



# LEGAL GUARDIANSHIP

Including information about the lasting power of attorney



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## Redaktion

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The Institut für transkulturelle Betreuung (Institute for Transcultural Legal Support) initiated the creation of this brochure. It has translated the text into many languages.



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DEAR READER,



guardianship law serves the protection, but also the support of adults who, on account of mental illness or physical, intellectual or mental disability, are no longer able to or are limited in conducting their own affairs, and are therefore dependent on the help of others. The essence of guardianship is that a person in need of assistance is supported by a guardian who conducts the person's affairs, with the scope of authorised duties being defined by a court of law, and whereby the wishes and wellbeing of those affected are to be given priority.

Many people from different countries live in the state of Rhineland-Palatinate (*Rheinland-Pfalz*). Migrants should have access to better information and support services, too. Often, they don't know about the counselling and support services offered by specialist agencies and education centres, or they have difficulty with the language used in public administration and don't know who they can turn to.

This information brochure provides answers to practical questions about legal guardianship (*rechtliche Betreuung*), the advance guardianship directive (*Betreuungsverfügung*) and the lasting power of attorney (*Vorsorgevollmacht*), and is available in German and additional languages, so that migrants may have access to guidance in their native language. In addition, this brochure is also available in 'plain German'. This helps people with learning difficulties better understand the content, which is often not exactly simple.

I thank the Rhineland-Palatinate State Office for Social Affairs, Youth and Services (*Landesamt für Soziales, Jugend und Versorgung Rheinland-Pfalz*) for publishing this brochure. It is an important contribution to informing people with disabilities and migration backgrounds a little better about their rights.

### **Sabine Bätzing-Lichtenthäler**

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(Minister for Social Affairs, Labour, Health and Demography of the State of Rhineland-Palatinate)*

DEAR READER,



fellow citizens who have come from other countries contribute significantly to the economic success of the Rhineland-Palatinate and enrich the cultural diversity of our state.

The proportion of foreign citizens among the population of the Rhineland-Palatinate amounts to approximately 10.9 percent. Almost 50 percent of them are citizens of EU member states, another quarter hold citizenships of non-EU states.

The Rhineland-Palatinate government's coalition agreement describes how immigration is linked to opportunities for the development of our state into the future. We should enable citizens with a migration background to enjoy participation in all aspects of society. This is a core task for our state and for our society.

To ensure it becomes reality, people with a migration background also need to know about legal guardianship and the lasting power of attorney because guardianship legislation is of great significance for integration and social participation.

This brochure from the Office for Social Affairs, Youth and Services (*Landesamt für Soziales, Jugend und Versorgung*) for migrants on guardianship legislation is intended to assist in providing low-threshold access to legal guardianship and the lasting power of attorney.

I am pleased to be able to provide you with this information.

## **Detlef Placzek**

*Präsident des Landesamtes für Soziales, Jugend und Versorgung Rheinland-Pfalz  
(President of the Rhineland-Palatinate Office of Social Affairs, Youth and Services)*

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# LEGAL GUARDIANSHIP AND PROVIDING FOR THE FUTURE

Any person can have an accident, become severely ill or suffer a mental crisis. This may lead to the person no longer being able to manage important things in her or his life, either for a period of time or permanently. This is also true for age-related illnesses.

In these cases, someone else is needed to promote the interests and rights of the affected person. For example when dealing with offices of public administration, public authorities and doctors.

In Germany, a range of options exists for acting on behalf of an affected person. For example, the person may grant authority to someone else using what is called a **lasting power of attorney**. A lasting power of attorney usually avoids the appointment of a legal guardian.

If no lasting power of attorney has been granted, the person's wishes regarding legal guardianship can be recorded in an **advance guardianship directive**.

The guardianship court (*Betreuungsgericht*) at the magistrate's court (*Amtsgericht*) rules on legal guardianship. This only occurs if no lasting power of attorney is at hand.

The following three legal terms are explained in this brochure:

- I. **LEGAL GUARDIANSHIP**  
(*Rechtliche Betreuung*)
- II. **THE ADVANCE GUARDIANSHIP DIRECTIVE**  
(*Betreuungsverfügung*)
- III. **THE LASTING POWER OF ATTORNEY**  
(*Vorsorgevollmacht*)

# I. LEGAL GUARDIANSHIP

The provisions governing legal guardianship (*rechtliche Betreuung*) can be found in the German Civil Code (*Bürgerliches Gesetzbuch, BGB*).

