

CARE AND CONTROL – A MODIFIED GUARDIANSHIP

With comments on power of attorney

Rheinallee 97 101
55118 Mainz

Telephone 06131 967 260
www.lsjv.rlp.de

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INFORMATION FOR MIGRANTS



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AG Migration der LAG BtG Rheinland-Pfalz
Landesamt für Soziales, Jugend und Versorgung
– Überörtliche Betreuungsbehörde Rheinland-Pfalz –
Rheinallee 97–101 • 55118 Mainz

Contact: Peter Gilmer • Telephone 06131 967-260
gilmer.peter@lsjv.rlp.de • www.lsjv.rlp.de

The Institute for Transcultural Support (Institut für transkulturelle Betreuung ITB) developed the idea for this brochure and was responsible for its translation into many languages.



Am Listholze 31A • 30177 Hannover • Telephone 0511 590 92 00 • www.itb-ev.de

DEAR READERS,

around 700,000 people with a migration background live in Rheinland-Pfalz. Their equal participation in all areas of society is an important goal of the State Government. A focal point of integration policy is to help and encourage families and to provide them with the support they need.

Migrant families need particular support, tailored to their needs, since they rarely take advantage of the advice and assistance offered by professional services and education centres.

The brochure „Legal Guardianship“ offers information on guardianship law and supplements the wide variety of information and welfare services in an area with which many migrant families are unfamiliar; an area, however, that increasingly affects their lives. This brochure is published in German and eight other languages, so that migrants can have a guide in their native language to matters that are often of a complex nature.

I would like to thank the Rhineland-Palatinate State Office for Social Affairs and Young People for publishing this brochure. It makes an important contribution towards familiarizing families with a migration background with family policy services.

Malu Dreyer

Minister of Labour, Social Affairs, Health, Family and Women
of the State of Rhineland-Palatinate



DEAR READERS,

the integration into German society of people from foreign cultures can only succeed when comprehensible information on important questions concerning living together is available to them.

Most migrants are still not sufficiently familiar with guardianship law, often because this instrument of social policy does not exist in their countries of origin. For this reason, the State Office for Social Affairs and Young People has published this brochure on guardianship law for migrants. It is intended to inform people with a migrant background about the legal bases and issues of guardianship and power of attorney, thereby helping them to find a solution when, for reasons of health, a member of their family can no longer manage his or her affairs.

Maria Weber
Representative of the Government of the State of Rhineland-Palatinate
Werner Keggenhoff
President, Rhineland-Palatinate State Office for Social Affairs and Young People

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LEGAL GUARDIANSHIP AND POSSIBILITIES OF PLANNING AHEAD

Every person can find himself as a result of accident, illness, emotional crisis or an age-related infirmity in a situation, in which he can no longer deal, either permanently or temporarily, with important matters in his life.

In such a case, someone is needed to represent the interests and rights of the person concerned in connection with government offices, for example, or public authorities, banks and doctors. Under the German legal system this can be someone who has previously been granted lasting power of attorney by the person concerned, or by someone who has been appointed legal guardian by court order.

Lasting power of attorney avoids, as a rule, the setting up of a guardianship. Where lasting power of attorney has not been granted, wishes concerning guardianship can be laid down in an advance directive or so-called living will. In this brochure, three terms are explained:

I. CARE AND CONTROL – A MODIFIED GUARDIANSHIP

Guardianship concerning persons of full age and curatorship ordered in case of mental or physical incapacity have been abolished and replaced by the new legal instrument called Betreuung, a modified guardianship of persons of full age.

II. APPOINTMENT OF GUARDIANSHIP

III. ENDURING POWER OF ATTORNEY

I. CARE AND CONTROL – A MODIFIED GUARDIANSHIP

The statutory foundations are laid down in Article 1896 f of the German Civil Code (Bürgerliches Gesetzbuch, BGB). A legal guardianship is only established in case of mental illness or incapacity or physical disability, which has the effect that the person concerned can no longer see to his own affairs. In the case of legal guardianship, particular areas of responsibility are prescribed by the guardianship court. Guardianship is limited to a maximum of seven years. On expiry of this period, guardianship is re-examined and a decision made as to whether it should be rescinded or extended.

