



Panel 13: Associations for the Support and Protection of Vulnerable Adults

Josef Thaler, Liechtenstein; Sybille Grebe, Yolande Erickson, USA; Roberta Rigamonti, Italy; Moderator: Jochen Exler-König, Germany

Introduction:

Jochen Exler-König, Germany

In Germany there are more than 1.3 million adults because of their illness or disability under court-appointed guardianship by German § Act 1896 ff BGB. The number of people and the complexity of the caseload involved with guardianship are increasing worldwide, especially in industrialized nations.

Most guardians are volunteers or family members. They ask for support and want education/assistance to fulfil the decision making or to represent the protected person.

More and more countries recognized this international development and supported the founding of Non Profit Guardianship Organisations (Austria 1984, Germany 1992, Italy 2004, Principality of Liechtenstein 2011 etc.). These organisations shall offer knowledge, skills, education and support to the court appointed volunteers and family members. National, regional or local differences are still existing. In Germany for example, the Non Profit Guardianship Organisations shall also inform regarding Power of Attorney.

The main goal of this panel is an international exchange of experiences in order to learn from each other and to point out the increasing importance of guardianship organisations worldwide.

Liechtensteinian point of view (see also file “Liechtenstein“):

Josef Thaler, Liechtenstein

Country/State: Principality of Liechtenstein

Area: 160 km²

Population: 37 468

Number of people under Guardianship: 160 (0.43% of Population)

Association of guardianship: 74

related party: 76

Relevant legislation:

All the following acts came into force on 1st of January 2011

§§ 269 to 284 g ABGB

Art 117 to 139 AussStrG

Art 1 – 18 VSG

Key terminology:

Klient (client) disabled person

Sachwalter (Guardian or deputy)

Sachwalterschaft (Guardianship)

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What types of guardianship do exist? (personal/financial affairs)?

Guardians can be appointed for specific matters e.g. representing the client in signing a contract, financial affairs, ... The certain affairs are listed in the court order.

Personal welfare is always a matter.

Guardianship for all matters has to be a last resort.

Who has the power to appoint an adult guardian?

The court (Fürstliches Landgericht) procedure is started up by a report to the court from anybody being involved or in worry about the client.

Only the nominated judge of the court of the principality for Liechtenstein can appoint a Guardian

What criteria do the court need to consider when deciding the need for a guardian?

§ 269 Abs 1 ABGB

If an adult Person suffering from mental illness or is mentally handicapped, AND unable to settle his matters without being in danger of disadvantage, a guardian may be appointed.

An authorised expert is providing a medical report to proof evidence of disability, while the court is proofing matters with which the person requires a substitute decision-maker.

Can a person under guardianship seek review of a guardian's appointment and/or guardian decisions?

YES

The person can appeal to court at any stage of court procedure. After the appointment of a guardian the person can make an application to revoke guardian's appointment. Only the nominated judge of the court can render a judgement.

There are three levels of jurisdiction

Does an existing enduring Power of Attorney (personal welfare/financial) remove the need for guardianship when capacity is lost?

YES

What are the responsibilities of not-for-profit guardianship organisations (eg support of family and volunteer guardians, recruitment and education of volunteer guardians, ...)?

- Guardianship
- Assessment for court procedure, in question:
 1. Matters
 2. Alternative solutions to guardianship
 3. Naming of people who would be willing and able to carry out guardianship
- Counseling and practical help for Relatives carrying out guardianship
- Recruiting of Volunteers, training and counseling

What costs are associated with guardianship and who pays? (e.g. application costs, court costs, yearly service fees)

The client might be charged by the court for the medical report. Only if very well off the client also has to pay the court fees. For low-income clients with no savings all these cost may be dispensed by court.

The guardian has to put forward a yearly report of the social and medical welfare and accounting. The guardian may apply to the court for compensation for undertaking this role.

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Usually they are awarded 5 per cent of the ward's annual net income, excluding benefits such as care benefit.

The guardian may also apply for reimbursement of expenses incurred undertaking the role. These payments may be reduced or dispensed by the judge (for low-income clients)

Describe your organisation:

Name: Sachwalterverein Liechtenstein

Founding date: 1st September 2011

Historical background (state organisation):

Change of law in 2011. The Parliament of Principality of Liechtenstein decided to quit the old law. A paradigm change took place. People with lack of capacity were no longer seen as someone with no rights. With the new law they are under special care and still able to bring their will forward. Since the law is young, the new modern sense of the law gradually starts growing in the society.

