



Reply to questionnaire for the country reports – Switzerland

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1. What statutory regulations are relevant for the legal protection of adults?

The legal protection of adults was newly regulated in Switzerland as of January 1st, 2013. The essential provisions are laid down in the **Swiss Civil Code (Zivilgesetzbuch/ZGB), i.e. in Art. 360 et seqq. ZGB¹**. However, in order to understand the law for the protection of adults, general regulations regarding legal capacity in personal law (**Art. 11 et seqq. ZGB**) also need to be taken into consideration.

The **administrative organization and the procedure** are governed by the cantons, however, the federal legal provisions in Art. 440 et seqq. ZGB need to be observed.

The **revision of the law for the protection of adults** (formerly: guardianship law) had several objectives. In the context at hand, what is important is that the Swiss lawmaker wanted to strengthen the right to self-determination of the person (cp. also Art. 388 section 2 ZGB), which was among other things attained by the possibility of making one's own provisions (advance health care directive, power of attorney) and the appreciation of the principle of subsidiarity associated with this. Conducive to the principle of subsidiarity – as well as relieving the public authorities – are the newly introduced statutory rights of representation of family members (see point 7 below). Mentally incapable persons are to be better protected with the new law. The 'customized' forms of welfare advocacy (Beistandschaften: different types of assistants, supporters, representatives) contribute to a reinforcement of the principle of proportionality. Also persons who due to debility are no longer able to make decisions independently, must, wherever possible, be included in the decision-making process. Therefore, a right of participation of mentally incapable (incapable of consenting) persons is explicitly provided for concerning medical measures (Art. 377 section 3 ZGB). The person concerned has a right of nomination as well as refusal with regard to the welfare advocate (Beistand; Art. 401 ZGB). The welfare advocate «if possible, takes [the] opinion [of the person concerned] into consideration and respects the person's will to create his/her life according to his/her abilities and his/her very own wishes and ideas» (Art. 406 section 1 ZGB).

Despite this increased consideration for the self-determination of the person concerned, the new law for the protection of adults – in accordance with the general regulations on legal capacity – still assumes that certain persons are unable to act autonomously due to debility. This applies especially to persons lacking **mental capability**, while there can be various reasons for this². Art. 16 ZGB defines mental capability as the ability to act according to reason. It is (indisputably) relative, meaning it always needs to be assessed for a specific – usually contractual – activity independently of age. Therefore it is for instance possible that a person may still be able to take care of everyday matters

¹ Swiss Civil Code (ZGB), SR 210, available at: <https://www.admin.ch/opc/de/classifiedcompilation/19070042/index.html> (besides the German version, the official versions in French and Italian are also available at this link, as well as an English translation, which however is not legally binding).

² Art. 16 ZGB cites childhood, mental disability, psychological disorder, intoxication or similar states as possible reasons for mental incapability.

on his/her own, however does not possess sufficient mental capability for complex capital transactions³. If there is a lack of mental capability, a representation in legal dealings is mandatory. Apart from that **other states of debility** may also seem to indicate legal measures for the protection of adults (see point 3).

2. What formal measures providing support in the exercise of legal capacity are available?

As long as the person concerned has **full legal capacity** (i.e. is mentally capable and of legal age: Art. 13 ZGB) he/she principally acts independently and alone (but also cp. point 1, at the end). Of course, issuing a power of attorney to another person is always admissible according to general regulations.⁴ The person concerned is at liberty to seek advice from another person or institution of his/her choice for certain decisions or legal dealings. Numerous public and private institutions offer specific advisory services for instance for elderly persons or persons with disabilities.

In the event of a later mental incapability, a person with legal capacity can in an **enduring power of attorney** «assign a natural person or corporate body to be responsible for taking care of personal or financial affairs or to represent them in legal affairs in case of their mental incapability» (Art. 360 ZGB). The enduring power of attorney may be established either by one's own hand or by public certification.

In an **advance health care directive**, a mentally capable person can furthermore «determine which medical measures he/she consents or does not consent to in the event of his/her mental incapability». Equally, he/she can «appoint a natural person, who in case of his/her mental incapability is to discuss the medical measures with the attending physician and make a decision on his/her behalf. He/she can give this person instructions.» (Art. 370 ZGB). If the person concerned has not determined a representative for the event of his/her own mental incapability, then either **statutory rights of representation of family members** will be applied (see below, point 7) or the Adult Protection Authority (Erwachsenenschutzbehörde) appoints a **welfare advocate** for the person concerned (see point 6), whereby the tasks of this supporter need to be specifically defined.

