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Report

ICSW Expert Meeting

Guardianship law in the context of the UN Convention on the Rights of Persons with Disabilities - A comparison of Austria, Germany and Switzerland

19/20 November 2013

Haus Mariahilf
Mariahilfstraße 42
6900 Bregenz
Austria

Preamble

Guardianship law in Germany, Austria and Switzerland is currently under discussion and not least because of guidelines set out in the UN Convention on the Rights of Persons with Disabilities (CRDP)¹, now signed up to by all three countries. Twenty years after its own reforms, Germany is bringing its laws into line. At the beginning of 2013, Austria started a pilot project on outcomes of so-called supported decision-making in order to develop further its laws on guardianship. Switzerland has been implementing its new law, which came into force on 1 January 2013, on safeguarding children and adults.

On 19/20 November 2013, thirty-five experts from the three countries, and from South Tyrol and Liechtenstein, came together at Bregenz, the meeting point of the three nations, in order to advise how far, in view of the new legal approach, a shift from medical to social, or from care to the human rights perspective, has been successful, or how far measures for the further development of a legal framework for guardianship law, have been indicated for the future.

The expert meeting was organised by members of the International Council on Social Welfare (ICSW)² in Germany, Austria and Switzerland. It was sponsored by ICSW Europe and ICSW Austria (Austrian Committee on Social Work – ÖKSA).

The choice of venue at Haus Mariahilf (St. Anna-Hilfe), at the Liebenau-Foundation in Bregenz, was a conscious decision to be in a place where older people and people with disabilities live, people who in part belong to the target group being given consideration by the group of experts. Our gratitude goes to Haus Mariahilf for such a warm reception and for supporting our conference.

We also extend our thanks to Dr Greti Schmid and Klaus Müller for their warm welcome to the region and to the facilities at St. Anna-Hilfe, as well as the organisers of the conference from Berlin, Vienna and Bern.

Cornelia Markowski

Berlin, April 2014

¹ Germany and Austria on 30 March 2007 as well as Switzerland on 17 April 2014

² Further information is available under www.icsw.org

PROGRAMME

DAY 1: Tuesday 19 November 2013		
14.00	Opening and welcome	<p>Dr Greti Schmid, Regional Adviser on Social Affairs, Vorarlberg Region</p> <p>Michael Chalupka, President of the Austrian Committee on Social Work</p> <p>Michael Löher, Executive Director of the German Association for Public and Private Welfare</p> <p>Dorothee Guggisberg, Chief Executive of the Swiss Standing Conference on Social Assistance</p>
14.20	Introduction to terminology, the legal context and definitions of terms in the three countries	<p><u>Austria</u> Dr Georg Kathrein, Federal Ministry for Justice</p> <p><u>Germany</u> Wolf Moritz Weis, Federal Ministry for Justice</p> <p><u>Switzerland</u> Dr Natascia Nussberger, Federal Office for Justice</p>
15.30	Coffee break	
16.00 – 18.00	Status of current discussions on the development needs of the three countries	<p><u>Austria</u> Silvia Weissenberg, Lebenshilfe Austria, Member of Monitoring Committee of CRPD</p> <p><u>Germany</u> Peter Winterstein, Vice-president of the Higher Regional Court Rostock, Chair of the Standing Conference on Guardianship</p> <p>Prof Dr Volker Lipp, Georg-August University, Göttingen</p>

		<u>Switzerland</u> Dr Natascia Nussberger , Federal Office of Justice
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DAY 2: Wednesday 20 November 2013		
09.00	Summary of Day 1	Michael Löher , Executive Director of the German Association for Public and Private Welfare
09.15	Future-oriented models and practical solutions in the countries concerned - Part 1	<u>Switzerland</u> Dr Patrick Fassbind , Child and Adult Guardianship Authority, Bern <u>Germany</u> Prof Dr Wolf Crefeld , Psychiatrist and Professor emeritus
10.45	Coffee break	
11.00	Future-oriented models and practical solutions in the countries concerned - Part 2	<u>Austria</u> Dr Peter Schläffer , Vertretungsnetz <u>South Tyrol</u> Dr Roberta Rigamonti , Association for Health and Social Affairs <u>Liechtenstein</u> Josef Thaler , Association for Guardianship
12.30	Closing discussion	
13.00	Closing	