In the choice of guardian, the wishes of the person concerned are first considered. Firstly, persons are appointed who have a close relationship to the person concerned and are also suitable. Legal guardians are legal representatives of the persons concerned. They represent them at court and out of court, and their activities within the scope of their areas of responsibility are legally binding (Article 1901 BGB). The will and well-being of the people concerned are of primary importance. Similar to a „manager“, guardians look after the property and financial affairs of the person concerned as well as health and personal welfare matters that he or she can no longer take care of. Guardianship is fundamentally not a question of decisions being taken by others, but rather one of assistance or support!

■ Mental illnesses

These are understood to be mental illnesses and disorders that are not definable physically, yet have physical causes (such as, for example, meningitis or brain damage). Addictive illnesses with an appropriate degree of severity can be considered as mental illnesses. Neuroses and personality disorders also belong to this group of illnesses.

- **Mental deficiency / learning disability**
This includes congenital or acquired impairment of mental capacities.

- **Mental deficiency**
Mental deficiency is understood to be permanent impairment arising from a mental illness. It also includes mental incapacity resulting from old-age infirmity.

- **Physical disabilities**
The possibility of legal guardianship also arises when a person's capacity to deal with his or her own affairs is partially lost or substantially impeded (for example, in the case of lasting immobility).
A guardian is only appointed for physically disabled persons on their own application.

Three steps to legal guardianship

1. Application

In order to put in train the process of obtaining a guardianship, application has to be made to the local guardianship authority (Betreuungsbehörde) or guardianship court (Betreuungsgericht) by, for example, relatives, neighbours, friends, acquaintances, doctors, social institutions, nursing homes or hospitals. The person concerned can himself apply for the setting up of a guardianship.

2. Procedure

The guardianship court generally instructs the guardianship authority to clarify the matter and to examine whether a guardianship is necessary. The guardianship authority speaks to the person concerned, as well as to others involved, determines what has to be regulated and informs the guardianship court accordingly. The guardianship authority also informs the

court of the person who appears to be suitable for the position of guardian. Social reports and the opinions of experts play an important role in the appointment of guardians. The expert's opinion covers important points such as the necessity and scope of guardianship, the chances of rehabilitation and the period for which help will be needed (for example, whether guardianship will be required only temporarily, or on a permanent basis).

Before a final decision is taken, the matter is discussed with the person concerned in his or her everyday surroundings. Should the person concerned not have a sufficient command of the German language an interpreter has to be called in.

3. Decision

The decision of the responsible judge on the setting up of a guardianship is notified in writing to the person affected, the guardian and the guardianship authority. The court decision lays down the person appointed as guardian and the duties he or she is authorized to perform.

All parties to the procedure have the right of appeal against the decision.

Areas of responsibility of the guardian

- **Health and personal welfare**

The guardian can participate in decisions on necessary health care or treatment for the person concerned. This includes initiation of and agreement to therapeutic measures and medical checkups for early diagnosis, giving consent to operations and controlling the taking of drugs and medicines.

- **Property and financial affairs**

This field includes the ascertainment and enforcement of income and earnings and application for social benefits, application for reductions and allowances, scrutiny of income and expenditure as well as management of bank accounts and assets.

■ Legal and official matters

The guardian is responsible for filing applications and conducting correspondence as well as telephone contact with local authorities. He or she is obliged to represent the interests of the person concerned in dealings with the authorities, including legal matters affecting foreign nationals.

■ Postal matters

This area comprises dealing with incoming and outgoing postal communications.

■ Right to determine place of residence

If the guardian is given responsible for this area he is obliged to protect the centre of the vital interests and familiar surroundings of the person concerned or, where applicable, to look for appropriate surroundings.

■ Accommodation and accommodation-related measures

Under certain circumstances (for example, where the danger exists of substantial self-inflicted injury or suicide) the person concerned can be put into a closed institution or closed section of a hospital or nursing home for the elderly.