3. Who decides on the appointment of a supporter/representative and what are the requirements for the respective measure?

The appointment of a welfare advocate is always effectuated by the **Adult Protection Authority**. This is an interdisciplinary specialized authority. The specific administrative organization resides with the cantons and can therefore not be described in general terms. In practice, the fields represented in the administration are Law and Social Work.

The **requirements for welfare advocacy** are laid down in Art. 390 section 1 ZGB. Accordingly, the establishment of a welfare advocacy is only possible if the person concerned is afflicted by debility, i.e. if he/she «due to a mental disability, a psychological disorder or a similar debility inherent in the person can only partially take care of his/her affairs or not at all,» or when the person concerned «due to temporary mental incapability or absence can neither act him- or herself nor has determined another person authorized to represent him/her regarding affairs that need to be taken care of». A regime of welfare advocacy is not established if the person concerned receives sufficient support

³For details on the law of legal capacity and the concept of mental capability see among others HAUSHEER/AEBIMÜLLER, §§ 6 and 7, with further references.

⁴ Civil representation is laid down in Art. 32 et seqq. of the law of obligation, OR, SR 220, available at:

<https://www.admin.ch/opc/de/classified-compilation/19110009/index.html>.

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from his/her personal environment (subsidiarity of measures for the legal protection of adults, see point 1).

There are four **different basic forms of welfare advocacy** available, depending on the type of debility. The form and substance of the respective welfare advocacy is not set out in detail by the law. Instead, the form and substance of the prescribed welfare advocacy is to be specifically declared in a given case by the competent authorities. At the same time, the principle of proportionality must be observed, meaning the prescribed measure must neither interfere more nor less with the legal position of the person concerned than is necessary for the desired objective – remedying, compensating or alleviating the negative effects of debility. Furthermore, the Adult Protection Authority will rescind the measure of welfare advocacy as soon as there is no longer a reason for it to continue. It can also make changes to the measure or replace it by one less elaborate if an extension or limitation seems appropriate.

If the person concerned only requires accompanying support in certain affairs, a **supporting welfare advocacy** (Begleitbeistandschaft) can be arranged (Art. 393 section 1 ZGB). This does not affect the legal capacity of the person concerned. The supported adult acts autonomously and is only responsible for his/her own actions. The supporting welfare advocate advises and supports the person concerned. Therefore this type of welfare advocacy only makes sense when the person concerned is willing to cooperate with the supporting welfare advocate. Supporting welfare advocacy necessarily requires the consent of the person concerned.⁵

If the person in need of support is not able to handle certain affairs his- or herself and needs to be represented in this respect, the authority will set up a **welfare advocacy with power of representation** (Vertretungsbeistandschaft, Art. 394 section 1 ZGB). This measure is also suited for such cases in which the person remains completely passive in certain matters, so that a representation is necessary, the person concerned however is not able to give someone power of attorney or supervise them. The welfare advocate with power of representation represents the person concerned and acts on his/her behalf within a certain scope of responsibilities (that must be specified in detail). The welfare advocacy with power of representation affects the legal capacity of the person concerned insofar as he/she must allow and take on the actions of the welfare advocate, meaning he/she is legally obligated by the actions of the welfare advocate (Art. 394 section 3 ZGB). This does not prevent the person concerned from also taking action him- or herself. However, the Adult Protection Authority can also (partly) remove legal capacity of the person concerned (Art. 394 section 2 ZGB), provided this is necessary for his/her protection. The welfare advocacy with power of representation can encompass taking care of personal, financial (asset management welfare advocacy/Vermögensverwaltungsbeistandschaft) and/or legal affairs.

If a person does not remain passive but, rather, there is a risk of him/her undertaking legal transactions detrimental to him/her, the authority can set up a **welfare advocacy with consenting power** (Mitwirkungsbeistandschaft). The welfare advocate with consenting power is not a legal representative and cannot act *for* but only *with* the person concerned. The latter must therefore still be mentally capable and able to act of his or her own accord. The legal capacity of the person concerned is restricted insofar as he/she is no longer able to legally act *alone* (Art. 396 section 2

⁵ In practice situations regularly arise in which the person concerned refuses to give consent at the time the measure is established, but then accepts the welfare advocacy when the mandate begins and also cooperates with the welfare advocate. The requirement of consent within the supporting welfare advocacy makes an establishment ex officio impossible in such cases.