All experts' presentations (in German only) referred in this report can be seen:
<http://www.deutscher-verein.de/03-events/2013/materialien>

REPORT of the EXPERT MEETING

by Cornelia Markowski

1. Opening

The expert meeting was opened with a preamble from the regional government of Vorarlberg, represented by **Dr Greti Schmid**, followed by **Klaus Müller**, Chief Executive of St. Anna-Hilfe, which is a pan-regional, major provider of social services at the three-border meeting point for Germany-Austria-Switzerland. A warm welcome was extended to all the experts present by the representatives of the three organising associations, namely the German Association for Public and Private Welfare (DV)³, Austrian Committee on Social Work (ÖKSA)⁴ and the Swiss Standing Conference on Social Assistance (SKOS)⁵ and representatives from South Tyrol and Liechtenstein.

Dorothee Guggisberg, Chief Executive of SKOS, emphasised the successful collaboration of the partnership which, with the support of ICSW Europe, has now held three international expert meetings on topics such as inclusion, the financing of care and the fight against poverty⁶.

Michael Löher, Executive Director of DV, welcomed the benefits of having an international exchange of innovative examples of good practice. While guardianship law was a topic of marginal interest up to 2001, it is now being discussed in Germany in many different arenas and with expert understanding - not only in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities. He went on to say that it is important that offers of care are shaped according to need, that self-determination of the person being cared for must be encouraged and that the concerns of relatives should not be overlooked. He expects valuable stimulus from the debate with the experts from the

³ Further information is available under www.deutscher-verein.de

⁴ Further information is available under www.oeksa.at

⁵ Further information is available under www.skos.ch

⁶ „Die Pflege in der Finanzierungsfalle?-Zukunftsmodelle aus deutscher, österreichischer und schweizerischer Sicht im Vergleich“ am 3./4. Mai 2010 in Berlin: http://www.icsw.org/doc/2010-05-Tagungsbericht-Expertentreffen-Pflegefinanzierung-ICSW-Berlin_DE.doc; „Armutsbekämpfung im Vergleich - Schweiz, Deutschland, Österreich“ am 30.09./01.10.2010 in Luzern: <http://www.icsw.org/doc/2010-10-Schweiz-Deutschland-Osterreich-ExpertInnenentreffen.pdf>; „UN- Konvention über die Rechte von Menschen mit Behinderungen - Deutschland, Österreich und Schweiz im Vergleich“ am 20./21. November 2011 in Wien: http://www.icsw.org/doc/UN-Konvention-uber-die-Rechte-von-Menschen-mit-Behinderungen_Austria-Germany-Switzerland-2011.pdf

other countries concerning the right of relatives for representation, because this instrument already has shown up as good practice in the neighbour countries.

Michael Chalupka, President of ÖKSA, presented the link between the implementation of the UN Convention on the Rights of Persons with Disabilities and the modernisation of guardianship law in Austria. The outcomes of this international meeting of experts will feed directly into the ÖKSA annual conference on 21 November 2013 “Self-determination instead of paternalism – Guardianship and alternatives in the context of UN Convention for people with disabilities”⁷ in Bregenz.

2. Introduction to terminology, the legal context and definitions of terms in the three countries

2.1 Austria

Dr Georg Kathrein, Federal Ministry of Justice, introduced the Austrian system of guardianship laws. It has been in place since 1984 and is the main task for civil courts in the protection of the mentally handicapped in their dealings with the law. The appointment of a guardian through the court for the person in question leads to loss of legal capacity, whereby the group of issues affected by this legal action is clearly set out and independent, ongoing checks by the court are put in place. In Austria guardians are organised into four professional associations, e.g. VertretungsNetz, IfS, and these ensure a high standard of social care and legal assistance.

In 2006 the principle of subsidiarity was strengthened in the context of a comprehensive reform of sponsorship of alternative approaches towards more self-determination by the subjects of care. This means that the appointment of a guardian, with simultaneous loss of legal capacity of the subject, may now only happen if his or her specific needs cannot be met in any other way. It is priority to select alternative approaches. These alternatives to comprehensive guardianship are representation by relatives (around 6,000) and a power of attorney provision (around 30,000) either for selected individual or for all legal issues of the person concerned. In both cases that person’s legal capacity remains unaffected.

