja*) of a minor are his/her guardians unless the court appoints another person for the task. Therefore, the main rule is that custodians of a minor are also responsible for the administration of the child's property as

3 For the development of the Finnish guardianship legislation, see Ahti Saarenpää, Henkilö- ja persoonallisuus-oikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 299–390, 328–329. The article can be found, <https://docplayer.fi/329246-Henkilo-ja-persoonallisuus-oikeus.html>.

4 In English, <https://www.finlex.fi/fi/laki/kaannokset/1999/en19990442.pdf>.

5 In English, <https://www.finlex.fi/fi/laki/kaannokset/2007/en20070648.pdf>.

6 See especially § 6 of the Act for the Patient's Right to Self-determination. The act can be found in English: https://www.finlex.fi/en/laki/kaannokset/1992/en19920785_20120690.pdf.

7 For the access to justice and protection of disabled individuals in different procedures, see Finland's initial report on the implementation of the convention on the rights of persons with disabilities, pp. 18–20. The report can be found in <https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606>.

guardians of the child (the Guardianship Services Act, § 4). It is possible, though, that a special guardian is appointed in order to administer the child's property.⁸

When a person is under 18 years of age, he/she is, thus, competent to enter into transactions if they are – in view of the circumstances – usual and of little significance (the Guardianship Services Act, § 24). For instance, if a child enters a contract concerning necessities, the contract is usually valid and enforceable.⁹

In addition, a person who is over 15 years of age may enter into, terminate or cancel an employment contract. A minor also has a right to administer his/her own earnings and may dispose of this property by a will (the Inheritance Code (40/1965), chapter 9, § 1 and the Guardianship Services Act, § 25). Furthermore, a child has the right to decide upon how he/she is medically treated if he/she has reached an age and maturity which allow him/her to understand the treatment and the consequences of it (the Act on the Status and Rights of Patients, § 7).¹⁰

II. *Adults*

If an adult – due to illness or some other comparable reason – is unable to take care or look after of his/her financial interests or personal matters, a guardian is appointed to support a ward in decision-making or – under certain circumstances – even to make decisions on behalf of a ward. A guardian may be nominated in case a person is disabled because of for instance a degenerative neurological disease which has weakened his/her capacity.

In addition to financial affairs, a guardian has to make sure that the ward is suitably treated and receives proper care and rehabilitation (the Guardianship Services Act, § 42).

III. *Appointment of a guardian*

A private person may be appointed to the task of a guardian in case he/she consents and has sufficient skills for the task (the Guardianship Services Act, § 5). In the assessment of suitability, the skill and experience of the nominee and the nature and extent of the task is taken into account.

Previously, guardianship was mainly an arrangement managed by the family and extended family, and still, there are many cases in where a spouse and children manage an elderly person's affairs as his or her ability to do so declines. It is usual that a child or

8 Custody of a child covers matters relating to the person of a child. Custody can be decided on the basis of marriage, a court decision or an agreement between the parents. Custody of a child can be exercised either jointly by the parents of the child or by only one of the parents. The purpose of child custody is to ensure the well-being and balanced development of a child in accordance with the child's individual needs and wishes (see § 1 of the Act on Child Custody and Right of Access [352/2019]). See the webpages of Digital and Population Data Services Agency, at dvv.fi, stating that 'the guardians of the minor are usually the minor's parents, who have custody of the minor. If two people have custody of a minor, both of them are guardians regardless of which parent the minor lives with. They must take care of the duties of a guardian together. Sometimes, a person who does not have custody of the minor may be appointed as the guardian. The same responsibilities apply to all guardians of minors'.

9 See also Kirsti Kurki-Suonio, *Parental responsibilities – Finland*, Commission on European Family Law, <http://ceflonline.net/wp-content/uploads/Finland-Parental-Responsibilities.pdf>.

10 For the right to self-representation of a child in civil, criminal and administrative proceedings, see Tuulikki Mikkola, *Family and succession law in Finland*, Wolters Kluwer, Warszawa, 2018, pp. 26–27.

a spouse/partner or other person close to the person in need of support and help will be nominated to the task of the guardian. Thus, a guardian cannot perform transactions on behalf of a ward in which he/she – or a person close to him/her – is a party. In order to perform these transactions, a substitute guardian is needed.

Not all persons in need of support are in a relationship or even have other close relations.¹¹ With the decline of the family and its significance, for over 100 years – starting in the big cities – *public guardianship* was arranged such that the guardian is not a private individual but a public official. Today, the public guardian is usually a public official employed by a public guardianship office.¹² The public authorities must ensure that every needy person has access to the services of a public guardian close to where they live. In some regions a public guardian may be employed by a provider of outsourced services (Act on Districts for Legal Aid and Guardianship, 477/2016).

