



Panel 4: Assessment of the Need of Support in Exercising Legal Capacity

Malcolm Schyvens, Australia; Peter Schlaffer, Austria; Torbjörn Odlöw, Sweden; Moderator: Klaus Gözl, Germany

Australian point of view:

Malcolm Schyvens, Australia

➔ See file “Australia”

Austrian point of view:

Peter Schlaffer, Austria; Translation from German: Ekpenyong Ani

In Austria, adult guardians/Sachwalter (statutory legal representatives) have currently been appointed for about 60,000 persons (approx. 0.7 % of the population). Adult guardianship/Sachwalterschaft (statutory legal representation) is often employed unreflectingly and as a compensation for structural problems. There is a lack of support systems. Social security entitlements often lead to a legal representation being suggested. There is a lack of barrier-free access to rights.

A successful model for avoiding adult guardianship/Sachwalterschaft, is the “Clearing” developed by VertretungsNetz, which was laid down by law in 2006. An alternative to the adult guardianship/Sachwalterschaft is sought together with the person concerned and his/her environment. The pilot scheme “Clearing Plus” offers “support in self-determination”. A member of the clearing staff ascertains the need for support and introduces alternatives to adult guardianship/Sachwalterschaft. In one third of the cases (almost 2/3 in the pilot scheme “Clearing Plus”) it is possible to abstain from the appointment of a special guardian and to preserve the autonomy of the persons concerned.

What is essential for the concept of “Clearing Plus – support in self-determination” is a change of attitude. Moving away from acting in place of the persons concerned to searching for solutions in cooperation with the person concerned.

On July 7, 2016, the Austrian Ministry of Justice presented a draft law for the legal protection of adults which VertretungsNetz was closely involved with:

https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00222/index.shtml

In the future, an extended clearing and as a last resort a judicial representation of adults for a limited period of time shall largely preserve self-determination for the person concerned. The four pillars of the revision can be found in the attached document of the Ministry of Justice.

4 PILLARS OF THE LAW FOR THE LEGAL PROTECTION OF ADULTS

ENDURING POWER OF ATTORNEY (existing alternative)	OPTED REPRESENTATION OF ADULTS (new)	LEGAL REPRESENTATION OF ADULTS (expanded)	JUDICIAL REPRESENTATION OF ADULTS (adult guardianship/ Sachwalterschaft)
may be granted for individual affairs or areas of affairs	may concern individual affairs or areas of affairs in specific domains may be conditioned on the agreement with the person represented , restrictable to rights to inspection and information representation in court included (unless agreed otherwise)	may concern individual affairs or areas of affairs in specific domains representation in court always included	may only be appointed for individual or various affairs that need to be presently conducted and are described as specific
in writing before a notary, lawyer or association for the protection of adults	in writing before a notary, lawyer or association for the protection of adults	registration in the ÖZVV (Austrian Central Registry for Representation) by a notary, lawyer or association for the protection of adults	judicial appointment
power of representation from registration of coming into force in the ÖZVV	power of representation from registration in the ÖZVV	power of representation from registration in the ÖZVV	power of representation from legal effect of the order of appointment
no regular review but judicial permission in certain affairs	annual report on the living situation and presentation of asset status	annual report on the living situation and presentation of asset status	annual report on the living situation and financial reporting
ends after 3 years, registration of revocation in the ÖZVV, death of the person represented or the representative or court decision	ends with registration of revocation in the ÖZVV, death of the person represented or the representative or court decision	ends with registration of revocation in the ÖZVV, death of the person represented or the representative or court decision	ends after 3 years, death of the person represented or the representative or court decision

Swedish point of view:

Torbjörn Odlöw, Sweden

The presentation outlines the Swedish regulation concerning the procedure for the assessment of a person's need of support in exercising legal capacity.

Initially the possible two available measures – mentorship and administratorship – are described. The key measure, mentorship (godmanskap), is the least intrusive measure. The mentor's principal retains his or her majority, including right to vote, enter into marriage, as well as the authority to enter into agreements in the same way as everyone else. A person for whom the other kind of measure, an administratorship (förvaltarskap), is established is restricted in exercising his or her legal capacity. The administrator has exclusive power to represent the person in all matters that are covered by the appointment and the person concerned cannot, without permission from the administrator, enter into legally binding acts. The administrator has exclusive competence to represent his or her principal in every matter encompassed by the assignment.

Following the description of the available measures the presentation accounts for actual procedure for assessment of the person's concerned need of support. The procedure for establishing both measures are similar (albeit not in all details) with respect to what kind of professionals and expertise are involved and which steps that has to be taken.

If a measure should be established, and if so what type of measure, is decided by a general district court. The presentation concludes with an account of recent case law in the matter.

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