As the figures show, the new instruments in practice have been well accepted and also fulfill needs with regard to protection vis-à-vis the legal process and social bureaucracy.

⁷ Papers available at: http://www.oeksa.at/files/Selbstbestimmung_statt_Fremdbestimmung.pdf

Need for improvement, he went on to say, is certainly demonstrated by the joint working of those with responsibility for guardianship law (legislation by federal level) and the responsibility for services for persons with disabilities or for social assistance at all (legislation by region). Even the environment of the subject was, in the case of decision-making, in the light of earlier experiences still too much in the background. Added to this are new international developments such as the requirements of the UN Convention on the Rights of Persons with Disabilities, which demands a stronger orientation towards the subject's capabilities and, as far as possible, no automatic loss of legal capacity. This is why consideration has been being given to reform since 2010. In the process of these reflections other matters are also being discussed, including evaluation of the instrument of representation by relatives and provision of power of attorney, as well as new methods such as "supported decision-making", supervised bank accounts or a pilot project called Clearing plus.

2.2 Germany

Wolf Moritz Weis, Federal Ministry of Justice, introduced the legal context in Germany. In 1992 Guardianship law for the protection of adults in Germany was subjected to a new and comprehensive regulation. Four basic amendments were made in order to strengthen power of attorney, the codification of patient provision as well as, in July 2013, the strengthening of local guardianship authorities, this coming into effect in July 2014. Actors in the field of guardianship are the guardians, associations for guardians, guardianship courts and guardianship authorities. The person who will be taken care for is in the center of all activities.

The requirements for the appointment of a guardian are regulated in Germany by § 1896 of German Civil Code (Bürgerliches Gesetzbuch, BGB): The guardian is appointed by the guardianship court, if an adult person due to mental health problems, a psychological or physical handicap is not anymore able to handle her or him legal matters by themselves and no power of attorney or other services (e.g. social services) is suitable to cover the need. If so, a person will be appointed that is suitable for the guardianship both in terms of expertise and personally. The law determines in any case an individual assessment of suitability of the guardian by the court. The court has to take into account the proposal of the person in need regarding preferred relatives or friends to become her or his guardian. In addition the basic principle is: a volunteer rather than a professional.

The appointment of a guardian does not affect the legal capacity of the person concerned. The rights and duties of the guardian and his legal position is described in §§ 1901 and 1902 BGB. The guardian can act in representation of the person in need. But representation is limited: representative actions are only possible within in the set of tasks determined by the court and as long as these actions are necessary. The person in care should keep her or his possibility to have a self-determined life according to her or his capabilities. The guardian court must of course take into account measures violating fundamental rights issues such as for example enforced treatment, behaviour which could endanger life or assets or any hospitalisation.

Guardianship law in Germany is already in line with the requirements of the UN Convention on the Rights of Persons with Disabilities. He went on to say that beside this an interdisciplinary working group (2009-11) chaired by the ministry has identified some needs for structural improvement alongside the latest reform of the guardianship law. What needs to be investigated in a more detailed way is whether enough space will be given to the basic principle of subsidiarity. Within the judicial sector personnel statistics of the courts will be analyzed and more trainings should take place. Networks of all actors should become more effective (“Betreuungsarbeitsgemeinschaften”). In addition, the funding guidelines for associations for guardians should be aligned to the same level across the whole country to safeguard better and reliable fundings in this sector.

2.3 Switzerland

In Switzerland guardianship law has recently been replaced by a new legislation for the protection of adults in which the guardianship authorities (for child and adult protection: Kinder- und Erwachsenenschutzbehörde, KESB) play a significant role. **Dr Natascia Nussberger**, Federal Office of Justice, introduced the basic features of the guardianship system in Switzerland. An important aim in Swiss reform was the professionalisation of the structures of the local authorities. Child and adult protection now falls under the responsibility of the same authority. The regions (Kantone) are responsible for overseeing them. The national level is limited to the role of law-giver. With the reform the precautionary power of attorney, Articles 360 et seq. Swiss Civil Code (ZGB), and living will, Articles 370 et seq. ZGB, have been newly regulated in order to strengthen the right of self-determination for those affected and the solidarity of the family - while at the same time professionalising the guardianship authorities.