The organisation is carried by an association, which is the link to the state.

Number of staff:

1 Managing director/Guardian (full-time)

2 Guardians (part-time)

1 Secretary (part-time)

6 Volunteer Guardians

Location: Village of Triesen

Who is funding your organisation: Subvention of the State, Payment of clients, Donations

How many clients: 78 (increasing)

Assessment approx. 30 cases/year

How many support for family guardians: Counseling is free

Point of view of the USA:

Sybille Grebe and Yolande Erickson, USA

Country/State/Region: Los Angeles County, California, USA

Population: Approximately 10 million people in Los Angeles County

Relevant Legislation:

- California Probate Code: Probate Guardianships
- California Welfare and Institutions Code: Mental Health Guardianships

Key Terminology:

- Conservator is the term used for a guardian in California
- Conservatee is the term used for a ward in California

Note: Most of the States in the US use the terms guardianship, guardian and ward

What types of guardianship exist?

Guardianships over the person or estate or both include Probate and Mental Health (called LPS) guardianships:

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- Probate guardianships include general guardianships for people who lack capacity to make medical decisions and care for their person or finances. Dementia powers may be added to a general guardianship to provide protective placement and dementia medications for adults with dementia or Alzheimers.
- Limited Guardianships are for adults with intellectual and developmental disabilities. These are Probate Guardianships designed to limit the authority of the guardian and ensure maximum independence of the ward.
- Mental Health (LPS) guardianships are for people who are “gravely disabled”, they are unable to provide for their food, clothing or shelter because of their mental health disorder. They allow for placement in a psychiatric facility and administration of psychiatric medications.

Who has the power to appoint an adult guardian?

The court

What criteria does the court need to consider when deciding the need for a guardian?

The court considers:

- Evidence from a doctor, psychologist or other expert about the nature of the physical or mental illness;
- A report from an attorney appointed to represent the proposed ward;
- Objections and evidence from interested parties;
- The desires of the proposed ward; and
- Alternatives to guardianship

Can a person under guardianship seek review of a guardian’s appointment and/or a guardian’s decision?

The ward can always seek to modify or terminate the guardianship. The ward can challenge decisions the guardian has made. The ward can ask for a new guardian. If the ward is unable to effectively communicate his/her wishes, the court will appoint an attorney to advocate for the ward.

Does an existing enduring Power of Attorney (personal welfare/financial) remove the need for guardianship when capacity is lost?

Yes

Who can be appointed as guardian?

Anyone over the age of 18 including a spouse, parent, sibling, friend or relative. A professional guardian (an individual or entity whose profession is acting as a guardian) may be appointed. Professional guardians in California must be licensed by the State. The Public Guardian is a county agency authorized to act as a guardian for persons living in the county.

What are the responsibilities of not-for-profit guardianship organizations to support, recruit and educate family guardians?

Guardians: advise the guardian of both his/her role as a fiduciary and duty to act in the best interest of the ward. Provide resources for education, support and access to services in the community.

Educate the guardian about services to insure independence for the ward

Note: The local bar association provides training and education for attorneys to effectively advocate for wards and identify issues where there may be continued need for court oversight.

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Describe your organization:

Ms. Erickson works for Bet Tzedek Legal Services, a non-profit founded in 1975 that serves people of all religions and ethnicities who meet low income guidelines. No fees are charged to clients. Funding comes from grants, government agencies and foundations as well as private donations.

Ms. Grebe is a private attorney. She is appointed by the court to act as an attorney for wards for which she receives a reduced fee paid by the county. Ms. Grebe accepts many cases pro bono for which she receives no compensation.

Italian point of view:

Roberta Rigamonti, Italy; Translation from German: Ekpenyong Ani

Country/State/Region (Land/Bundesland oder Region): Italy

Population (Bevölkerung): approx. 60,000,000

Number of people under Adult Guardianship (Anzahl von Erwachsenen unter Betreuung/Sachwalterschaft): approx. 136,000 (under a special guardianship)

Relevant legislation (Gesetzesgrundlage):

Law No. 6/2004

Art. 404 Civil Code (CC)

Key terminology (Fachbegriffe):

Support guardian (*Amministratore di Sostegno*)

Special guardianship (*Amministrazione di Sostegno*)

What types of guardianship exist (personal welfare/financial affairs)?

Welche Aufgabenbereiche umfasst die Betreuung/Sachwalterschaft (z. B. Personensorge, Gesundheitsangelegenheiten, Finanzangelegenheiten)?