ZGB). For legal transactions affected by the measure, he/she always needs the consent of the welfare advocate. The welfare advocate and the adult receiving support necessarily must act concertedly (Art. 396 section 1 ZGB). In the decision setting up the measure, the Adult Protection Authority must state for which type of legal transactions the welfare advocate's consent is required.

The three types of welfare advocacy just described can also be **combined** (Art. 397 ZGB). For example, a supporting welfare advocacy could be set up for the vulnerable person regarding healthcare so that where necessary the person concerned receives advice and support; and regarding assets that are particularly at risk (for instance the residence) a welfare advocacy with consenting power can be set up so that the person concerned cannot dispose of them independently to his or her disadvantage.

General welfare advocacy (umfassende Beistandschaft) is equivalent to the previous juridical incapacitation and basically applies to all affairs. This measure is a last resort and only justified when a person is in a particular state of need and less rigorous measures, also a combined welfare advocacy, do not sufficiently protect him/her. A general welfare advocacy may only be set up if the person concerned requires particular protection or an official removal of legal capacity is to establish clarity. Accordingly, the general welfare advocacy fulfils two functions: for one, it comes into effect when it is not justifiable that a person continues to carry out legal actions in almost all spheres of life. On the other hand, it is also available with regard to providing comprehensive protection for persons who no longer act at all. However, if a person is no longer able to act him- or herself, for instance in cases of severe dementia, de facto a welfare advocacy with power of representation is sufficient. By law, a general welfare advocacy covers all matters concerning care of personal, financial and legal affairs (Art. 398 section 2 ZGB). In this sense, the welfare advocate can and is obliged to take care of the concerns of the supported person in a comprehensive way and is his/her exclusive legal representative. With the establishment of a general welfare advocacy, legal capacity is lawfully suspended. This is explicitly laid down in Art. 17 ZGB. However, insofar as the person concerned is mentally capable in certain areas, he/she still retains a certain legal capacity despite general welfare advocacy. His/her incapacitation is limited (Art. 19 et seqq. ZGB). Therefore it is for instance possible that he/she continues being able to consent to medical treatment alone or participates in business transactions with the legal representative's consent.

With the appointment of a welfare advocacy, the welfare advocate is provided with a corresponding customized legal power (representation, support, consenting power). This applies in relation to third parties. **Internally** the welfare advocate must keep doing everything possible to facilitate the self-determination of the supported person as much as possible (esp. Art. 388 section 2, Art. 406, Art. 409 ZGB). Therefore the welfare advocate with power of attorney must only conclude a transaction when the person concerned cannot do this him- or herself or if necessary also when he/she does not wish to do so. Insofar as the concerned mentally capable person (if need be with the support of the welfare advocate) is able to act on a transactional level, this form of participation in business transactions must have precedence, with the welfare advocate then needing to give consent to the transaction (Art. 19 section 1 ZGB).

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4. Who is involved in the procedure of assessing the need for support in legal affairs and in what capacity?

The **Adult Protection Authority** at the place of residence of the person concerned is responsible for official measures. The authority's decisions can be reviewed by a cantonal judicial appeal body and in the last instance by the Swiss Federal Court.

The Adult Protection Authority takes action ex officio or upon being alerted by a private person regarding a person in need of support. The authority officially establishes the facts relating to the case and gathers the evidence required. If necessary, the authority mandates an expert opinion (Art. 446 ZGB). The law prescribes the obligation to cooperate for other authorities and officials (Art. 448 ZGB). If need be, the person concerned is represented by a welfare advocate in the procedure so that he/she can exercise their rights despite restrictions (Art. 449a ZGB).

5. What significance does the legal capacity of the person concerned have and is there a constitutive determination of (lack of/ restricted) legal capacity?

The general regulations on legal capacity (Art. 12 et seqq. ZGB) state that only legally capable persons have the ability to establish rights and obligations through their own actions. As mentioned above, **full legal capacity** implies **mental capability and majority** (Art. 13 ZGB, also see above, point 1). A person not able to form his/her own will or to put their will into action is – independent of any official measure – not mentally capable and therefore not legally capable.

