

Asset management within the context of conservatorship or 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 revision, Swiss guardianship legislation as set out in the Swiss Civil Code (Art. 360–455 old SCC) had 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 conservatorship.

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 measures can be provided in the form of supported decision-making authorization, substitute decision-making authorization (often applicable to asset management), co-decision-making authorization, combined decision-making authorization, or general conservatorship. The term “guardianship” is still used for minors.

Special agencies provide child and adult protective services

Under the revised 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 child and adult protective services.

Transitional provisions

Persons declared incapacitated under the old law became automatically subject to general conservatorship under the new law. The previous instruments of conservatorship 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 the end of 2014.

Asset management

The cantons drew up regulations governing the investment and safekeeping of assets managed for wards as well as the type of accounting, billing, and reporting under the old law (Art. 425(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 conservators in the area of asset management in Art. 408 et seq. SCC as follows: The conservator must manage the assets with all due diligence and must carry out all the legal business that the management of the assets entails. Said conservator shall make freely available to the person under conservatorship appropriate amounts of money from their assets (Art. 409 SCC) and shall keep a record. The conservator shall present this to child and adult protective services for approval at intervals determined by the agency, but every two years at the least (Art. 410(1) SCC). To ensure the standardized implementation of the federal law, the Federal Council also passed provisions on the investment and safekeeping of the assets (Art. 408(3) SCC).

Investment ordinance of the federal council

Based on this delegation standard, the Federal Council passed an ordinance on the management of assets in connection with decision-making authorization or guardianship (VBVV), which entered into force on January 1, 2013, together with the new adult protection law. The ordinance assumes that, within the framework of conservatorship and guardianship, the person mandated to manage the assets 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 them. 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 6(e) as well as all the investments pursuant to Art. 7 must be authorized by child and adult protective services. 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, Postfinance: 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 employee benefits insurance institutions

■ **Investments for wider-ranging needs (Art. 7(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, Postfinance or with insurance companies
- f. Real estate

■ **Particularly favorable financial circumstances**

(Art. 7(3))

If the financial circumstances of the person affected are particularly favorable child and adult protective services can authorize more comprehensive investment.

For more details, please refer to the above-mentioned ordinance on the management of assets in connection with decision-making authorization or guardianship (VBVV), as well as the supporting report issued by the Federal Office of Justice in May 2012, which contains some additional information, and the recommendations of the SBA and the KOKES of July 2013.

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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, illness or the need for care, must also be considered.

The investments 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 a conservator frequently also include income and asset management. Thus the conservator 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 ability of the person affected.

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