The person publicly commissioned to give the guardianship and, where necessary, the person or body recorded in the civil register (a person, organisation or bank) represents someone who is no longer able to make own decisions. The certification which gives the representative the authority to act in legal matters and describes the extend of guardianship is supplied by the KESB after examination of the legality of the contract.

With the new regulation of living will there is now unity of regulation in all twenty-six regions of Switzerland. This puts an emphasis on the ability to make a judgment, with regard to those medical measures for which the consent of the individual is required. The requirements for its execution are less strict than in the case of power of attorney provision, in particular as far as publicity goes. KESB is only involved when an application is presented because, for example, a living will is not being met or the document was not put forward under the free will of the person affected. In such a case the KESB functions as a point of complaint.

The strengthening of the solidarity of the family is being implemented in the new law by means of the right of representation of a spouse - or registered partner - in accordance with Article 374 ZGB (so far as there is no precautionary power of attorney in place). It embraces all legal acts, covering the need for maintenance, inclusive of income and asset management. For the agreement of medical measures there is a graded system of representation power for a larger circle of relatives. In any case of doubt a doctor can assume that all siblings are of the same view when one family member comes forward with representational powers.

With the law there was also prescribed cases of mental health problems, psychiatric disturbances or similar problems, with temporary incapacity for work, the right to appoint an advisor (Beistandschaft), Articles 388 et seq. ZGB. This was how the former legal status of incapacitation was enshrined in Swiss national law. The scope of work for an advisor is determined by the KESB and may include accompanying, representation, assistance or a combination of these things, or an all comprehensive representation. The more comprehensively an advisor is asked to operate, the stronger the loss of capacity of the subject.

There is also new regulation in force with regard to enforced action, which is where the subject has not given his/her assent. This is only permitted on the orders of a senior doctor in the case of the subject being unable to make judgements, or in the case of the subject

being in serious danger or being a danger to others and permissible in the context of commensurability, Article 434 ZGB.

3. Status of current discussions on the development needs of the three countries

3.1 Austria

Silvia Weissenberg from Lebenshilfe Austria linked her contribution to Dr Kathrein's earlier contribution which had shown the alternatives for family representation and provision for power of attorney, introduced in 2006, but at the same time made it clear that the environment in which the subject was living was still being given too little consideration. Frau Weissenberg referred to the situation which still occurs for many guardians, whereby the previous guardianship law is often unable to offer an individual, flexible solution or where there are simply not enough professionally registered guardians. Furthermore, subjects can determine very little for themselves, if the contact between them and the guardian occurs only once a month and in between times is not involved at all. The desired paradigm shift to the avoidance or the reduction in guardianship orders is not being argued for.

Motivated more than anything by the rulings of the UN Convention on the Rights of Persons with Disabilities, and in particular Article 12 CRDP, this country is now the target of work for reform, away from guardianship regulation and more towards self-determination, for example through "supported decision-making". For "supported decision-making" a subject can, by means of a legal file, (signed in the presence of two witnesses, the named person and a representative of the official monitoring committee) specify a person to help him or her with specific decisions. The person in the support role must carry out the wishes of the subject who is also responsible for him or herself. Proxy representation and a shift in legal responsibility are permitted only in exceptional cases.

Austria has adopted a national action plan within which a pilot project for the introduction of "supported decision-making" was started and a monitoring committee assembled to oversee the implementation of the UN Convention. In autumn 2013 the programme was singled out for praise by a UN commission on the implementation of the convention, because it was more even-handed with guardianship in accordance with Article 12 of

CRDP. “Supported decision-making” makes it possible to find solutions outside the court system and pre-court hearing. It makes it possible to develop a tailored package of support services and carries above all the formalisation of informal support, and leads to a better hearing for relatives from the subject’s immediate environment.

3.2 Germany

Peter Winterstein, Vice-president of the Higher Regional Court Rostock and **Prof Dr Volker Lipp**, University Göttingen, dealt with the issues already addressed by Mr. Weis, namely of the current need for structural improvements in German guardianship system. Pivotal and cardinal points here are Article 12, para. 1 to 4 CRPD. The aim of the previous guardianship law in Germany (since 1992) has not been to protect legal transactions from activities by persons who have lost their legal capacity but to respect their free will and prevent them to harm themselves. According to this the appointment of a guardian does not affect the legal capacity of a person under guardianship. The only relic of the old guardianship law is a declaration of consent for the benefit of the guardian, where substantial danger to the subject or the subject’s assets has to be averted, § 1903 BGB.

Taking a look at alternative power of attorney provision, it can be seen that in Germany, different from Austria and Switzerland, fewer formal conditions have to be met and so it can come into play at a lower threshold. In addition, there are only very few closely related issues which are excluded by law and which cannot be dealt with by power of attorney. Power of attorney provision is regularly experienced by relatives, rarely by lawyers or professional advocates. Practice also shows that there is more of an incentive to set up a proxy because services of this kind can be calculated according to a lump sum per case. Other forms of support seem to be less attractive.

In conclusion, there is a clear vote in favour of a shift towards self-determination but not so much by legal reform, more by good quality public work in support of the respect and observation of priority being given to the wishes of the subject. Experience shows that doctors and staff from banks and authorities are unclear about what guardianship actually means and how far the subject of it is in fact acting of his/her own will. A guardian is still often seen as the subject’s representative. The purpose of the guardianship law reforms of 20 years ago has, in this respect, still not been achieved.

3.3 Switzerland

The status of current debate in Switzerland was then presented by **Dr Natascia Nussberger**. Because changes in the law first came in at the beginning of the year, practitioners and expert specialists are still in the process of coordinating the new provision. Relevant discussion of individual cases has not yet taken place.

However, what can already be seen is that the special challenge now resulting from the re-organisation of KESB for safeguarding adults is the shift from previous local level responsibility to what is now responsibility at regional level (Kanton). What is also new is the KESB obligation to confidentiality regarding their actions, according to the January 1, 2013 Articles 451 and 452 ZGB and which all public and private sector organisations have had to deal with. There is certainly already a parliamentary initiative for the reintroduction of the duty to “go public”.

A further parliamentary initiative, she went on to say, is also aimed at the abolition of the newly introduced obligation to take on a position as advisor (Beistand), which - in the case of stated suitability - leaves the subject no choice about accepting the obligation or not. When questioned about this, Dr Nussberger explained that the choice of an advisor from the subject’s immediate circle, from a group of unknown, committed people or from a group of people recruited advisors brought together by the local community is a successful method – wholly according to the wishes of the subject.

Taking a look at the living will provision, discussions are currently going on in Switzerland as to whether there should also be electronic patient records with access rights for selected doctors, because at the moment the doctor dealing with the subject is not required to make any entries on the individual insurance record and, as a result documentation, is lacking.

4. Future-oriented models and practical solutions in the countries concerned

4.1 Switzerland

In the view of Dr Patrick Fassbind, President of KESB Bern, it is important that local guardianship authorities collaborate in partnership with the various social services, for example advisory services on child-rearing or services for labour market integration, and in

a well organised manner. In most cases KESB becomes engaged on the initiative of social services. The KESB tries to give priority to the organisation of solutions with volunteers before getting involved with authorities, provided that there is no urgency. Obstacles which have to be overcome are found in practice above all in “Pickett-Service” (stand-by for emergency duties), in coordination with other bodies and with interdisciplinary work in teams comprising social workers, lawyers, psychologists etc. Turnover in authorities is comparatively high as far as these initial problems are concerned.

As far as public work is concerned, it is appropriate to implement the acceptance of KESB certifications at banks and post offices and to address the shortfall in publicity by KESB, something referred to already by Dr Nussberger.

Overall the opportunity to have tailored approaches to our subjects is extremely welcome. Still to be worked out in practice is how far the matching of individual ability to act, in accordance with the new legal requirements, will actually go.

4.2 Germany

Prof Wolf Crefeld, psychiatrist, took as his starting point his demands for the future of the German way of the guardianship system, describing it as viewed too little from a social policy or socio-legal standpoint. In his view, the battle against stigma will be best carried out by practitioners in the field. Collaboration with experienced psychiatrists, as in the Hamburg project “Irre menschlich” (“Crazily human”)⁸ shows good results. Further training for staff and judges, too, needs to be equally interdisciplinary.

Independent, easily accessible complaint points for people with psychological disturbances and their relatives must be standard, as has been done in an exemplary fashion in the last few years in Stuttgart and Berlin. In order to work effectively to avoid complaints, the courts’ should also be equipped with the right tools for the job when arranging provision for individuals. This is where professional care could be better organised in teams in order not to leave the quality of guardianship to the judgment of one person. Examples of this can be found in Ottobeuren and Emden, partially sponsored by the Federal Union for Professional Carers (BdB).

In the following discussion about the contributions of both Germany and Switzerland, it was said that advice and voluntary guardianship should not be seen as expendable.

⁸ For more information see: www.irremenschlich.de

Because financial structures were so variable by region, so was the range of care offerings. In every case it was seen as desirable to have a central clearing point for those in need so that before a guardianship order is issued, there can be an examination of whether there are other possibilities in the community to be used as a priority, such as community psychiatric services. In practice the impression was made that the local authorities do not take sufficient account of their duty to give advice, because the number of young people who are the subject of guardianship in Germany is increasing, instead of trying successfully to avoid placing people in care. One reason for this may be that guardianship works better than psychiatric treatments, something which has been rooted in law since the 1970s, but has not been put into practice. As a result guardianship would be ordered “from the pool” in order to give the subject assistance.

4.3 Austria

Dr Peter Schlaffer, VertretungsNetz, the representatives’ network in Austria, shaped his lecture around models for the future and practical solutions in the Austrian guardianship system from the standpoint of one of the four big associations for guardians (Sachwaltervereine). He introduced the network as an association, funded and recognised by the Federal Ministry of Justice, and active in the area of guardianship, patient advocacy and resident representation.

In particular, he went into the function of the VertretungsNetz as a clearing point to get the most self-determined care possible before it comes to appointing of guardian from an guardianship association. In around 40% of cases in which a court uses the association as a clearing point, a guardian is successfully found, for example, an authority for a close relative to represent. The basis for a successful clearing system, he went on to say, is a good network of guardians and social services and the robust involvement of subjects.

However, even in Austria in recent years there has been an observed increase in advocacy cases. In relation to the UN Convention on the Rights of Persons with Disabilities the government set up the “Clearing Plus” programme as a measure within a national action plan. The objective is that, when a subject becomes involved, the old scenario of empowerment deficit will be changed and the personal circle of the subject be activated in order better to give support. “Clearing Plus” starts with the professional assessment of an individual case, the results of which are used for the planning of individual support (goals, self-help plan, statement of resource in the social and personal

circle of the subject), in order to be able to activate the necessary resources (motivation, “supported decision-making”, concrete help with applications etc, contact to social services and organisations). When this process is concluded, a report is sent to the court making the enquiry.

He went on to say that the VertretungsNetz has around eighty different locations across Austria and so get a good overview of hurdles and success stories in guardianship. The following demands for the future are based on these experiences, addressing social policy: Alternatives to previous guardianships must be developed at national level. Family representation and power of attorney provision must be further shaped and an ombudsman put in place, with specific regard to these instruments. Clearing should be introduced as a compulsory part of the process, completed by means of the obligatory process representation by an association for guardians.

Guardians’ periods of duty should be limited to a maximum of 3 years with the clear goal of empowering the subject within this period. A more precise definition should be set, not only for the time-frame but also for the areas of responsibility determined for the guardian. With this in mind, expert references should be supplied on the examination of broadening out those aspects which affect the legal capacity of the subject - notwithstanding basic diagnoses.

Marriage and custody of children should be dealt with independently of guardianship, because existing laws offer sufficient protection already. Privacy of correspondence should also be safeguarded, notwithstanding the appointment of a guardian.

The subject selects his or her representative and any enforced action by lawyers should, in particular, be done away with, because this is where in practice a lot of problems are currently noted.

No less an important requirement of federal law on guardianship, patient advocacy and representation of persons in residential care is that people with disabilities should also have the right to advice the federal law dealing with associations for guardianship and representation of different types. The work conforms according to the UN Convention on the Rights of Persons with Disabilities and is in accordance with its requirements to move towards tailored solutions which take account of the right to a self-determined way of life.

4.4 South Tyrol

Dr Roberta Rigamonti, Association for Health and Social Affairs, introduced practice in

guardianship law in Italy. In South Tyrol there are currently around 1500 guardians. Guardianship can be brought into play when the guardianship court sees the conditions of an incapacity petition not being met. The legal institution for petitioning on grounds of incapacity in South Tyrol is still valid, because to date it has not been possible to find a way of abolishing it within legal policy. In 2004 it was certainly reformed to such an extent that petitioners were granted the right to take forward specific administrative procedures themselves. At the same time the instrument of guardianship was established. In court practice rarely does it come to the appointing of a petition for incapacity, in the majority of cases a guardian is put in place.

Where a subject has restricted legal capacity and so needs to draw on the field of guardianship, the guardianship court also remains firmly in place. Advocacy is by and large carried out by volunteers. What is new is that this is not limited to those with psychological disturbances but is there to take account of the interests of all those with problems, whether psychological or physical. The subject can propose the guardian and also remove him or her in the case of misconduct.

Practice has shown that it can be very hard to find a guardian where problems are very severe or where there are weak links in the family network. Furthermore, there is no insurance for the work of a guardian. In this respect, the new guardianship law is still in its implementation phase. In order to find a solution, cross-authority working groups were set up with decision-makers from not only the public and private sector but also the court system. An official register of guardians, an information point for subjects, relatives and for guardianship judges have all now been introduced. Since 2006 there have been specific advisory services and in 2010 an association for guardians was founded, offering information and trainings, as well as being able to offer guardianship services itself.

However, as far as the future is concerned, there remain a few aspects in South Tyrol, which for a long time has had no legal regulation. The compensation regulations for guardians must be examined for their suitability and should be revised, as has already happened in some of Italy's provinces. Petitioning for incapacity must be completely abolished. The appointment of a guardian should take place by public deed in the presence of a notary and be documented in the public register. Protection for adults from non-EU countries, and with no legal capacity, should be extended because at the moment this is only possible if there is a comparable legislation in the country of origin of the person concerned. What lies behind this is the fact that Italy has not signed up to the Hague Convention on the International Protection of Adults.

4.5 Liechtenstein

The new guardianship law in Liechtenstein was presented by **Josef Thaler** from the Association for Guardians (Sachwalterverein). The new law has been in place since 2011 and is strongly oriented towards the Austrian with the exception, that relatives' representation was not adopted as an instrument. In the middle of 2011 an association for guardians was founded in Liechtenstein and half of approximately 110 guardians active in Liechtenstein are organised by this association.

With the new guardianship law well-being and free will of the person in need was put in the center, see §§ 272 and 281 of Common Civil Code in Liechtenstein (AGBG). According to the old law, a subject lost his or her voting rights once a guardian had been appointed. The status of guardianship would have been made known in the civic newspaper for the principality and immediately attract a stigma. Reasons such as alcohol addiction and wastefulness, as well as being a burden on one's immediate circle, were at that time sufficient reason for the appointment of a guardian.

At the moment the ministry is examining a proposal of the Liechtenstein Office for Foreign Affairs concerning the consequence of the implementation of the UN Convention on the Rights of Persons with Disabilities, esp. burden and expenses.

For the future, there are in practice the following challenges for Liechtenstein: courts and experts, as well as society at large, need to be made sensitive to the new guardianship law. The monitoring of guardianship law by the courts must be improved. An ombudsman must be established for people concerned.

5. Conclusion

The expert meeting was seen by all participants as a good opportunity to improve knowledge on legal and actual circumstances in the neighbour countries and to exchange arguments in order to consider better care arrangements in their home countries.

It is interesting to note that in Switzerland the local guardianship authorities have been given a pivotal role for care and, above all, given guardianship to bring together child and adult safeguarding arrangements. The KESB certainly had to work at this new role. In Germany and Austria the guardianship courts play, as before, the predominant role in appointing and supervising care. Local guardianship authorities are responsible more for front-end care provision, although in Germany they have already been strengthened by the

2013 amendment to the law.

As far as shortcomings in practical guardianship are concerned, and recognising the regulations of the UN Convention on the Rights of Persons with Disabilities, the question repeatedly coming up in discussion was whether the issue is the quality of the law and its implementation (implementation quality) or whether there is a general lack of capability amongst those who care for the subjects (qualification of professionals). In the case of Germany, a funding deficit for implementation structures and quality assurance made a difference. In practice the freewill of the subjects, which had been given less priority than the interests of banks, doctors etc, came to the fore once more in dealings with the law. Wide-ranging quality of a good standard was evidenced in German guardianship law as well as uniformity with the Convention itself. Austria is different: Taking into account the requirements of the UN Convention on patient-centered services, on the fostering of inclusion and on orientation towards assistance a significant need was identified in the further development of guardianship law.