There is **no general determination of legal capacity or legal incapacity**, neither by the Adult Protection Authority nor any other authority or a court. A person's mental capability is the rule and is assumed.

However, when a regime of welfare advocacy is imposed, this can be tied to a **restriction of legal capacity if this is essential for the protection of the person concerned**. In this respect, a distinction between the types of welfare advocacy has to be made (above, point 3). A supporting welfare advocacy does not affect legal capacity. A welfare advocacy with power of attorney may, if necessary, be combined with a partial restriction of the legal capacity of the person concerned. A welfare advocacy with consenting power leads to the restriction of legal capacity in the sense that the person concerned needs to obtain consent from the welfare advocate for transactions affected by the welfare advocacy. Only the general welfare advocacy, which can only be imposed in exceptional circumstances, results in a loss of legal capacity. However, insofar as the person concerned is still mentally capable, he/she may still make certain legal transactions alone, despite general welfare advocacy (Art. 19 section 2 and 3 ZGB, Art. 19c section 1 ZGB). The person concerned can therefore gain free benefits, handle minor affairs of everyday life, exercises personal rights him- or herself (e.g. entering into marriage, consent to medical measures, etc.) and has the capacity for delict liability. Otherwise, he/she depends on a representative acting on his/her behalf, however, as stated above (point 1), the representative must not only safeguard the interests of the person concerned but must also take the person's wishes into consideration.

Despite these nuanced provisions regarding legal capacity, the Swiss law takes on an 'all-or-nothing perspective' in the sense that in principle when there is a **lack of mental capability** legal capacity is removed – aside from the right of participation. It is therefore particularly important that the threshold for mental capability is not set too high and that mental capability is always related to specific actions and not generally negated.

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6. What are the duties of a supporter/representative and what are the obligations and principles he/she needs to comply with?

When setting up any type of welfare advocacy, the Adult Protection Authority must **describe the welfare advocate's duties as precisely as possible** (Art. 391 section 1 ZGB). This may extend to taking care of personal, financial and legal affairs (Art. 391 section 2 ZGB). Welfare advocacies are 'measures made to measure' and not unalterably ready-made legal instruments. Accordingly, the welfare advocate's duties arise primarily from the specific directive of the authority. In part, the structure of these duties is already predefined by the type of welfare advocacy. The duties must always be performed in view of the interests of the person concerned (Art. 406 section 1 ZGB; concerning the inner relationship and that relating to third parties, see above point 3, end).

Personal care can include all affairs relevant to the person being supported. This may encompass maintenance and accommodation, mental and physical health, education and career. What is always critical is the description of the duties provided by the authority. The extent of care needed depends on how much assistance the person concerned needs. The person needs to be supported in his/her self-chosen lifestyle and individuality as much as possible. The welfare advocate is liable to a duty of care and an obligation of confidentiality (Art. 413 ZGB), is supposed to alleviate the situation of debility as much as possible, as well as possibly bringing the person under advocacy back to autonomy. Insofar as the person concerned is mentally capable, he/she can continue to participate in legal dealings acting on his or her own within the right to legal capacity, provided that he/she has not been restricted in this by the measure (Art. 407 ZGB). The welfare advocate must take this into account. But regarding the duties assigned to him/her, the welfare advocate must also be considerate of the opinion of the person under advocacy as far as this is possible and respect the person's will. The person concerned is to be allowed as much latitude as possible regarding his/her way of life (Art. 406 section 1 ZGB). He/she must be respected as an independent individual with his/her own ideas and wishes. The person's best interest and respect for his/her personality have priority, therefore the remaining ability for self-determination is to be allowed enough room. If possible, the welfare advocate is to establish a **relationship of trust** with the person concerned (Art. 406 section 2 ZGB) as well as protect and support him/her in their autonomy.

As far as the welfare advocacy comprises **representation**, this duty must also only be exercised on behalf of the person concerned. To safeguard this, the power of representation is revoked by law when there is a collision of interests (Art. 403 section 2 ZGB).