If a person is mentally or emotionally ill, or intellectually or physically disabled, legal guardianship can be arranged for him or her. This only happens if the person can no longer manage her or his own affairs. In principle, legal guardianship requires the consent of the affected person, but it may also be imposed without the person expressing his or her wishes, or against the person's will.

The guardianship court determines the scope of legal guardianship to comprise certain authorised duties. These are agreed with the affected person.

The legal guardian may only act within the scope of these duties. They relate, for example, to the health care and / or financial affairs of the person receiving guardianship (the ward), or to interactions with offices of public administration.

After seven years at the latest, the guardianship court checks whether legal guardianship is still necessary or will be terminated.

The wishes of the affected person are paramount in selecting a legal guardian. Preferably, people with a close personal relationship to the affected person are appointed guardian. The judge checks whether such a person possesses the necessary competencies, and is personally capable and suitable to carry out such important duties responsibly.

A legal guardian is the affected person's (the ward's) legal representative and acts on her or his behalf in and out of a court of law.

Legal guardianship represents a form of support, not paternalism!

According to the UN Convention on the Rights of Persons with Disabilities (Art.1), the term 'persons with disabilities' relates to people "who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

## ■ **Mental illness**

This term is intended to include all mental illnesses that have no apparent physical causes, but also mental disorders resulting from physical illnesses or external influences: for example the results of brain inflammation, tissue changes or injury. Dependency disorders (addictions) may, depending on their severity, also be considered a mental illness.

## ■ **Intellectual disability / learning disability**

These include congenital and acquired intellectual impairments. The resulting reduced capacity to live independently is also called impaired social competence.

## ■ **Mental disability**

The term mental disability describes permanent impairments that have developed as a result of mental illness. These also include cognitive impairment caused by age-related degenerative processes (e.g. dementia).

## ■ **Physical disability**

The option of legal guardianship is also available in cases where the physical ability of a person to manage his or her own affairs is partially lost or significantly impaired (e.g. in case of permanent immobility). Physically disabled people can only receive legal guardianship by applying for it in person.

## **Three steps towards legal guardianship**

### **1. Notification**

In order for legal guardianship to be considered and arranged, the guardianship court or the local guardianship authority (*Betreuungsbehörde*) must first be formally notified. The affected person, but also relatives, neighbours, friends, acquaintances, doctors, social services, care homes and hospitals can formally notify.

### **2. Procedure**

The guardianship court (*Betreuungsgericht*) asks the guardianship authority (*Betreuungsbehörde*) to check whether there are grounds for the appointment

of a legal guardian. The guardianship authority speaks to the affected person and others involved in order to determine the scope of the affairs to be managed. The guardianship court is then notified of these.

The guardianship authority gives the guardianship court the names of persons who seem suitable to become legal guardian.

Expert opinions (*Gutachten*) and social status reports (*Sozialberichte*) play an important role in the appointment of a legal guardian.

The guardianship authority writes the social status report.

This report contains statements about:

- the necessity for and scope of legal guardianship
- the person to be appointed legal guardian
- the nature and duration of the requirement, e.g. whether legal guardianship may perhaps only be required in the short term.

The social status report is submitted to the court.

Medical experts or public health authorities (*Gesundheitsämter*) write mental health reports and certificates. For this to happen, the guardianship court orders an expert opinion (*Gutachten*).

The guardianship court judge is obliged to grant the person whose legal guardianship is to be determined a personal hearing. This means that the person has a further opportunity to make a comprehensive personal statement. If the affected person does not speak sufficient German, an interpreter is asked to attend. For legal guardianship to be arranged, the affected person must agree in principle. However, there are exceptions where legal guardianship may be imposed without the person expressing his or her wishes, or against the person's will.

### 3. Decision

The guardianship court judge rules on legal guardianship on the basis of the social status report (*Sozialbericht*) and the hearing (*Anhörung*).

The decision on a legal guardianship being arranged is made by way of a written ruling. All involved receive a copy. The guardianship authority also receives the ruling. The ruling determines who will be legal guardian and which duties the guardian is authorised to perform.