However, arranging guardianship through the public guardianship is not without problems as here we are talking about a large-scale activity. The public discussion on guardianship mostly focuses on the limited public resources available for guardianship in general or for the supervision of the guardians. A single public guardian can have an average of over 200 principals. Previously, when municipalities bore the responsibility for guardianship, the number of principals per guardian was even higher, but caseloads have declined somewhat since the Parliamentary Ombudsman reviewed the situation and strongly emphasised that guardians should know each ward at least somehow. This derives from the obligation of the guardians to cooperate with each ward to the highest degree possible.¹³

IV. *Tasks of a guardian, different levels of competency and the ward's right to self-determination*

In applying Finnish guardianship legislation, it is important to note that there are two leading principles. Firstly, *a person has a right to self-determination* (in Finnish: *itseäänäärämis-oikeus*) which means an equal right of every capable person to make decisions in issues concerning him or her. On the other hand, *a person has a right to protection*. In case an appointment of a guardian is considered necessary, any interference in the status of the person in question occurs in accordance with the principle of minimal interference. An individual's rights may be restricted *only to the extent that is necessary* to safeguard his or her interests and rights.¹⁴ Legal competence is therefore not deemed in a black-and-white manner or as an either/or concept. *Competency can be supported and restricted at different*

11 It has been estimated that some 32,000 people with dementia are living alone in Finland, some of whom are truly lonely with no safety net to protect them. See A. Mäki-Petäjä-Leinonen, Protecting a person with dementia through restrictions of freedom? Notions of autonomy in the theory and practice of elderly care, in: *Subjectivity, citizenship and belonging in law: Identities and intersections*, eds. A. Griffiths, S. Mustasaari, A. Mäki-Petäjä-Leinonen, Routledge, London, 2017, pp. 146–170, at p. 164, with references.

12 The Handbook on Public Guardianship Services (2020) describes the activities, principles and values of the public guardianship offices. The Handbook contains recommendations on how public guardianship services should be provided so that they protect the clients' interests in the best possible manner. The Handbook is available in Finnish and Swedish at the Institutional Repository for the Government: <https://julkaisut.valtioneuvosto.fi/handle/10024/162426>.

13 Ahti Saarenpää, Henkilö- ja persoonallisuus-oikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 348–349.

14 Hanna-Maria Niemi, The use of human dignity in legal argumentation: An analysis of the case law of the Supreme Courts of Finland, *Nordic Journal of Human Rights*, 2021, vol. 39, pp. 280–299.

levels, at all of which the principle of respect for human dignity must be considered in light of the circumstances of each individual case.¹⁵

At the first level, a guardian only *supports* a ward in his/her transactions. The ward's own competency is not restricted by the appointment of a guardian and does not lead to disqualifying the ward entering into transactions by himself/herself. The second option is to restrict ward's competency but not more than what is necessary in order to protect the ward's interests. There are three possibilities in this respect. Firstly, a ward may enter into a transaction only in conjunction with the guardian, or a ward is not competent to enter into *certain* transactions or to administer *certain* property. The third option is that a person is declared incompetent (see the Guardianship Services Act, § 18). Declaring a ward incompetent is seldom used in Finland.¹⁶

A restriction of competency of a ward becomes relevant principally when it is known that the individual in question, in spite of his/her condition, is actively and clearly against his/her own interests making transactions that weaken his/her financial position, such as by donating assets or by incurring debt. Competency must not be restricted more than what is necessary for safeguarding the interests of that person.

The rationale behind the legislation is not to restrict the rights of an individual unnecessarily and therefore restrictive use of a guardianship is always the last resort (necessity principle). *A guardian cannot be appointed if one's affairs are properly managed in other ways* (the Guardianship Services Act, § 8.1).¹⁷ The court as well as the guardianship authority generally requires further evidence of the need for the appointment of a guardian, in practice information on the individual circumstances of the person and proof indicating that the person's problems could not be solved by less restrictive means. An individual cannot therefore be forced into guardianship against their will where they have made suitable arrangements on their own in an acceptable manner – for example, if a person has invested his/her assets with the assistance of a bank.¹⁸ This, as well as the requirement for specific-

15 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 337–338.

16 See more closely Tuulikki Mikkola, *Family and succession law in Finland*, Wolters Kluwer, Warszawa, 2018, pp. 28–29, with references, and also Finland's initial report on the implementation of the convention on the rights of persons with disabilities, pp. 16–18. A person who has been declared legally incompetent may, however, self-decide on matters pertaining to their person, if they are able to understand the significance of the matter. An incompetent person may enter into transactions which, in view of the circumstances, are usual and of little significance. An incompetent person has the right to decide on the proceeds of their own work earned during the incompetency.

17 See Salla Silvola, *Finland*, <https://assets.vu.nl/7099fct9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf>, who writes, 'There are alternative ways of handling the affairs of for example, an aging person of deteriorating capacity. In practice, spouses have the possibility to continue to handle the affairs of the other spouse, if they share a common bank account. Written authorizations governed by the general Contracts Act (228/1929) for different transactions are sometimes used by near relatives even after the capacity to give new authorizations may already be questioned. Municipal social authorities also use brokering accounts where social benefits are paid and which are used for the benefit of the beneficiary and/or his/her family. In chapter 18, § 10 of the Code of Commerce, there is also a historical statutory provision on *negotiorum gestio*, which allows a relative or a friend to act on behalf of another in a situation where the circumstances (for example due to extreme urgency) do not allow official authorization. Under *negotiorum gestio*, the person who acts as a representative for another without due authorization, bears the responsibility of his actions in damages.'

