

Norway

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1. The 2010 Norwegian Guardianship Act¹ entered into force in 2013 and in the same year Norway ratified the UN Convention on the Rights of Persons with Disabilities (CRPD) that was signed in 2007. Norway has not yet endorsed the Optional Protocol 2009 to the CRPD. The Norwegian Guardianship Act introduced individually tailored guardianships and was meant to implement new principles in the CRPD based on the integrity and preference of the individual and the principle of the least restrictive means. The Guardianship Act introduced an administrative reform as well, and the guardianship authority was transferred from the municipalities to the county governors. Norway has not signed the Hague Convention on the International Protection of Adults (2000). The Nordic Family Law Convention 1931 contains private law provisions on guardianship in chapter III.

2. Three relevant measures of protection for adults are contained in the Norwegian Guardianship Act: **guardianship, lasting power of attorney and ex lege right of representation** for close family members. In addition, non-statutory rules of **negotiorum gestio** exist.

3. **Guardianship** Anyone who has reached the age of 18 and who “due to mental illness, including dementia, mental disability, substance abuse, serious gambling addiction or severely impaired health is unable to safeguard his or her interests” may be placed under guardianship if necessary (§ 20). The guardianship should be tailor-made to the person’s needs and can cover financial and/or personal matters. The persons under guardianship *retain their legal capacity* (supported decision making) and they must give a written consent to the guardianship, to its scope and to the actual guardian. However, the law states that consent is not necessary if the person is not in a position to understand what consent entails. In these cases, where a person lacks decision making competence, it is unclear whether guardianship may be established against the person's will. In a green paper the Ministry has proposed an amendment to make it clear that persons cannot be placed under guardianship if they object. Guardianship is decided administratively by the County Governor.

Persons mentioned in § 20 may also have *their legal capacity restricted* (substituted decision making) if the requirements in the Guardianship Act § 22 are met. Such deprivations of legal capacity must be decided by the district court and does not need consent. In financial matters, persons may be deprived their legal capacity partially or wholly if this is deemed necessary to prevent their assets from being significantly degraded or to prevent them from being exploited economically in an unacceptable manner, see Norwegian Supreme Court Judgement HR-2016-2591-A. They may also be subject to restrictions to act in personal matters in specific areas if there is a significant risk that they will act in manners that may be materially detrimental to their interests (§ 22). A total number of little more than 200 persons are deprived of their legal capacity in Norway - and about half of them for a limited period of time. The guardianship does not include the capacity to vote in elections, to marry, to declare paternity, donate organs and other capacities in particular personal matters, unless stated in specific provisions (§ 21). Several such provisions exist, especially in health legislation, and this has been criticized, see below.

¹ The Norwegian Guardianship Act 2010 (only in Norwegian): <https://lovdata.no/dokument/NL/lov/2010-03-26-9?q=vergem%C3%A5slsloven>

The Guardianship Act introduced a private law instrument of **lasting power of attorney (LPA)** set up by donors while they still have the mental capacity to exercise their powers. They can then decide that one or more persons may represent them in financial and/or personal matters after they “due to mental disability including dementia, or severely impaired health” no longer are able to take care of their interests in the areas covered by the LPA (§ 78). LPAs are subject to the same formal requirements as testaments, e.g. they have to be signed by the donor with two witnesses. (§ 81). LPA is primarily user-controlled and no official registration or confirmation is needed; the attorney decides when the requirements are met (§ 83). However, the attorney may ask the County Governor to confirm the decision (§ 84) and the County Governor may exercise some control *ex post* NB (§ 90).

Ex lege representation. It follows directly from the Guardianship Act that close family members have the right to represent a family member that is unable to take care of his or her financial interests “due to mental disability, including dementia, or severely impaired health” (§ 94). The right to represent is limited to assistance in daily financial tasks, such as buying food, paying the rent, etc. Close family members are persons over the age of 18 that are (in priority order) either a spouse or cohabitant, a child, a grandchild or a parent.

4. No major law reform is planned in Norway at the moment. Recently, the Ministry of Justice has proposed amendments to the Guardianship Act in a Green Paper, most importantly a provision in § 20 that explicitly states that no one can be placed under guardianship by the County Governor contrary to the person's will, even if they lack decision making competence. In these cases, guardianship must be decided by the court.

5. At the end of 2017, there were little more than 200 registered guardianships involving full or partial restrictions on legal capacity to act. This accounted for about 0.5 per cent of a total of about 40 000 registered guardianships for adults. At the same time there were about 17 000 guardianships for minors. (Minors cannot be subject to restrictions on legal capacity to act.) Lasting power of attorneys are not registered, and therefore statistics is not available. The population of Norway is 5.3 million.

The Guardianship Act have been criticized by Civil Society Organizations, Norwegian National Human Rights Institution and The Equality and Anti-Discrimination Ombud. Here are some aspects of their criticism:²

- Supported decision making should be developed with a view to minimizing substituted decision-making. The terminology in the law should be changes from *guardianship* to *supported decision making*.
- Studies indicate that it is common that persons with cognitive or psychosocial disabilities are declared not competent to give consent and thereby de facto be deprived of legal capacity to act, even if the legal capacity is not formally restricted. This decision by the County Governor is often made without meeting the person concerned.
- In most cases, the mandates of guardians are broad and generic, and not adapted to the individual needs of the person under guardianship. The county governors also lack sufficient knowledge concerning the training of guardians. Most County Governors ask for national guidelines on how to carry out supervision of the guardians, how to assess a person's competence to consent and how to ensure individual adaptation of guardianships.

² See https://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1304&Lang=en

- The capacity of guardians should correspond to the number of guardianships that are placed under their care and provide further training. In 2017, 32 guardians had guardianship for more than 100 persons, and 325 guardians had 21-100 guardianships.
- The Ombud finds that it is a serious breach of CRPD Article 12 that the guardian can give consent on behalf of the person under guardianship on matters such as health care, sterilization, abortion and clinical trials. The fact that a person with an impairment may not be permitted to marry or obtain a passport without the prior consent of their guardian is also a serious infringement of autonomy.