

THE LAW ON ADULT PROTECTION IN AUSTRIA

Paradigm shift from guardianship to self-determination

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BMSGPK V/A/6: Ageing and Volunteering Policies

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Criticism on the former guardianship law

- Frequent complaints to the office of the ombudsman about grievances
- High number of people in guardianship (2018: 53.000 persons throughout Austria)
- Criticism of the Monitoring Committee on the United Nations Convention on the Rights of Persons with Disabilities

The 2nd adult protection act

- Entry into force of the 2nd adult protection act (“2. Erwachsenenschutzgesetz”) on July 1st 2018
- Most comprehensive reform of the guardianship law since 1984
- Paradigm shift from guardianship to self-determination

§ 239 Abs. 1 ABGB

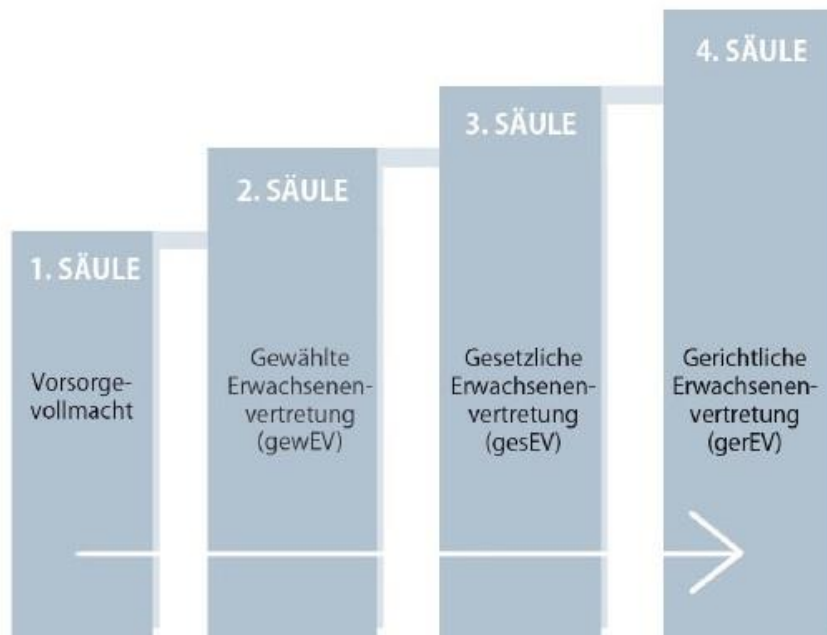
“In legal dealings, care must be taken to ensure that persons of full age who are restricted in their decision-making capacity due to mental illness or a comparable impairment are able to manage their affairs as independently as possible, if necessary with appropriate support.”

„Im rechtlichen Verkehr ist dafür Sorge zu tragen, dass volljährige Personen, die aufgrund einer psychischen Krankheit oder einer vergleichbaren Beeinträchtigung in ihrer Entscheidungsfähigkeit eingeschränkt sind, möglichst selbständig, erforderlichenfalls mit entsprechender Unterstützung, ihre Angelegenheiten selbst besorgen können.“

Essential changes

- New terminology: adult representative instead of guardian, represented/adult/affected person instead of disabled person
- Expansion of alternatives: authorisation in advance, selected adult representation, statutory adult representation, judicial adult representation (four pillars); judicial adult representation only as an ultima ratio
- Selected adult representation is possible if the person affected is still able to understand the basic meaning and consequences of representation, to determine his or her will accordingly and to act accordingly even if the decision-making capacity has already decreased

Illustration



Essential changes

- Expansion of autonomy for the represented persons: none of the forms of representation leads to an automatic loss of the legal capacity to act in the representative's sphere of influence; exception: reservation of approval (only judicial adult representation)
- Focus on the individual and not on the disease: mandatory clearing by adult protection associations (including the search for alternatives)
- Adult protection associations as a hub of legal care: Mandatory involvement in any judicial appointment and renewal process

Essential changes

- Unification of standards for the establishment of alternative forms of representation: involvement of professionals required
- Increase in transparency: Austrian Central Representative List (ÖZVV)
- Extension of the principle of subsidiarity:
 - Representation only as final option
 - Regular review of the need for representation, limit of three years for statutory and judicial adult representation
 - Continuous renewal/registration of the representation possible

Significance in practice

- First of all, it has to be checked whether the affairs of the person concerned (e.g. administration of pension income or savings, application for care allowance, consent to medical treatment, dissolution/selling of the flat as a result of moving to a care home, etc.) can be taken care of by sufficient support measures
- Only if no sufficient support is available or possible - if the person concerned has not established an authorization in advance - can adult representation be considered
- The principle of subsidiarity must be respected

Significance in practice

- Judicial adult representation only if none of the other three forms is applicable
- If judicial representation is necessary: initial personal hearing and subsequent order by a judge
- In any case, the specific matters to be dealt with must be described as precisely and in as much detail as possible in order to actually limit the representation to what is absolutely necessary and to preserve the independence of the person concerned as far as possible
- Time limitation, reviews

Remaining need for improvement

- The alternative of "support before representation", especially in the form of professional social work, is often simply not available - particularly in the area of care for people in nursing homes (financial reasons)
- Some banking institutions have difficulties with the matters described in detail by the courts for which judicial adult representation has been ordered
- Training needs in the area of medical treatment: maximum possible involvement of affected persons

Conclusion

- Paradigm shift: Representation only where it is unavoidable
- Significant contribution to the self-empowerment of older people
- Further awareness raising in the society is still required: older people are full members of society and only in exceptional cases a restriction of their (legal) possibilities of action should be ordered

Thank you for your attention!

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