The same persons and authorities are entitled to use their legal right to lodge an appeal (*Beschwerde*).

## Scope of authorised legal guardianship duties

### Health care

Health care (*Gesundheitssorge*) comprises everything to do with a person's health. If a person supported by legal guardianship (the ward) is still able to take action in relation to her or his health, the person makes decisions independently. In all other cases, the legal guardian must make the decision.

This includes:

- initiating and consenting to
  - therapeutic interventions
  - preventive health checks
  - operations
- consenting to medical examinations, operations and treatment interventions
- ensuring medical treatment
- doctor's obligation to inform (no professional confidentiality towards the guardian).

The legal guardian is in constant contact with doctors, hospitals, care providers and other health services, and discusses all health-related issues with them.

### Financial affairs

Financial affairs (*Vermögenssorge*) comprise the management and protection of the ward's financial interests.

This includes, for example:

- administering the ward's bank account
- checking credits and debits
- determining and claiming sources of income or applying for social security benefits
- applying for concessions and benefits.

## **Representation when dealing with public authorities**

Within their scope of authorised duties, legal guardians also lodge applications with public authorities on behalf of their wards. This also includes all types of written correspondence and telephone calls with public authorities.

Immigration affairs can also lie within the scope of legal guardianship duties.

## **Postal affairs**

This area of authorised duties comprises receiving and opening incoming correspondence of the ward. This area of authorised duties is required only if she or he can no longer complete the tasks arising from incoming postal correspondence.

## **Right to determine place of residence**

According to the residence registration laws of the German states, the mandatory registration / deregistration / re-registration of a residential address with the residence registration office (*Einwohnermeldeamt*) on behalf of the ward is one of the legal guardian's duties.

A legal guardian can enter into and give notice on rental agreements on behalf of his or her ward.

Initiating custodial accommodation for the ward is also part of the 'determining place of residence' (*Aufenthaltsbestimmung*) area of authorised duties.

Decisions on place of residence should, where possible, be reached together with the ward.

## **Involuntary admission**

Under certain circumstances (e.g. in case of a risk of significant self-harm or even suicide), the ward may be accommodated in a closed facility or a closed hospital or aged care ward.

The guardianship court decides on the need for accommodation in a closed facility on the basis of a prior application for involuntary admission (*Unterbringungsantrag*) lodged by the guardian.

## Restraining measures

This includes all restraining measures that curtail a ward's freedom regularly or for an extended period through the use of mechanical devices, medication or by other means (e.g. bed rails, waist, wrist or leg restraints for beds or chairs, locked rooms, sedatives).

In such cases, a court order is also required unless the ward is able to give consent.

## Housing

In the area of housing (*Wohnungsangelegenheiten*), the legal guardian takes care of entering into and maintaining e.g. rental agreements. Authorised duties may also concern moving into a suitable care home, giving notice on rental agreements or the dissolution of the household.

The ward can be supported in all aspects of housing. For example:

- financing accommodation (rent and utilities)
- communicating with landlords or property managers
- communicating with energy suppliers.

A legal guardian may only give notice on or cancel a rental agreement with prior permission from the court.

# Who may become a legal guardian?

## 1. Guardianship volunteers

Legal guardians in a voluntary capacity do not exercise legal guardianship professionally. This means that they are not paid for their guardianship services, but only receive an annual expense allowance.

Important prerequisites are in place for acting as a legal guardian. These include good German language skills and a good knowledge of the German legal and social systems.

Those who may be considered for selection as a legal guardian in a voluntary capacity are mainly individuals who have a close personal relationship with the affected person and who have the capacity to act as a legal guardian. Preference is given to family members or people from the affected person's social circle.

The guardianship authority and the guardianship court assess the person's suitability to become a legal guardian.

The guardianship authority and guardianship associations (*Betreuungsvereine*) provide legal guardianship volunteers with the assistance and support they require. Guardianship associations are also responsible for initial and in-service training, as well as the certification of guardianship volunteers.

## 2. Professional legal guardians

Professional legal guardians are persons who provide legal guardianship as paid professional service providers. Guardianship associations employ professional legal guardians as staff members. These are called associated legal guardians (*Vereinsbetreuer*).