The decision of the guardian on the necessity of closed accommodation requires the approval of the guardianship court. Accommodation-related measures are understood to be all actions that, through the use of mechanical devices, drugs or by other means, deprive the person concerned of his or her liberty regularly or over a long period of time. Such measures include bed bars, abdominal belts in bed or on a chair, the tying of arms and legs, locking of the room or ward and drugs that support immobilization. In these cases, too, court approval is necessary, should the person concerned lack the capacity to give consent.

■ Housing matters

If the guardian is assigned responsibility for this area, he will take care of such matters as tenancy or the financing of the flat (that is, rent and additional costs). The guardian may only give notice to end a tenancy agreement with prior approval of the guardianship court.

Who can become a guardian?

1. Voluntary guardianship

Voluntary guardians conduct their duties non-occupational basis and without payment. There are important prerequisites for the conduct of guardianship, including knowledge of the German language as well as of the German legal and social system.

In selecting a guardian, first and foremost persons are considered who have a close relationship to the person concerned, and who are able to fulfil the duties of guardianship. Suitability for the position of guardian is determined by the guardianship authority and the guardianship court. The guardianship authority and guardianship associations provide voluntary guardians with the necessary support and supervision.

2. Professional guardianship

A professional guardian must have an appropriate qualification and be able to provide the person concerned with sufficient support in legal matters. Guardianship associations employ professional guardians, and are responsible for their training, monitoring, further vocational training and qualification. Guardians from such associations may only be appointed with the agreement of the particular association. In exceptional cases, members of the staff of guardianship associations and authorities can conduct guardianships in an official capacity.

Who bears the costs?

In principle, the person concerned pays the costs of guardianship himself. This applies for those whose assets exceed the sum of 2,600 euros. Should the person concerned be impoverished and have little or no income, the costs are paid by the state.

So far as the costs of legal proceedings are concerned, there is an asset allowance of 25,000 euros. Persons with assets in excess of this allowance must themselves pay resulting fees and the cost of medical reports and certificates.

II. APPOINTMENT OF GUARDIANSHIP

With an advance directive or living will, the person concerned can himself determine in advance who should be appointed to be his or her guardian at such a time when he can no longer manage his or her own affairs. In such an advance directive several persons can be named for different areas of responsibility, or persons named who should under no circumstances be appointed as guardians. This precautionary decision enables wishes to be expressed with regard to the guardianship procedure, areas of responsibility and allocation of funds to third parties as well as instructions concerning medical treatment and accommodation. If the guardianship court is aware of such a living will, it has basically to bear it in mind in reaching its decision.

Summary

- The advance directive or living will is a precautionary measure.
- With an advance directive or living will a person can determine who should be appointed as guardian and also lay down the terms according to which the guardian should act.

III. ENDURING POWER OF ATTORNEY

With an enduring power of attorney, a person of trust is authorized to act in a legally binding manner on behalf of the person who has granted power of attorney (the donor or granter). Lasting power of attorney is of a precautionary nature, and is intended to come into effect only when the donor is no longer in a position, or no longer willing to personally manage his or her own legal affairs. Lasting power of attorney can preclude the establishment of a guardianship by the guardianship court.

The person granted power of attorney (the donee, or attorney) can act immediately on behalf of the granter without further legitimization. Financial institutions, however, often only recognize powers of attorney that have been documented on a form that they themselves provide, or which have been drawn up and certified by a notary. Powers of attorney do not have to be of a particular notarized or certified form; they should, however, be put down in writing and signed by the granter.

The signature under a power of attorney can be notarised, or the power of attorney itself drawn up and certified by a notary. By notarising the signature the notary confirms its authenticity. In the case of certification, the notary advises the donor, or granter, on the content of the power of attorney, which they draw up together.

Certification by a notary is an indication of the completeness and correctness of a document. Such certification is necessary when the person granted power of attorney can dispose of property or, for example, participation in a company. Guardianship authorities can also witness the signature on a power of attorney, but they are not authorized to draw up and certify powers of attorney.

Summary

- At the time of issuing a power of attorney the donor, or granter, must be of full legal capacity (that is, legally competent to act).
- The power of attorney is an agreement under private law between the person concerned (the donor or granter) and his or her person of trust (the donee or attorney).
- The donor, or granter, himself decides on the particular powers authorized.