18 For the necessity and proportionality principles, see travaux préparatoires of the legislation: Report 20/1998 of the Law Committee, p. 3 and HE 45/2008 vp, p. 17. Also Hanna-Maria Niemi, The use of human dignity in legal argumentation: An analysis of the case law of the Supreme Courts of Finland, *Nordic Journal of Human Rights*, 2021, vol. 39, pp. 290–293.

ity, was underlined in a Supreme Court precedent KKO 2009:7. A mere medical diagnosis does not in itself give the right to restrict anyone's competence to decide on matters concerning their own assets. The prerequisite is that the risk to important interests is clearly shown in a concrete way.¹⁹

The number of valid guardianship arrangements and powers of attorney continues to increase every year. Guardianship legislation is systematically connected to elder law as typically the guardian is appointed for an aging person of deteriorating capacity.²⁰ It is notable, though, that it seems that the number of guardianships in all age groups is increasing, and guardianship clients include also young individuals due to, for example, substance abuse.²¹ In 2020, the total number of registered guardianship arrangements was almost 82,000.²² The population of Finland is approximately a little over 5.5 million.

V. Continuing power of attorney

By providing a continuing power of attorney (in Finnish: *edunvalvontavaltuus*), individuals can prepare in advance for the management of their affairs in the event that they are at a later time unable to manage them themselves. It is even possible to include personal matters, such as type of living and form of healthcare in the document. Systematically it is, with respect to guardianship, primary and enabling way to organise a guardianship.

The main idea behind the continuing power of attorney is to *support and strengthen a person's right to self-determination*. A person is able to arrange the management of his/her affairs in advance in case he/she becomes incapable of managing them self for instance due to an illness. The act regulating the document came into force in 2007. Its enactment stems from the recommendations of the Council of Europe on the protection of the adult population. Additional socio-economic rationale for the act lies in the scanty resources of the public guardianship system. The person appointed is usually someone close to a donor or even advocate in cases of more complicated wealth planning.

There are several reasons for making the power of attorney. It is an efficient and flexible way of making estate and tax planning. The donor may allow gifts in the document in order to transfer his/her assets through donations by an anticipated inheritance. The continuing power of attorney is a way to keep the financial matters of the donor private; the donee does not need to draw up a separate annual statement for the management of affairs to the authority, unless the donor has entered a requirement for this into the power of attorney. The donor decides what is required in terms of supervision arrangements.

The general precondition for drawing up a power of attorney is that the donor has reached the age of 18 and is able to understand the significance of the power of attorney. Naturally, it would be wise to start preparing a power of attorney at latest when the initial symptoms of impaired functional capacity have emerged. However, in this case, it may already be necessary to request a medical certificate to ensure that the donor is able to understand the significance of the power of attorney.

19 Finland's initial report on the implementation of the convention on the rights of persons with disabilities, p. 17.

20 Pertti Välimäki, *Edunvalvontaoikeus*, Alma Talent, 2013, pp. 1–2.

21 Salla Silvola, *Finland*, <https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf>, also *The Handbook of Public Guardianship Services Act 2020*, p. 11.

22 See *The Handbook of Public Guardianship Services Act 2020*, p. 13.

Preparing a continuing power of attorney has similar strict formalities as a will. It has to be made in writing and it requires two witnesses. The witnesses have to know that the document is a continuing power of attorney, but since it is a private document, its contents does not have to be disclosed to them.

In order to enter into force, the guardianship authority has to verify the document. The requirement for the confirmation of the power of attorney is that the donor has become unable to management his/her affairs – for instance, due to deteriorating health. The original document must be presented to a registrar who, after reviewing medical documents of the donor's health, can verify authority of guardianship.²³

It must be noted that a continuing power of attorney loses its power at the time of death, so the only tool to manage a person's assets after death is by a will (the Guardianship Services Act, § 17).²⁴

VI. Personal matters

Although a guardian or a donee may also be appointed for personal matters, legislation on health and social care include additional provisions on decision-making in the matters of health and social care.

In addition, a guardian or a donee is not competent to give consent to marriage or adoption on behalf of the client, nor to acknowledge paternity, consent to an acknowledgement of paternity, make or revoke a will or represent the client in other matters of a comparable personal and individual nature (the Guardianship Services Act, § 29 and the Act on Continuing Powers of Attorney, § 2).²⁵

Implementation of the Article 12 of the UN Convention on the Rights of Persons with Disabilities

Finland signed the UN Convention on the rights of persons with disabilities in 2007 but did not ratify it until 2016. The ratification was postponed as it was deemed that there were certain parts of Finnish legislation that did not mirror the articles of the Convention well enough.²⁶ Specifically, it had to be ensured that the domestic legislation fulfilled the conditions for ratification of Article 14 of the Convention. Following this, amendments were made to the Act on Special Care for Persons with Intellectual Disabilities (519/1977).²⁷

²³ See in detail <https://dvv.fi/en/continuing-power-of-attorney>.

²⁴ See also Pekka Tuunainen, *Finland: International estate planning guide*, IBA, 2021, pp. 2–3.

²⁵ Salla Silvola, *Finland*, <https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/2e0dda55-648d-4098-818a-a4f856b504ae/Finland.pdf>.

²⁶ In order to ratify the Convention, a working group was appointed in 2011. The working group included representatives from different ministries, the Office of the Parliamentary Ombudsman, the Association of Finnish Local and Regional Authorities, the National Disability Council, the Finnish Disability Forum and the Threshold Association. Representatives of the Human Rights Centre (HRC) and the Finnish Association of the Deaf served as permanent experts in the working group.

²⁷ In the reform of the legislation on equality and non-discrimination carried out in 2015, refusing reasonable accommodations was defined as discrimination and the scope of the obligation to provide reasonable accommodations in order to ensure the equality of persons with disabilities was broadened. The Municipality of Residence Act (201/1994) and the Social Welfare Act (710/1982) were amended in 2010 in order to strengthen the right of persons with disabilities to choose their place of residence. A provision was added providing that persons in long-term care relationships, i.e. lasting more than one year, living outside their

The purpose was to strengthen the right of self-determination of persons in special care and to reduce the use of restrictive measures and restrictions of freedom.²⁸ When approving the amendments, Parliament required the government to monitor the impacts of the legislation on the implementation of the rights of persons with intellectual disabilities and to continue developing the regulation concerning the right of self-determination.²⁹

It is notable, though, that the implementation process of the Convention has been criticised by stating, i.e. that the rights of people with dementia were ignored as the Intellectual Disability Act does not usually apply to people with dementia – even though it seems clear that the UN convention is applied to people with dementia. This is a challenge as older people with dementia makes them particularly vulnerable to unjust treatment. It has been emphasised in legal literature that a better way of securing care for people with dementia is to apply disability legislation to them equally. This means treating them in the same way as people in other illness and disability groups.³⁰

The Convention and its Optional Protocol (Treaty Series 27/2016) entered into force in Finland on June 10, 2016. Finland did not submit any reservations or declarations to Article 12. The legislation on guardianship and the guardianship system was reformed in 1999, and as a result, no reform to the Guardianship Services Act was deemed necessary due to the ratification process. In this respect the implementation of the Convention should, in general, emphasise the fulfilment of already existing obligations of authorities in order to ensure that the rights of disabled persons are realised in practice.

The Parliamentary Ombudsman together with the Human Rights Centre and its Human Rights Delegation serve as an independent national mechanism tasked to promote, protect and monitor the implementation of the Convention. A provision on this task is contained in the Parliamentary Ombudsman Act, § 19f.³¹ In addition, Finland has published a National Action Plan on the Convention. Its purpose is to effectively implement

municipality of residence have the right to choose their municipality of residence. Another added provision gave persons in long-term need of institutional care, residential services or family care the right to apply for a service needs assessment from another municipality than their municipality of residence. According to the provision, a change of the municipality of residence may also be based on the person's own decision to seek residence in another municipality and to receive its services. See Finland's initial report on the implementation of the convention on the rights of persons with disabilities, <https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606>.

- 28 See the webpages of the Finnish Institute for Health and Welfare, <https://thl.fi/en/web/handbook-on-disability-services/disability-rights-and-legislation/rights-and-legislation>. Also H.-K. Hoppania, Anna Mäki-Petäjä-Leinonen, H. Nikumaa, (Un)equal treatment? Elderly care and disability services for people with dementia in Finland, *European Journal of Social Security*, 2017, vol. 19, pp. 225–241, at p. 234.
- 29 See Finland's initial report on the implementation of the convention on the rights of persons with disabilities, <https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606>.
- 30 It has been stated in legal literature that from the perspective of equality, it would have been vital to update the legislation from the perspective of all disability groups in Finland before the UN Disability Convention was ratified. In essence, this means that, for example, the practices involved in restricting the freedom of people with dementia in Finland are contrary to the UN Convention. See A. Mäki-Petäjä-Leinonen, Protecting a person with dementia through restrictions of freedom? Notions of autonomy in the theory and practice of elderly care, in: *Subjectivity, citizenship and belonging in law: Identities and intersections*, eds. A. Griffiths, S. Mustasaari, A. Mäki-Petäjä-Leinonen, Routledge, London, 2017, pp. 146–170.
- 31 For national monitoring, see Finland's initial report on the implementation of the convention on the rights of persons with disabilities, <https://um.fi/documents/35732/0/CRPD+initial+report+Finland.pdf/959fa430-9e7e-9fe0-76d1-c435f47181ea?t=1565948791606>, pp. 68–69. See also the webpages of the Parliamentary Ombudsman, https://www.oikeusasiamies.fi/en_GB/web/guest/the-rights-of-persons-with-disabilities.

the Convention. The following is stated in the webpages of the Finnish Ministry of Social Affairs and Health:

The aim and objective of the action plan is to raise awareness of the rights of persons with disabilities and to take account of their rights in all activities in the different administrative branches and in society at large. Accessibility, availability and participation are essential when implementing the rights of persons with disabilities. . . . The Action Plan contains 82 measures that the ministries are committed to implement. Part of the measures will be implemented during the current Government's term of office. Some measures take a longer time to carry out.³²

Also, the Finnish Institute for Health and Welfare (THL) maintains the Online Handbook on Disability Services in Finland. The Handbook covers the rights and social services of persons with disabilities in Finland and the phases and tasks of the social work process. It describes disability as a phenomenon in society and the problems of disability research, and it supports the management and supervision of disability services.³³

Active legal capacity of natural persons and its restrictions for the sake of disabilities – procedural aspects (court or outside-court mode of taking decision)

I. Introductory remarks concerning the appointment process of a guardian

A guardian is appointed by a guardianship authority or by a court. An application for the appointment of a guardian can be submitted to the court by a relative or a person close to the individual concerned. On the other hand, an application for the appointment of a guardian can be submitted to the guardianship authority. When needed, the guardianship authority submits the application to the court (the Guardianship Services Acts, §§ 7–8, 10).