Professional and associated legal guardians must be suitably qualified and have the capacity to provide legal guardianship within the required scope of authorised duties. No dedicated professional qualification according to the German Vocational Training Act (*Berufsbildungsgesetz*) or specific university degree exists.

## Who covers the costs?

In principle, the affected person himself or herself covers the costs of legal guardianship.

They comprise court costs, as well as fees for professional legal guardians or expense allowances for guardianship volunteers respectively.

Should the person have no income of his or her own, or be on a low income, the justice system covers the costs on behalf of the state. Any assets above 5,000 euro must be drawn upon to cover the costs of legal guardianship. If the asset threshold of 5,000 euro is exceeded, the person must pay professional legal guardianship fees or expense allowances for guardianship volunteers himself or herself.

The guardianship court conducts the required assessment. In some circumstances, the guardianship court may charge annual fees and reimbursements. These are also called procedural and court costs (*Verfahrens- und Gerichtskosten*).

The asset threshold for procedural court costs is 25,000 euro.

Persons owning assets in excess of this threshold must cover the costs of any fees or medical specialist opinions themselves.

## II. THE ADVANCE GUARDIANSHIP DIRECTIVE

The advance guardianship directive (*Betreuungsverfügung*) is a provision for the future.

The advance guardianship directive can be used to determine ahead of time who should be appointed legal guardian, as well as document the ward's wishes to be taken into account by the guardian.

It can also be used to exclude certain persons from being appointed legal guardian.

The advance guardianship directive makes it possible to express wishes to be considered in the guardianship procedure with regard to the guardianship procedure itself, the scope of authorised duties, remittances to third persons, and directives regarding medical treatment and accommodation.

It therefore plays an important role in circumstances where the guardianship court imposes legal guardianship and the person is no longer able to express her or his views. The advance guardianship directive is used to identify the person who is intended to act as legal guardian. In it, several persons may be listed for the different areas of authorised duties, as well as persons who should definitely not be appointed legal guardian.

**If the guardianship court is aware of the advance guardianship directive, it is in principle obliged to consider it in its ruling.**

**The guardianship court is obliged to assess the person proposed and to determine her or his suitability to act as legal guardian.**

**If no advance guardianship directive is at hand, the guardianship court can select a suitable person if required.**

# III. THE LASTING POWER OF ATTORNEY

The lasting power of attorney (*Vorsorgevollmacht*) is a civil law agreement between a person who is granting the authority to act on his or her behalf – the donor (*Vollmachtgeberin / Vollmachtgeber*) and a person of his or her trust who receives the power to act – the agent (*Bevollmächtigte / Bevollmächtigter*). In a lasting power of attorney, the person(s) who will make decisions for the donor are determined.

The power of attorney is a provision for the future, and intended to only come into effect when the donor is not longer able or willing to conduct his or her own legal affairs.

The donor must be of age and legally capable at the time of granting the power.

**Any person can draw up a lasting power of attorney on his or her own. It is also possible to use templates or suggested phrases.**

**Guardianship associations and local guardianship authorities can provide comprehensive advice on lasting powers of attorney.**

**It is possible, but not mandatory, to involve a notary in drawing up a lasting power of attorney.**

A lasting power of attorney can avoid the appointment of a legal guardian by the guardianship court.

The agent can act on behalf of the donor legally, immediately and without bureaucratic barriers.

Financial institutions often only recognise powers of attorney that use their own forms or documents that are notarised.

They don't need to meet particular formal requirements. If they are granted in writing – which is strongly recommended –, they must also be signed in person.

Certification and notarisation of the power of attorney by a notary is not generally required, but recommended if the power is to be used to e.g. sell real estate.

With the **certification** of a lasting power of attorney, a guardianship authority or a notary confirms that the document has actually been signed by the author's own hand.

**Notarisation** of a power of attorney by a notary is required for certain transactions, such as:

- purchase or sale of real estate
- commercial and civil law transactions, e.g. sale or change of incorporation of a company
- renunciation of inheritance
- personal loan agreements.

Guardianship associations are authorised to certify lasting powers of attorney. This is uniformly legislated at the federal level in the Guardianship Authorities Act (*Betreuungsbehördengesetz*).

Guardianship authorities are, however, **not** authorised to notarise documents.



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Received from: