

Asset Management within the Context of Guardianship or Limited Guardianship



Guardianship law has been completely revised. The revised articles in the Swiss Civil Code entered into force on January 1, 2013. At the same time, the Federal Council passed an investment ordinance that replaced the previous cantonal and municipal investment regulations.

What Is Involved?

Until the current revision, Swiss guardianship legislation as set out in the Swiss Civil Code (Art. 360–455 old SCC) has remained more or less unchanged since its implementation in 1912. The old law made provision for three official measures, i.e. guardianship, limited guardianship and legal assistance.

Tailor-Made Official Measures

Instead of standard measures, the authorities can now order only as much official support as is really required in an individual case. Tailor-made official assistance can be provided to arrange personal, representational, asset management, cooperation or other comprehensive support to persons who need legal assistance. The term “guardianship” is still used for minors.

Special Agencies to Serve As Child and Adult Protection Agencies

Under the new law the cantons have to appoint special agencies to take on this role, which led to structural reforms in all cantons. Instead of the previous guardianship authorities (depending on the canton, courts or local government offices), the cantons now establish regional or cantonal adult and child protection agencies.

Transitional Provisions

Persons declared legally incompetent under the old law automatically subject to comprehensive official assistance under the new law. The previous instruments of legal assistance and limited guardianship became invalid as of December 31, 2015 if no new measures had been ordered.

Under the Federal Council’s investment ordinance, investments had to be converted by end of 2014.

Asset Management

The cantons drew up regulations governing the investment and safekeeping of assets managed for minors as well as the type of accounting, billing and reporting under the old law (Art. 425 para. 2 old SCC). Several cantons passed such regulations in the form of ordinances, circulars or recommendations.

New Legal Bases

The revised law describes the responsibilities of legal assistance in the area of asset management in Art. 408 et seq. SCC as follows: The officer offering legal assistance must manage the assets with all due diligence and must carry out all the legal business that the management of the assets entails. Said officer shall make freely available to the person receiving legal assistance appropriate amounts of money from their assets (Art. 409 SCC) and shall keep a record. The officer shall present this to the adult protection agency for approval at intervals determined by the agency, but every two years at the least (Art. 410 para. 1 SCC). To ensure the standardized implementation of the federal law, the Federal Council has also passed provisions on the investment and safekeeping of the assets (Art. 408 para. 3 SCC).

Investment Ordinance of the Federal Council

Based on this delegation standard, the Federal Council has passed an ordinance on the management of the assets within the framework of legal assistance and guardianship (VBVV), which entered into force on January 1, 2013, together with the new law on the protection of adults. The ordinance presumes that, within the framework of legal assistance and guardianship, the person mandated hereto shall have the required basic specialist knowledge to be able to identify the economic needs of the person affected and to select the appropriate investment strategy for him/ her. However, the ordinance does not consider any complex investment instruments, since it is not anticipated that any investments will be made by financial experts.

Principle

The VBVV states in Art. 2 that the assets must be invested safely and, as far as possible, that they should generate returns. Investment risks must be kept to a minimum through

appropriate diversification. Art. 5 sets out how the personal circumstances of the person affected must be taken into account.

The following articles, numbers 6 and 7, describe how the assets must be apportioned to guarantee that daily living costs are covered and which investments are permissible for wide-ranging needs.

The investments mentioned in Art. 6 d and e as well as all the investments pursuant to Art. 7 must be authorized by the child and adult protection agencies. In the case of especially favorable financial circumstances, these agencies can also authorize other investments that are not named specifically in the ordinance.

- **Guaranteeing Daily Living Costs**

(Art. 6)

- a. Cantonal banks with an unlimited state guarantee: unlimited cash investments, bonds, time deposits
- b. Other banks, Post Office: cash investments, bonds, time deposits up to max. CHF 100,000 (per institution)
- c. Fixed income federal bonds and mortgage bonds issued by central mortgage bond institutions
- d. Property (owner-occupied/stable in value)
- e. Claims secured by pledge (stable in value)
- f. Investments in occupational benefits institutions

- **Investments for Wider-Ranging Needs**

(Art. 7 para.1)

- a. CHF bonds in creditworthy companies
- b. CHF shares in creditworthy companies, max. 25% of total assets
- c. CHF bond funds with investments in creditworthy companies managed by Swiss banks
- d. Mixed CHF investment funds with max. 25% shares and max. 50% foreign companies managed by Swiss banks
- e. Pillar 3a investments with banks, the Post Office or with insurance companies
- f. Real estate

- **Particularly Favorable Financial Circumstances**

(Art. 7 para. 3)

If the financial circumstances of the person affected are particularly favorable, the child and adult protection agencies can authorize a greater investment.

Please refer to the above mentioned ordinance on the management of the assets within the framework of legal assistance and guardianship (VBVV), as well as the supporting report issued by the Federal Office of Justice in May 2012, which contains some additional information, for more details.

Consideration of Personal Circumstances

As far as the choice of investments is concerned, the personal circumstances of the person affected must be taken into account, in particular their age, health, subsistence needs, income and assets as well as insurance coverage. As far as possible, the wishes of the person affected must also be taken into account.

Any insurance benefits, in particular in relation to retirement, accident, sickness or the need for care, must also be considered.

The investment must be selected in such a way that funds are available for general living costs and also to cover any extraordinary expenses that might arise, without the need to liquidate assets at a disadvantageous time.

Challenging Task

As well as the social function, the responsibilities of guardianship frequently also include income and asset management. Thus the guardian must consider not only the security but also the specific needs of the person affected. Therefore the evaluation of which investments are appropriate must always be made individually, based on the so-called risk capacity of the person affected.

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