Processing of a guardianship matter by the guardianship authority will vary depending on whether the matter has been initiated via an application by the person in need of guardianship or via a notification from a third party. The issue of an appointment of a guardian may be decided by the guardianship authority in case a person himself/herself wants a guardian to be appointed and understands the significance of the matter. Additional requirement is that he/she requests that a named person can be appointed as the guardian (the Guardianship Services Act, § 12). The authority will hear the petitioner in person before it makes a decision on the petition.

32 <https://stm.fi/en/-/suomen-ensimmainen-yk-n-vammaissopimuksen-toimintaohjelma-vahvistaa-vammaisten-henkiloiden-oikeuksia>. The Advisory Board for the Rights of Persons with Disabilities (VANE) was responsible for drawing up the National Action Plan, and the Advisory Board will also coordinate the national implementation of the convention. There are representatives of disability organisations, labour market organisations and the ministries with key significance to the rights of persons with disabilities in the Advisory Board. Disability organisations and persons with disabilities were heard when the Action Plan was being prepared.

33 The Online Handbook can be found in <https://thl.fi/en/web/handbook-on-disability-services/contact/what-is-the-online-handbook-on-disability-services->.

Anyone is able to submit a notification with the guardianship authority stating that a person is in need of guardianship. A notification can be given by anyone (notwithstanding confidentiality). There have to be reasons in the notification explaining why it is necessary for a guardian to be appointed for the person in question. The notification must be well-reasoned and justified – i.e. it should state why it is necessary for a guardian to be appointed for the person in question and what kind of problems the person has encountered in managing his/her own affairs. Inability is usually determined on the basis of a medical opinion.³⁴ It is thus notable that guardianship is not an open social service. One must exceed *the guardianship threshold* to be eligible for the appointment of a guardian.

In a Supreme Court judgment, KKO 2005:2, the argumentation emphasised the rights-based approach to the question of guardianship services, and the principle of respect for human dignity was visibly brought out in the argumentation (in Finnish: *ilmisarvon kunnioittaminen*).³⁵ Also, one must take into account the principles of necessity and proportionality. The Supreme Court underlined the respect of basic rights and right to self-determination. In the organisation of guardianship services, individual circumstances and the possibility that the person's interests are in danger must be assessed from his/her point of view. A guardian cannot be appointed in order to ease the authority's operations even if a person is difficult to deal with. Instead, it should be shown how the person's interests are in danger under the individual circumstances. It was made visible in the argumentation of the Supreme Court that in each case *individual rights have to overcome the public good*.³⁶

The Parliamentary Ombudsman (in Finnish: *oikeusasiamies*) has given an important decision in a case where the Register Office received an e-mail, including a demand that a guardian should be appointed for the couple named in the e-mail. The mail included the following claims:

I have known A from childhood. . . . Unfortunately she is my sister. She never understood the difference between what is hers and what isn't. She has gone through life by cheating. . . . Stealing my money from the estate. . . . Now she has found a like-minded B (spouse) . . . a guardian should be appointed for that scumbag, too.

It seems clear that the application as such had insubstantial grounds because the e-mail did not explain how A and B (the couple) was unable to look after their financial or other interests or if there were reasons to expect that they were at risk of being taken advantage of financially. The e-mail message mainly contained bitter and defamatory comments about the couple. It even referred to criminal activity. Still, the Local Register Office had initiated the process for investigating the couple's need for guardianship services.

The Register Office requested couple's medical certificates from the health centre and only after the complainant had contacted the Register Office, had the application been noted groundless. At this point the request for medical certificates was cancelled. Still, the health centre had been in touch with the complainant and his spouse (A and B) for the

34 See for the process in detail, <https://dvv.fi/en/processing-of-a-guardianship-matter>. Also Kati Juva, Mäki-Petäjä-Leinonen, Of sound mind? Dementia and aspects of assessing legal capacity, *European Journal of Health Law*, 2015, vol. 22, pp. 13–37.

35 For the importance of human dignity as a building block of the guardianship law, see travaux préparatoires of the legislation: Report 20/1998 of the Law Committee, p. 3.

36 For the principle of human dignity, see also the Supreme Court precedent KKO 2009:7.

purpose of assessing the requirement of guardianship services. Notification of this was also included in their patient documents.

The Parliamentary Ombudsman stated that the Register Office had begun its investigation on obviously insubstantial grounds and the health centre was routinely contacted without first contacting applicant for additional information or consulting the couple in question. Therefore, the Ombudsman found that the Register Office had, without proper cause, violated the interested parties' protection of privacy and right to self-determination. It was emphasised in the decision of the Ombudsman that

the mere investigation of the need for guardianship services may in many ways violate a person's fundamental rights, as an investigation of his or her state of health, housing conditions and financial circumstances is initiated. The Register Office should pay particular attention to whether or not, based on the petition, it is obvious that the person in question needs a guardian to protect his or her interests and rights. The purpose of the petition for guardianship services is that those in need of protection can have access to the services. It is not intended as an instrument of harassment.³⁷

II. A register of guardianship

The register of guardianship affairs provides information on whether someone is under guardianship, who their guardian is and what the duties of the guardian are. Information on any restrictions on the person's capacity is also recorded in the register. The register also includes information on valid power of attorney mandates for the management of financial affairs and the assignees that have been granted power of attorney (see Chapter 7 of the Guardianship Services Act). It serves as a medium for both the exchange and the control of the organisation of guardianship.

Register discloses information to various authorities, associations and private persons. State or municipal authorities, as well as associations or entrepreneurs, who continuously need data from the register for an approved purpose, can access information via a technical user interface.³⁸ As the register includes mainly data that is deemed as sensitive and private, it is not in all respects open for everybody.

Ahti Saarenpää has stated that the register is a problematic one. It makes available information on the guardianship of individuals and limitations on their legal capacity, which may attract untoward interest from the markets. In the process, it reveals something essential of our privacy and self-determination. An ordinary power of attorney in civil law is a more discrete solution in this regard.³⁹

37 Parliamentary Ombudsman Petri Jääskeläinen's decision no 3746/4/15 (<https://www.oikeusasiamies.fi>, available only in Finnish).

38 See <https://dvv.fi/en/extracts-from-the-register-of-guardianship-affairs>.

39 Ahti Saarenpää, Henkilö- ja persoonallisuus oikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, pp. 357–359.

Organisation and institutional aspects of the assistance and guardianship for the purpose of doing legal acts by persons with disabilities

I. Introductory remarks

Functionally the guardianship system operates in two ways. Firstly, there is a level of practical activity where a guardian supports and helps a ward and, if necessary, represents him/her in different transactions and in the management of financial issues. The provisions of the Guardianship Services Act concerning this practical activity are generally deemed as belonging to civil law. Secondly, essential parts of the organisation of guardianship are supervision and accountability as the guardian is accountable for the management of his/her duties to the Digital and Population Data Services Agency, which is the guardianship authority. A guardian also needs a permit from the guardianship authority for actions that are the most important from the perspective of their ward. This part of the organisation of guardianship belongs mainly to administrative law.

As some of the cases concerning guardianship organisation are heard in the district courts and some in the administrative sector, meaning the guardianship authority, appeals are directed down to different paths. For instance, an appeal against a decision of a district court on appointment of a guardian is lodged in the court of appeal. If a guardianship authority has given a decision, an appeal must be made to the administrative court.

It is also important to note that the Parliamentary Ombudsman oversees the legality of actions taken by the authorities, also by the guardianship authority and all public guardians.⁴⁰ The Ombudsman can take matters under investigation on his/her own initiative or by investigating complaints received from for instance a ward or his/her relative. During recent years a very large proportion of the Ombudsman's oversight of legality is currently targeted at the organisation of guardianship. Each year the ombudsman gives approximately 100 decisions on cases concerning guardianship. Cases that are deemed as being most important are published in the annual reports.⁴¹

II. Accountability and supervision

A guardian is under a duty to keep accounts of the client's assets, debts and liabilities and of the events and transactions of each financial period, normally annually. In the beginning of his or her appointment, the guardian has to provide the guardianship authority an inventory of the ward's assets and liabilities. The guardian must submit regular, normally annual, accounts to the guardianship authority.

A guardian cannot freely perform any transaction on behalf of the ward. The permission of the guardianship authority is needed e.g. for selling or buying real estate or a residence, for pledging property as collateral for a debt and for taking out some other loan than a state-guaranteed student loan (see, in detail, the Guardianship Services Act, § 34).

40 According to § 109 of the Constitution, the Ombudsman shall ensure that the courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. See the webpage of the Parliamentary Ombudsman, even in English, <https://www.oikeusasiamies.fi/en/eoa>.

41 Pertti Välimäki, *Edunvalvonta-oikeus*, Alma Talent, 2013, p. 12. Summaries of the annual reports are published in English, https://www.oikeusasiamies.fi/en_GB/web/guest/toimintakertomukset1.

The guardian is not empowered to donate the property of the client. A transaction beyond the competence of the guardian is not binding on the ward.

The guardianship authority also supervises the actions of the donee of the continuing power of attorney. When the donee begins his/her task, he/she has to submit a list of assets and debts of the donor – that are in the remit of the power of attorney – to the guardianship authority. At the request of the guardianship authority, the donee has to submit a report on the management of the donor's assets. The continuing power of attorney can, thus, include provisions on the extent of supervision applied by the guardianship authority.

In case it is noted that a guardian is not fit for the task, he/she is released by a court. The court will also terminate a guardianship upon petition, once there no longer is need for one. In order to ensure that no one is under guardianship without proper reasons, the guardianship authority reviews all guardianships every four years and determines whether they should continue. The tasks of a guardian and a donee under a continuing power of attorney are terminated, if the client dies. A guardian whose task is terminated or whose task has been restricted has to provide the guardianship authority with a statement of accounts relating to the property no longer managed by the guardian, for the period that has not yet been accounted for (final statement).

The guardian is liable to provide compensation to their client for any damage that they have caused intentionally or through negligence in the performance of their duties. A claim for damages based on the actions of the guardian will expire three years after the final statement has been given to the person entitled to it.

The provisions on accountability and supervision of a guardian are included in chapter 6 of the Guardianship Services Act.

III. Opinion of a ward

The ward's right to self-determination is strong even after a guardian is appointed as *a guardian must strive to work in cooperation with each ward*. Before making any important decisions that will affect the ward, the guardian must inquire his/her opinion if this is possible considering the ward's condition.⁴²

Although the legislation has been reformed, as explained earlier in this chapter, in practice the old attitudes still figure prominently. The Guardianship Services Act has even been interpreted to mean that a guardian whose role is only to assist the ward can, through his or her actions, bypass the ward's will. This has been noted in the decisions of the Parliamentary Ombudsman who has handed down a considerable number of decisions in cases where public guardianship has meant that bureaucratic expediency has seemingly been a more worthy goal than protecting the ward's right to be consulted in matters that affect his/her interests.

One of the Ombudsman's decisions concerned a case where the Public Guardianship Services had carried out a thorough clean-up in the complainant's (the ward) flat while she was being treated at the hospital. The cleaner had disposed of some of the ward's belongings without consulting her. The guardian did not even claim that consulting the principal would have been impossible because of her state of health or of any other reason.

42 The Guardianship Services Act, § 43: Before the guardian makes a decision in a matter falling within his/her task, he/she shall inquire the opinion of the ward, if the matter is to be deemed important from the ward's point of view and if the hearing can be arranged without considerable inconvenience.

According to the Parliamentary Ombudsman, this has led to the violation of the ward's private life. The Parliamentary Ombudsman summarised that it had not been enough that the hospital staff had discussed the clean-up with the ward. It had been the duty of the guardian *to consult the ward in person in order the ward to express her own view*. This duty was not cancelled out by the fact that having the flat cleaned had been as such required.⁴³

Accordingly, in the decision of a Supreme Court, KKO 2015:31, the question was whether there were reasons to dismiss the guardian and to appoint a new guardian and – especially – whether the ward's opinion needed to be considered. The court stated that although the individual concerned has no right to dictate who is appointed as guardian, his/her opinion must be given weight and especially since appointing a new guardian was against the wishes of the ward in a case at hand. The rights-based approach is clear from the reasonings of the Supreme Court, and it was emphasised that *one's right to participate in decision-making concerning oneself must be respected as far as possible*.

The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law (against crimes which can be committed as a result of doing legal acts)

A person lacking capacity cannot self administer property or enter into contracts or other transactions. An incompetent person may only enter into transactions which, in view of the circumstances, are usual and of little significance. A transaction beyond the competency of the person is not binding on him/her, unless the guardian or, after the end of incompetency, the person himself/herself ratifies the same.⁴⁴

Also, a person who is not declared incompetent might suffer from physical, mental or intellectual impairment which may, de facto and under certain circumstances, weaken his/her capacity and make him/her vulnerable to exploitation. A person with diminishing legal capacity can be faced with *different situations requiring different types and degrees of capacity for decision-making*. As written by Kati Juva and Anna Mäki-Petäjä-Leinonen, stock trading and risk investment, for instance, require a much greater capacity for decision-making than drafting a simple will or choosing a nursing home. When assessing the capacity of such people, the determining factor is whether a person understands the meaning and consequences of the decision he or she is about to make:

Therefore, a person with diminishing legal capacity also has a right to make decisions insofar he or she can understand the meaning and consequences of the specific act. It should be self-evident that the mere diagnosis of a disease which may weaken a person's legal capacity does not automatically remove their autonomy. As long as the person is capable of making valid decisions, those decisions have to be given priority over the opinion of a legal guardian or a close relative. There is a legal presumption of capacity unless shown to the contrary.⁴⁵

43 Parliamentary Ombudsman Petri Jääskeläinen's decision no 3050/4/15 (<https://www.oikeusasiamies.fi>, available only in Finnish).

44 Ahti Saarenpää, Henkilö- ja persoonallisuusoikeus, in: *Oikeusjärjestys III*, ed. Risto Haavisto, Lapin yliopisto, Rovaniemi, 2000, p. 345.

45 Kati Juva, Anna Mäki-Petäjä-Leinonen, Of sound mind? Dementia and aspects of assessing legal capacity, *European Journal of Health Law*, 2015, vol. 22, p. 15. Also Antti Kolehmainen, Edunvalvojan edustusvalta ja päämiehen itsemääräämisoikeus, *Lakimies*, 2019, pp. 289–312.

Usury (in Finnish: *kiskonta*) refers to situations of exploitation in which the usurer is aware of the vulnerability of the exploited person. Usury is sanctioned under the Criminal Code, chapter 36, § 6.⁴⁶ The provision pertaining to usury was reformed in connection to the first ‘instant-loan regulation package’, and it came into force in 2010. The provision states that a person who – by taking advantage of the financial or other distress, position of dependence, lack of understanding or thoughtlessness of another, in connection with a contract or other transaction – obtains or requires for himself or herself or another person economic benefit that is clearly disproportionate to the remuneration, shall be sentenced for *usury* to a fine or to imprisonment for at most two years.

