

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 information 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. Conclusions and parameters

1. General information on the German Guardianship Law

Adults with impairments have a right to have a guardian appointed to them by the court, if they cannot wholly or in part take care of their legal affairs.

Adults in general can avoid a guardianship by giving another person power of attorney (see Volker Lipp, Breakout series # 8) if they have the capacity of giving someone power of attorney.

The German guardianship law was changed in 1992. One of the most important modifications was the separation between appointing a guardian and the declaration of legal capacity to act. In the process we also had a change in terminology (Betreuung instead of Vormundschaft). The official translation of the German Civil Code uses the term custodianship. For this presentation I will use the term guardianship when referring to the legal instrument, and, based on this term, guardian and ward.

The German guardianship in general has no influence on the person's legal capacity. Legal capacity is a question of current capability and not of a status as a result of a court decision. Nevertheless, the guardian functions as a representative regarding selected

tasks prescribed by the court. A guardian may not be appointed against the free will of an adult which means he/she has a right to refuse a guardian.

A guardian is appointed by the court and the suggestion of the concerned adult who should be the guardian should be followed unless it is inconsistent with the best interests. Mostly adult family members or professionals (such as social workers) function as guardians.

2. My assumptions

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

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

Does this constitute an irreconcilable contradiction?

Regardless of the question of legal capacity with the power of attorney, the guardian is able to infringe upon the person's right of self-determination if he/she does not respect the law. In this case, this means following the principle of necessity. According to this principle, the person's rights should be interfered with as little as possible.

Guardians in most countries have power of attorney, although the extent may differ. But also where countries developed "alternative systems", such as representation agreements in Canada or the "Vorsorgevollmacht" in Germany, the power of attorney gives the representative, in a sense, the possibility of substituted decision-making.

The question of how to make a decision while respecting self-determination remains.

There is a legal interpretation in Germany which argues that a guardian's decision should be made by accommodating the ward's wishes and his/her wellbeing to protect him/her from substantial self-damage. This interpretation does not consider the ward's capabilities.

I do not agree with this interpretation. The law does not permit a principle which accommodates wishes and the ward's wellbeing in general. This interpretation is the result of a paternalistic understanding of guardianship which considers wards "under guardianship".

3. The ward's risks

It seems that we have an irreconcilable contradiction between self-determination and security. But giving the guardian the obligation to accommodate these basic interests of one person in decision-making can also be a risk for the ward.

Some circumstances may typically influence the decision-making process:

- “difficulties” arising from communication with the ward
- the influence of the guardian's own values
- the guardian's own interests
- other player's interests or values
- the guardian's liability (important question for professionals)

Let's try to find answers to how it is possible to respect the capability of self-determination:

4. The guardian's obligations

Decision-making follows guidance on the law. Basic principles follow from Art. 12 CRPD and the principle of necessity in the German Civil Code (§ 1901).

Necessity in this context means that the guardian is obliged to support the person concerned as far as possible to make his/her own decisions. The threshold for substituted decision-making is the concerned person's inability to make decisions with support.

Guardian law demands to protect the person only under a legal condition. The protection against current and former wishes is only allowed and requested when the person gets into substantial danger due to a mental illness or mental or psychological handicap and cannot recognize the necessity of the protective decision.

What are the conditions when he/she cannot recognize the necessity of a protective decision/measure?

What constitutes substantial danger the ward needs to be protected from?

(1) Priorities of supported decision-making

Counseling/advising the ward

Explaining the circumstances of a decision in a comprehensible way (remove barriers)

Supporting the capability to make the decision and realizing self-determination of the ward

(2) Supported decision-making in the form of shared decision-making complying with the current wishes of the ward (informed consent) and using the guardian's power of attorney to transfer the decision outside of legal relations.

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

(4). Substituted decision-making: protection against current and former wishes is only allowed and requested when the person gets into substantial danger due to a mental illness or mental or psychological handicap and cannot recognize the necessity of the protective decision, substituted judgment or the best interest.

5. Conclusions and parameters

What do guardians need to fulfill these obligations?

Guardians need to have the ability:

- to communicate with the ward
- to make out (former) wishes and values
- to change their perspective
- for self-reflection
- to be patient

What should the parameters for decision-making processes be?

- Information and training regarding guardianship, communication and the significance of self-determination
- Counseling services
- Monitoring and safeguarding