If the welfare advocacy also includes **asset management** it is imperative that at the beginning of the welfare advocate's activity, he/she and the Adult Protection Authority record an inventory of all assets that need to be managed (Art. 405 section 2 ZGB). The welfare advocate must manage the assets diligently. He/she must conserve them in their substance and if possible increase them. To this end, he/she must in principle invest capital at 'low risk'. Thereupon the welfare advocate is obliged to keep accounts of the asset management and to submit the corresponding reports periodically to the Adult Protection Authority (Art. 410 et seqq. ZGB). The authority determines the respective periods which must not exceed two years (Art. 410 section 2 ZGB). All actions of the welfare advocate must serve the interests of the person under advocacy. As this generally hardly applies to certain types of legal dealings, the new law also determines legal transactions which the welfare advocate is in any case prohibited from conducting. Even with a restriction of his/her legal capacity, the person concerned must be allowed free disposal of adequate amounts of his/her assets and/or income (Art. 409 ZGB).

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The welfare advocate must perform his/her duties with the same diligence as someone with a mandate (Art. 413 section 1 ZGB refers to Art. 398 OR). However, the welfare advocate's liability is determined by the provisions of the law for the protection of adults (Art. 454 et seqq. ZGB), that is the canton is liable for possible negligence of the welfare advocate.

7. What is the role of family members and what requirements do they have to meet?

In the Swiss law for the protection of adults family members play a part in two respects. Firstly, the law provides for certain statutory rights of representation. And secondly it is possible for a family member to be appointed as a welfare advocate.

Regarding the **representation of a mentally incapable patient in medical treatment decisions**, Art. 378 ZGB provides for a host of persons with decision-making power, giving priority to the person named in an advance health care directive or in an enduring power of attorney, and in the second instance to the welfare advocate charged with this task. If there is no such person available, the spouse (or registered partner⁶), domestic partner, the descendants, parents, and finally siblings are responsible for giving consent to the treatment plan developed by the doctor on behalf of the patient. However, besides the formal status of family membership, the power of representation always requires an existing relationship. Apart from that, family members are not examined further regarding their qualification. However, if the power of representation seems unclear or the patient's interests could be compromised, the physician or any closely related person may call on the Adult Protection Authority (Art. 381 ZGB).

Only the spouse (or registered partner) and no other family member has a **right to representation regarding legal transactions**. If the person concerned is mentally incapable, this encompasses «(1) all legal actions usually required for covering maintenance needs; (2) the correct management of income and other assets; and (3) if necessary, the authorization to open and attend to the mail» (Art. 374 section 2 ZGB). The right of representation arises by law without the need for any official intervention. The Adult Protection Authority revokes the right of representation when the interests of the person concerned are no longer protected (Art. 376 section 2 ZGB).

Family members of the person concerned do not have a prerogative to be **appointed as welfare advocates**. However, when they are assigned as welfare advocates, they do occupy an **exceptional position**. The spouse, the registered partner, the parents, a descendant, a sibling, or the factual domestic partner of the person concerned exercising the duty of the welfare advocate, *may be* completely or partly absolved from the obligation of submitting an inventory, the duty of submitting periodical reports and bookkeeping, and the obligation of obtaining consent for certain transactions (Art. 416 f. ZGB) if this is justified by the circumstances (Art. 420 ZGB). However, this does not absolve the authority from its general duty of supervision. The provisions regarding a direct state liability for the welfare advocate's misconduct remain applicable (Art. 454 ZGB). Of course, the appointment of family members as welfare advocates is only possible if they are suitable for the specific task (also see point 8 below).

⁶ The so-called registered partnership/civil union is the legal instrument the Swiss legislator make available to same-sex couples for a committed life partnership. In the context of interest here, the legal effects are identical with those of marriage.

8. What is the role of volunteers and what requirements do they have to meet?

It is possible for **volunteers** to be appointed as **welfare advocates**. This also includes family members and friends. With very few exceptions, the law does not differentiate between a professional welfare advocate and a private welfare advocate. In this case they have the same rights and obligations any other welfare advocate has and must also meet the same requirements. Therefore they need to be suited for their task (Art. 400 section 1 ZGB) and this suitability refers to both **personal as well as specialized qualities** and includes **social, personal, methodical and professional skills**. Furthermore, the welfare advocate must also be able to invest enough time to fulfill this function so that he/she can actually personally discharge the tasks he/she is entrusted with.