The Criminal Code, chapter 36, § 7, rules on the aggravated usury. If the usury (1) involves the seeking of considerable benefit, (2) causes considerable or particularly significant loss, (3) involves the offender taking unscrupulous advantage of a special weakness or other insecure state of another or (4) is committed in a particularly methodical manner, and the usury is aggravated also when assessed as a whole, the offender shall be sentenced for *aggravated usury* to imprisonment for at least four months and at most four years.

There are also civil law remedies against usury. The remedies are designed for contractual relations and allow for annulment or adjustment of a contract or a specific part of the contract.⁴⁷ Accordingly, legal act may be invalid if someone has taken advantage of the weakened capacity of a contracting party at the time of the legal transaction. Such a legal act can be declared invalid based on the provisions of invalidity in the Finnish Contracts Act (228/1929). Therefore, a court may declare a legal transaction invalid if there is enough evidence that a person, while performing the legal act, in practice turned out to be incapable of understanding its meaning and consequences (*de facto* legal incapacity).

According to the Contracts Act, § 31,

If anyone, taking advantage of another’s distress, lack of understanding, imprudence or position of dependence on him/her, has acquired or exacted a benefit which is obviously disproportionate to what he/she has given or promised or for which there is to be no consideration, the transaction thus effected shall not bind the party so abused.

The essential elements of usury may be fulfilled for instance in a case where a party takes advantage of the fact that the other party is seriously ill and this causes a lack of understanding. The requirement for applying § 31 of the Contracts Act is that the stronger party had acquired benefit which is obviously disproportionate to what he/she has given or promised. The imbalance of a contract must be a result of the blameworthy behaviour of the stronger party.

In a Supreme Court case, KKO 2003:48, A and B owned an apartment together. A (the wife) owned bigger part, 61%, and B (the husband) smaller part, 39%. In 1997 A allegedly had sold her part of the apartment to B. The price was 200,000 Finnish mk (markka), but

46 Can be found in English, <https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf>.

47 Finnish contract law is based on the principle of freedom of contract. Thus, there are three other principles that should be taken into account: loyalty, balance and the protection of the weaker party. In case a contract is invalid – for instance, due to defects in the declaration of intent – it is conceived as an all-or-nothing situation. However, if the provision on the adjustment of a transaction is applied, it is possible to leave the contract in force and to adjust only some of the contract clauses. For Finnish contract law (in English), see e.g. Soili Nystén-Haarala, *The long-term contract: Contract law and contracting*, Finnish Lawyers Publishing, Helsinki, 1998; Petra Sund-Norrgård, *Contract law in Finland*, Kluwer Law International, 2017, https://books.google.com/books/about/Contract_Law_in_Finland.html?id=XQHfswEACAAJ.

it could not be proven that the sum was ever paid to A. At the time of the transaction, the value of the apartment was at least 700,000 Finnish mk. Both spouses died soon after the purchase, in 1998. A's daughter C laid a claim before a district court against the shareholders of B's estate and demanded that the transaction should be declared invalid. According to the published reasonings of a court, A suffered from a stroke in 1993 and had become dependent on B's help, even in daily activities. Witnesses were heard, and they all said that A had been in a weaker position to her husband, and B had been trying to isolate A from her relatives and friends. The case ended up being decided by the Supreme Court which found that B, in connection with the transaction, had abused A's physical and psychological dependence on him and made her transfer her share of the apartment without any compensation. A's interests had been violated through this transfer. The contract of purchase was declared invalid according to regulation 31 of the Contracts Act and did not thereby bind the heir C of A.

According to the Contracts Act, § 36, it is also possible to adjust the contract (in Finnish: *sopimuksen sovittelu*). If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and other factors are taken into consideration. In this respect, judges have wide discretion of adjusting contract terms or even setting them aside.⁴⁸

Cases of criminal usury are seldom prosecuted in courts. Civil law is usually thought to give enough protection to the exploited party.

Summary

The idea behind the Finnish guardianship legislation is that a guardian can be defined as the ward's trusted advisor. The guardian takes care of the property and financial and personal affairs of the person for whom the guardian has been appointed, in cooperation with the person himself or herself. No matter in which way the guardianship is organised and whether a guardian is a friend of a ward or a public guardian, from a legislative point of view guardianship is deemed as a personalised service that respect the clients' right to self-determination without posing any unnecessary restrictions. Supported decision-making underlines a respect to human dignity, which means that instead of objectively evaluating best interests of a person, one is required to respect the will of a person in question as far as possible. The appointment of a guardian does not usually prevent a person from entering into transactions. If legal capacity of a ward is exceptionally restricted, the primary alternative is to perform the legal act together with the guardian. When making decisions, the guardian must hear the client. Therefore, acting for the benefit of the person requires keeping in contact with him/her.

Accordingly, from the legislative point of view, guardianship is strongly being viewed as having a rights-based dimension. The basics of Finnish guardianship legislation form an essential part of the law of personality which respects the principles of self-determination, individuality, personal liberty and privacy. The goal is to protect vulnerable individuals – and give them a right to self-determination to a highest degree possible. The challenge is, thus, how to ensure that the goals are achieved in practice.

48 The Contracts Act can be found in English: https://www.finlex.fi/fi/laki/kaannokset/1929/en19290228_19990449.pdf.