

3rd World Congress on Adult Guardianship : Breakout Series # 5
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Adult Guardianship Decision-making process Legal Perspective – Germany

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Outline

1. General informations on the guardianship law in Germany
2. Is there a contradiction between self-determination and avoiding harm?
3. The ward`s risks in decision making processes
4. The guardian`s obligations in decision making processes
5. Conclusion and parameters

General informations

- Adults with impairments have to have a right to have a guardian, if they cannot in whole or in part take care of their affairs.
- Adults in general can avoid a guardianship by giving s.o. power of attorney.
- A guardian may not be appointed against the free will of an adult.
- A guardian can be a family member or a professional person (like a social worker).
- Guardianship has no influence to the legal capacity to act of a ward.
- Legal capacity is a question of current capability and not of a status as a result of a court decision.

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My assumptions

The decision-making process is the most important detail in guardianship. The guardian has

- to comply with the wards right of self determination
- to protect the ward from significant and serious self damage

Does this constitute an irreconcilable contradiction?

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My assumptions

- There is no principle permitted which balances wishes and the wards wellbeing in general
- Guardian law demands to protect the person only under a legal condition. The protection against current and former wishes is only allowed and demanded when the person gets into a substantial danger by reason of a mental illness or mental or psychological handicap and cannot recognize the necessity of the protective decision.

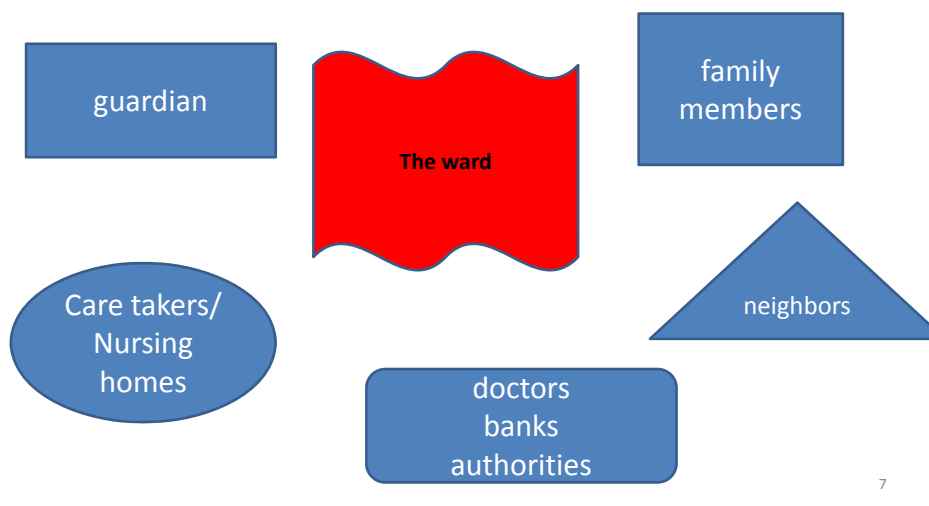
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The ward`s risks

- What are the conditions when he/she cannot recognize the necessity of a protective decision/measure?
- What is a substantial danger to protect the ward?
 - “difficulties” arising from communication
 - the influence of the guardian`s values
 - the guardian`s own interests
 - other players interests
 - the guardian`s liability

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Focus ist the wards best interesset
and not the interesset of other players



Guardian`s obligations 1

Art. 12 CRPD and the principle of necessity in the
German Civil Code (§1901)

→ decision making follows guidance on the law

1. Priority of supported decision making

- Counseling/advising the ward
- Explaining the circumstances of a decision in a understandable way (remove barriers)
- Giving the capability to make the decision and realizing self determination of the ward

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Guardian`s obligations 2

2. Supported decision making in form of shared decision making complying with the current wishes of the ward and using the guardians power of attorney to transfer the decision outside of legal relations.

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Guardian`s obligations 3

3. Guided decision making of the guardian on the base of former wishes, values, beliefs and preferences of the ward
 - substituted judgment
 - best interest

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Guardian`s obligations 4

4. The protection against current and former wishes is only allowed and demanded when the person gets into a substantial danger by reason of a mental illness or mental or psychological handicap and cannot recognize the necessity of the protective decision.
- Substituted decision making in form of substituted judgment

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What do guardian`s need to fulfill these obligations?

Guardians need to have the ability:

- to communicate with the ward
- to investigate (formers) wishes and values
- to change perspectives
- for self-reflection
- to have patience

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What should be the parameters for decision making processes?

- Information`s and training about guardianship, communication and the significance of self determination
- Advisory services
- Monitoring and safeguarding

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