Whether the Adult Protection Authority appoints a so-called professional welfare advocate (see point 9 on this) or if a private welfare advocate is assigned is left to the authority's discretion. What is essential is that the person concerned has a **right of nomination**. He/she can nominate a familiar person as a welfare advocate. The authority must comply with this nomination unless it deems the nominated person unsuitable, which it needs to justify (Art. 401 section 1 ZGB). Apart from this there are various forms of support for private welfare advocates. To some extent they are actively recruited, trained and supported by authorities and/or local services. Other authorities focus on working with professional welfare advocates. Concerning this there are also no associations in Switzerland comparable to for example the Austrian associations for "Sachwalter" (special guardians) or the German associations for "Betreuer" (court-appointed legal representatives).

9. Are there professional supporters/representatives and what requirements/qualifications do they have to meet?

Professional welfare advocates are **mandate holders** who as a rule have an employment relationship with the polity and carry out their work as a principal occupation. The Adult Protection Authority has to see to it that welfare advocates receive the required instruction, guidance and support (Art. 400 section 3 ZGB). As appropriate, this may include adequate training and further education. Professional welfare advocates are mostly social professionals, less frequently commercially trained persons with advanced training, lawyers, social pedagogues, or psychologists.

What is **impermissible** is the appointment of **members** of the **Adult Protection Authority** and its ancillary staff as welfare advocates because in this case independence could not be sufficiently safeguarded and supervision would be mixed up with supporting/representational tasks. Apart from that, professional welfare advocates need to meet the same requirements as private welfare advocates, meaning they have to be **suited** for the specific duty **in every respect**. This task may – but does not necessarily have to – require special skills, e.g. in asset management.

10. Who bears the costs for procedures and the supporter/representative?

The question of who bears the **procedural costs** is not laid down by the law for the protection of adults. Accordingly, the cantons are authorized to put a regulation in place. As a rule, the procedural costs are imposed on the person concerned.

Remuneration of the welfare advocate is covered by the income or assets of the person concerned as far as he/she is able to (Art. 404 section 1 ZGB). The income of the person under advocacy also includes maintenance payments by family members or claims arising from obligations of support

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based on family law. In case the income or assets of the person concerned are not sufficient, cantonal law regulates the absorption of costs by the polity.

11. How are the supporters/representatives supervised and what is done to ensure that the rights, will and preferences of the person concerned are respected? (cp. Art 12 section 4 UN CRPD)

Die Adult Protection Authority must **generally supervise** the welfare advocate in his/her practice. It has to intervene when learning that the interests of the person under advocacy are jeopardized by the welfare advocate's activities. Insofar the authority acts officially.

The Adult Protection Authority must **audit and approve** the **accounting and reports** of the welfare advocate. If need be, the authority withholds its approval respectively demands amendments and further information (Art. 415 section 1, Art. 425 section 2 ZGB). Based on the reports, the authority possibly needs to impose further measures (Art. 415 section 3 ZGB). Such measures may involve appointing an additional welfare advocate for the person concerned in order to investigate or raise responsibility claims against the welfare advocate or the authority itself. The reports serve as a statement of accounts to the authorities and the persons concerned as well as helping to determine a position regarding a continuation of the imposed measure. In this way it can be evaluated if the personal care/assistance is adequate, if the interests of the person under advocacy are being observed, and if it may be necessary to adjust the measure.

There are certain transactions which the **welfare advocate cannot manage alone** for the person under advocacy; he/she must obtain consent. These transactions are specified in Art. 416 section 1 ZGB. The legal transaction only comes into effect when consent has been given (Art. 418 ZGB).

Furthermore, there is the **option of appeal**: the person under advocacy as well as any close relative of his/hers is authorized to appeal to the Adult Protection Authority. Third parties may also call on the authority, provided that they have a legally protected interest (Art. 419 ZGB). Appeal causes are not only actions but also defaults of the welfare advocate or other persons the authority has assigned to the task within the legal protection of adults. Any type of behavior in the context of a measure can be reprimanded. As the case may be, the Adult Protection Authority's decision then becomes the cause of the appeal to the judicial appeal body (Art. 450 et seqq. ZGB).

There is no institutional supervision of family members exercising a **legal right of representation** (see point 7). But in case of the interests of the person concerned being in jeopardy, an appeal can also be made to the Adult Protection Authority or the authority intervenes officially.