In connection with this recognition, in the three countries with power of attorney provision, living will, relatives' representation or appointment of an advisor (Beistand), there are already good alternative instruments which make it possible for subjects to have greater self-determination and tailored assistance. There was complete agreement on representation by relatives and a belief that this group, as well as the subject's wider circle, must in future be given much clearer consideration. In Switzerland it is possible for relatives to take on representation, provided there is no advisor or guardianship in place. Even in Austria attempts are made to give priority to representation by relatives, because this way employability status remains intact. In Germany provision for powers of attorney is often given to relatives. However, wider approaches are being discussed in all the countries concerned, one of these being "supported decision-making".

In all three countries it was felt that a further challenge for the future would be to ensure stronger linkages between guardianship and other services (social services, advisory services etc.) or other administrative bodies. In Germany, the mediation of other assistance must be insisted upon, as is foreseen in the law which serves to strengthen care arrangements. Furthermore, where there is financial difficulty, the funding guidelines for associations for guardians should be aligned to the same level across the whole. It is important in Switzerland that KESB's partnership work with the various social services, for example advisory services on child-rearing or on labour market integration, is well

organised. In Austria, all the attention will be on the cooperation of the two departments, namely the one for legal matters and the social, both at national and regional level, in order to create the linkage between legal assistance and other social services. The debate about the legal framework at national level is to continue in all the countries concerned.

LIST of PARTICIPANTS (in alphabetical order):

Bachmayr-Heyda, Mag., Florian	IfS, Austria
Barth, Veronika	Professional guardian, Germany
Brandstätter, Albert	Lebenshilfe, Austria
Chalupka, Dir. Mag., Michael	Diakonie, Austria
Crefeld, Prof, Wolf	Psychiatrist, Germany
Fassbind, Dr, Patrick	KESB, Switzerland
Fuchs, Dr, Walter	IRKS, Austria
Fröhlich, Elisabeth	Office for Social Affairs, Switzerland
Guggisberg, Dorothee	SKOS, Switzerland
Kania, Margit	Supra-local guardianship authority, Germany
Kathrein, Dr, Georg	Fed. Ministry of Justice, Austria
Köhler, Irene	ÖKSA, Austria
Kroworsch, Susann	DV, Germany
Lipp, Prof Dr, Volker	University Göttingen, Germany
Löher, Michael	DV, Germany
Cornelia Markowski	DV, Germany
Mayrhofer, Dr, Hemma	IRKS, Austria
Millner-Kurzbauer, Mag., Teresa	Volkshilfe, Austria
Mosimann, Urs	SVBB, Switzerland
Nägele, Mag., Günther	IfS, Austria
Nussberger, Dr, Natascia	Fed. Office of Justice, Switzerland
Rasch, Dr, Edna	DV, Germany
Rigamonti, Dr, Roberta	DSG, South Tyrol
Rosch, Prof (FH), Daniel	University for Applied Studies Lucerne, Switzerland
Rubisch, Dr, Max	Fed. Ministry for Labour and Social Affairs, Austria
Schlaffer, Dr, Peter	VertretungsNetz, Austria
Schmid, Dr, Greti	Regional government Vorarlberg, Austria
Scholl, Sieglind	Diakonie, Germany
Schulze, Dr, Marianne	Monitoring committee, Austria
Thaler, Josef	Association for Guardians, Liechtenstein
Tragust, Dr, Karl	ASWE, South Tyrol

Tschann, Mag., Elisabeth
Wolf Moritz Weis,
Weissenberg, Mag., Silvia
Winterstein, Peter

Regional government Vorarlberg, Austria
Fed. Ministry of Justice, Germany
Lebenshilfe, Austria
Higher Regional Court Rostock, Germany



Participants at the ICSW expert meeting on 19 November 2013 at Haus Mariahilf, Bregenz

All experts' presentations (in German only) referred in this report can be seen:
<http://www.deutscher-verein.de/03-events/2013/materialien>