

Newsletter No.

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What is it about?

Unfortunately, cases potentially leading to guardianship are becoming increasingly common as the average age of the population rises. An unpleasant fact of life is that we all age and our minds start to deteriorate as we do so. Aging or other fateful events, such as head injuries and strokes, may result in situations where people are unable to conduct their daily business affairs or even take care of themselves.

The law's revision supports an individual's right to choose. For this purpose the law institutes two new instruments: (i) the Advance Directive and (ii) the Advance Health Care Directive. In addition, new legal rights regarding representation are stipulated and take into account the desire of an incapacitated person's family members to make certain decisions quickly and easily. Care by the authority shall only be ordered if other – i.e. private – arrangements are insufficient. Thus, every person may take precautionary steps in order to avoid becoming dependent on the state so as to perform legal acts (e.g. to sign contracts or to exercise voting rights) if he becomes incapacitated. Furthermore, these steps may also protect his family from being forced to rely on the goodwill of a banker so as to ensure that living expenses are met.

The law's revision also provides for a professionalized organisational structure for the guardianship authorities. Currently, some communities still employ laymen in such positions. In the future, each canton will designate a Specialist Authority (*Erwachsenenschutzbehörde*) to perform the new statutory tasks.

Advance Directive

The revision of the guardianship law facilitates an individual's ability to shape his own affairs for the event of future incapacity. A person may draw up an Advance Directive and stipulate how he wants to be cared for and legally represented in the event of incapacity, thereby settling such matters privately. The existence and place of deposit of an Advance Directive may be registered at the Civil Registry Office in a central database. This allows the Specialist Authority to learn of the existence of an Advance Directive. By registering its existence, the content of an Advance Directive does not need to be filed and the principal is entrusted with its safe-keeping.

The agent may be either a natural person or a legal entity (e.g. a bank). The principal must have legal capacity and be of legal age of majority at the time the Advance Directive is established. The Advance Directive must be hand-written, dated and signed by the principal, or in the form of a public deed. The principal may describe therein the agent's tasks and provide instructions, constraints,

and bans. To permit the agent to perform legal acts on behalf of the principal, it is recommended to include such an authorization in the Advance Directive.

In the event that the Specialist Authority learns of an individual's legal incapacity, it checks whether an Advance Directive has been validly set up, the prerequisites for its effectiveness have been met, the agent is suitable for the task, and any other measures are necessary. If the agent accepts his mandate, then the Specialist Authority indicates the agent's duties and issues a special certificate (*Vorsorgebeauftragterzeugnis*) describing the agent's rights as representative of the legally incapable person. This certificate serves as an official legitimization of the agent towards third parties.

Power of Legal Representation

In the event that no Advance Directive exists, a limited power of representation is issued to spouses and registered partners if they share a common household with an incapacitated person, or if they provide such a person with regular and personal support. This representation right is granted by law for the coverage of general maintenance costs and general administrative acts. However, for legal acts concerning extraordinary asset management, the spouse or the registered partner needs the approval of the Specialist Authority. According to legislative materials, the legal power of representation is only applicable in the event of transient legal incapacity. Since this restriction reduces the power of legal representation to a merely temporary one, the legal representation rights do not supersede an Advance Directive.

Advance Health Care Directive

By drawing up an Advance Health Care Directive, the principal may determine the medical measures he will accept or refuse and designate a representative for medical affairs in the event of legal incapacity. It is also possible to appoint a person authorized to make such decisions. In contrast to the Advance Directive, the Advance Health Care Directive may be set up in simple writing, and dated and signed by the principal.

The existence and place of deposit of an Advance Health Care Directive may be registered on an individual's insurance card. As a result, doctors will, in the future, need to check whether an insurance card contains such a directive and, if so, its whereabouts.

Power of Legal Representation for Medical Measures

In the event that no Advance Health Care Directive exists, the new law provides for a multi-level cascade of persons with representation rights for medical concerns. In addition to spouses and registered partners, cohabiting partners, descendants, parents, and siblings are eligible if they regularly and personally support the legally incapable person.

Governmental Measures

Part of the law's revision affects the catalogue of governmental measures. The three existing measures («Vormundschaft», «Beistandschaft», and «Beiratschaft») are replaced by a new unified governmental measure called «Beistandschaft» (*guardian*), which enables the bespoke measures to be ordered.

Appointment of Reversionary Heirs

Regarding incapacitated descendants the new guardianship law also brings some innovative changes to the inheritance law, notably by allowing the possibility of appointing reversionary heirs for the remains (*Nacherbeneinsetzung auf den Überrest*).

As an incapacitated child - due to its incapability - cannot make testamentary dispositions and has no spouse, under the current law his estate passes to his statutory heirs. While parents of an incapacitated child are generally willing to pass their fortune on to their child, they often find it inappropriate if, after the demise of their child, the statutory heirs inherit their fortune. The new law avoids this situation by enabling parents to appoint the incapacitated child as an encumbered heir (*Vorerbe*) and any third person as reversionary heir (*Nacherbe*) for the remains.

Conclusion

The possibility of a self-determined lifestyle with the free exercise of rights vanishes with the loss of legal capacity. With the use of an Advance Directive and an Advance Health Care Directive, appropriate provisions can be set up for the event of legal incapacity. Such provisions can be implemented prior to the enactment of the new law, and it may already be advisable for individuals to do so.

The new provisions regarding reversionary heirs are applicable if the testator dies after the new law takes effect. As a result, it may already be desirable for individuals to draw up or amend their wills accordingly.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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