12. Who decides on deprivation of liberty and involuntary medical treatment and what requirements does the decision have to meet? Is there a differentiation between endangerment of self and others?

In Switzerland the legal instrument of **involuntary commitment** (Fürsorgerische Unterbringung) is applied. Articles 426 et seqq. ZGB are always applied when a mentally capable or a mentally incapable person has to be committed to or retained in an institution without their consenting to staying there. The condition for an involuntary commitment is like in the case of welfare advocacies (see point 3) a debility and derived from that a need for support and protection. In conclusion the law describes the respective **debilities** for the protection of the person concerned. They include: a psychological disorder, a mental disability or a severe state of neglect (Art. 426 section 1 ZGB). Psychological disorders also include addictions, e.g. drug, prescription drug and alcohol abuse. Severe

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neglect indicates an individual's state of social deviance which has an intensity that is no longer reconcilable with human dignity. Mild cases do not fall within the scope of the facts, likewise vagrancy or homelessness is not sufficient for committing the person concerned to an institution. The order of an involuntary commitment requires that the debility makes **personal welfare care**, for instance therapeutic measures, special care, or treatment of a physical condition in a protected environment **necessary**. The measure must comply with the general principles of the law for the protection of adults. Particularly the **principle of subsidiarity as well as proportionality** must be observed. Commitment or retention can only take place in a **«suitable institution.»**

The **burden** the person concerned is **for his/her environment** is neither a requirement for commitment nor sufficient justification for imposing a deprivation of liberty. However, it is taken into consideration when the question arises if the necessary personal care can only be realized by a deprivation of liberty or possibly through other means. If the safety of the personal environment is considerably at risk this as a rule constitutes an unreasonable burden.

Jurisdiction: the due order of a commitment or retention lies within the responsibility of the **Adult Protection Authority** (Art. 440 ZGB). Besides the Adult Protection Authority, the cantons can also determine **physicians** to be responsible for commitments (Art. 429 section 1 ZGB). However, a medical commitment is always temporary (Art. 429 section 2 ZGB). The term for a medical commitment is determined by cantonal law and must not exceed six weeks. If a person hospitalizes him- or herself voluntarily they may basically leave at any time without needing consent from the hospital management. If the patient however suffers from a psychological disorder the medical administration can retain him/her for a maximum of three days against his/her will if he/she poses a serious danger to his/her own life and limb or the life or physical integrity of third parties (endangerment of others; cp. Art. 427 section 1 ZGB). The patient may only be retained for a longer period of time if the Adult Protection Authority has issued a legally binding decision for deprivation of liberty.

Like any other decision of the Adult Protection Authority, decisions on involuntary commitment are also subject to **judicial evaluation** following an appeal (Art. 450 et seqq. ZGB). The appeal does not need to be justified (Art. 450e section 1 ZGB). Then both the commitment decisions of the medical staff and the decisions of the hospitals concerning retentions and requests for release form part of the appeal to the court (Art. 439 section 1 Ziff. 1–3 ZGB). If the involuntary commitment is based on a psychological disorder, the court must necessarily base its decision on an expert report (Art. 450e section 3 ZGB). The expert witness must be an independent person that does not belong to the formation of the court. The court has to personally hear the person concerned as a council (Art. 450e section 4 ZGB; this also applies when the first instance is a judicial authority that has heard the person concerned: BGE 139 III 257 E. 4). If necessary, the appeal board orders a representation by a person experienced in welfare and legal matters (Art. 450e section 4 ZGB). The decision should be made within five working days (Art. 450e section 5 ZGB).

Medical treatment of the involuntarily committed person is possible when the mentally capable person concerned gives his/her consent (however, particular procedural provisions need to be observed, Art. 433 ZGB). Without consent being given, **treatment of a psychological disorder** is legitimate when ordered by the chief physician of the department and only when cumulatively (1) without treatment of the person concerned there is a threat of serious damage to their health or the life or physical integrity of third parties is seriously endangered; (2) the person concerned is mentally incapable regarding his/her need of treatment; and (3) there is no appropriate measure available

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that is less invasive (Art. 434 section 1 ZGB). The person concerned can appeal to the court (without going through the Adult Protection Authority) against the order of treatment without consent (Art. 439 ZGB).

13. Further comments

None.

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