The support guardian (*amministratore di sostegno*) can be responsible for financial affairs, administrative matters, as well as tasks regarding the personal care of the person concerned (e.g. organization of caregivers, concluding employment agreements with caregivers, giving consent to medical measures, etc.). Certain transactions (so-called extraordinary administration), e.g. the sale of immovable property, require a special authorisation by the court.

Who has the power to appoint an adult guardian?

(Welches Gericht setzt den Betreuer/Sachwalter ein?)

The court at the domicile or place of residence of the beneficiary decides on the competence regarding the establishment of a special guardianship (*amministrazione di sostegno*).

What criteria does the court need to consider when deciding the need for a guardian? (Nach welchen Kriterien richtet das Gericht eine Betreuung/Sachwalterschaft für die betroffene Person ein?)

The requirements for a special guardianship are laid down in Art.404 of the Italian Civil Code (CC), according to which “a person that due to an illness or a physical or mental disability is incapable – even if only partially or temporarily – of taking care of his/her personal interests, can be provided with a support guardian.”

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Can a person under guardianship seek review of a guardian's appointment and/or a guardian's decisions?

(Kann eine Person unter Betreuung/Sachwalterschaft die Einrichtung einer Betreuung/Sachwalterschaft bzw. Entscheidungen des Betreuers/Sachwalters widerrufen?)

The beneficiary can submit a request to the guardianship court at any time for the purpose of revoking the special guardianship, replacing the support guardian, or altering the directions in the judicial decree of appointment.

Does an existing enduring Power of Attorney (personal welfare/financial) remove the need for guardianship when capacity is lost?

Hat eine bestehende Vorsorgevollmacht Vorrang vor einer Betreuung/Sachwalterschaft?

An enduring power of attorney as provided by German law does not exist in Italian law. The validity of a notarial power of attorney depends on the full legal capacity of the beneficiary. If a notarial (general) power of attorney exists, it is superseded by the regulations of the special guardianship. Concerning the advance nomination of a support guardian, Art. 408 CC provides the possibility for the person concerned to nominate a support guardian with regard to his/her future mental incapability, whereby this declaration must be deposited with a notary.

Who can be appointed as guardian? (e.g. family members, private guardian, private body, public body)

Wer kann als Betreuer/Sachwalter eingesetzt werden (z. B. Familienangehörige, ehrenamtliche Betreuer, professionelle Betreuer)?

Anyone can be nominated as support guardian. In accordance with Art. 408, clause 1 CC the election of the support guardian takes place exclusively with regard to the welfare and the interests of the beneficiary. When the beneficiary nominates a specific person as the support guardian, according to Art. 408, 1st half sentence there must be serious grounds speaking against him/her for the guardianship judge to appoint another support guardian.

The majority of appointed support guardians are family members.

If there are no next of kin available or the guardian judge deems it appropriate to appoint an extra-familial person (this is the case particularly when there are family conflicts), the duty can be assumed by volunteers or a professional expert (particularly attorneys). An extra-familial person is also appointed in cases when the medical certificate (which must be included with the application for the establishment of a special guardianship) or any other documents (e.g. a social services report) already recommend appointing someone outside of the family.

Art. 408, section 4 CC provides for the possibility of associations or foundations to assume the task as well, however, this is not yet being implemented in practice.

In general it should be noted that there is a rising tendency of cases in which extra-familial support guardians are appointed.

In Italian law support guardian is not a "profession" in the proper sense but a voluntary task that is not remunerated. In some cases the support guardian may be awarded an "expense allowance" for exercising the function; this depends on the amount of work involved and the assets of the beneficiary and is determined by the guardianship judge. In this respect Italy does not (yet) have a consistent regulation. Currently this expense allowance is not subject to tax.

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What are the responsibilities of not-for-profit guardianship organisations (e.g. support of family and volunteer guardians, recruitment and education of volunteer guardians)?

Welche Aufgaben hat ein Betreuungsverein/Sachwalterverein (z.B. Unterstützung von Familienangehörigen und Ehrenamtlichen, Rekrutierung und Fortbildung von ehrenamtlichen Betreuern/Sachwaltern)?

In Italy there is no legislation determining the role and responsibilities of non-profit organisations operating with special guardianships. Since the law regarding special guardianships came into effect in 2004, around 15 associations particularly in the northern region of Italy were founded, offering mainly advice and information services to citizens.

It has not been implemented into practice that associations take on special guardianships.

In many regions in Italy citizens can register on lists provided by the public authorities if they are interested in taking on a special guardianship.

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