

Advance directive

A self-determined future

As of January 1, 2013, child and adult protection laws allow a legally competent person to establish an advance directive that sets out their wishes and instructions in the event that they become incapacitated due to an accident, serious illness or old age.

Revisions to the law

The existing guardianship legislation was replaced with new child and adult protection laws in 2013. The most important changes included the introduction of specialist agencies, measured government action, efforts towards strengthening family solidarity, and the promotion of the right to choose. This right to choose can be exercised in the form of an advance directive and a living will.

Loss of judgment

If no advance directive exists and the precautionary measures under law (partner representation) are insufficient, then Child & Adult Protective Services (abbreviated as CAPA) will assign a conservatorship. To ensure that commensurate legal assistance is provided, the law makes a distinction between supported decision-making authorization, substitute decision-making authorization (e.g. for asset management), co-decision-making authorization, a combination thereof, and a general conservatorship. The CAPA appoints a conservator to carry out the foreseen tasks. In many cases this will be an employee of the official conservatorship/local authorities. The appointment of a personally and professionally suitable person is also possible. The CAPA may, but need not, take a proposed conservator into account.

The conservator's duties

The conservator performs the ordered measures under the CAPA's constant supervision. In terms of managing the assets of the person judged incapable, the appointed conservator must strictly observe the Federal Council's investment ordinance (see separate fact sheet "Asset Management within the Context of Guardianship or Limited Guardianship"). In addition, the law and the aforementioned investment ordinance require that the CAPA approve certain transactions and investments.

A conservatorship can be avoided through the prior establishment of a comprehensive and valid advance directive.

The advance directive

An advance directive determines when and by whom you want to be cared for in the event of a loss of judgment. The advance directive can include personal care and/or financial care. After a loss of judgment, the CAPA appoints the person designated in the advance directive. Permanent supervision by the authorities does not occur.

What does personal care entail?

The personal care provider must ensure the care and orderly everyday life of the subject. In particular, this includes arranging the subject's housing situation (e.g. decision on accommodation) as well as arranging all necessary health measures (if no living will exists).

What does financial care entail?

The person designated with financial care has to manage all assets, file tax returns, and represent the subject's financial affairs.

What needs to be ascertained in the management of financial assets?

It is advisable to provide clear asset management instructions in the advance directive for the person designated with financial care. The Federal Council's investment ordinance is not applicable. A proposed wording can be found at the end of this document.

Who can be appointed in an advance directive?

With an advance directive, any natural person or legal entity can be appointed as long as they are legally competent. It is important that the designated person's identity be clearly ascertained. Different individuals can be appointed for personal care and financial care. It is also advisable to name substitutes in the event that the primary designated person is not suitable for, does not accept, or resigns from the task.

Who can set up an advance directive?

The advance directive can be set up by any person who is legally competent. This person therefore must be of legal age and sound mind when the advance directive is established and not already have been placed under any general conservatorship.

How can the advance directive be set up?

The advance directive must be written by hand or be certified by a notary public. Both forms are equally valid. The handwritten advance directive is to be written down, from start to finish, by the subject, then dated and signed. The advance directive must be certified before a notary public.

■ **Can an advance directive be revoked or changed?**

An advance directive can be changed or revoked at any time before the onset of the loss of judgment. The advance directive must be revoked using one of the valid ways, either written by hand or certified by a notary public; however the chosen form does not have to be the same as the form used to set up the advance directive. It is also possible to revoke the advance directive by destroying it or by establishing a new advance directive that replaces the existing one.

■ **Where does the advance directive have to be deposited and to which authority must its existence be reported?**

In some cantons, the advance directive may be deposited with the CAPA. This offers the advantage that the CAPA already has the advance directive documents and they can validate them after a loss of judgment. The advance directive may also be stored at any other secure location. In this case, it makes sense to report the location of the advance directive to the local registry office, which means it will be registered in a Switzerland-wide database. This procedure is particularly recommended if future changes of residence cannot be ruled out.

■ **When does an advance directive take effect?**

As soon as the CAPA receives notice of the loss of judgment, it formally reviews the validity of the advance directive and the suitability of the conservator. After the review, it issues a declaratory ruling, also called a validation. The appointed conservator can use this to prove his/her identity vis-à-vis third parties and carry out his/her tasks independently. The CAPA will only intervene if the interests of the subject are at risk or no longer being looked after.

The living will

With a living will, any legally competent person can establish in advance what medical procedures he/she would accept and which would be rejected. It is also possible to designate a close relative to discuss medical procedures with a doctor, which is important, for example, in patchwork family situations. The living will makes it easier for physicians to make difficult decisions and also provides relief to relatives. The Swiss Medical Association, for example, provides two living will versions as well as a wallet card (www.fmh.ch/services/patientenverfuegung).

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We advise, for example, that the following paragraph be included in any advance directive: "My entire financial assets (excluding land and other personal property) shall continue to be managed according to the investment strategy defined on the date that this advance directive takes effect and/or pursued by my bank. The conservator of the advance directive is entitled, but not obliged, to adapt, where appropriate, the strategy and to choose a lower-risk investment profile. He/she is expressly empowered to issue asset management instructions to the bank, as well as to take out, extend, or repay mortgages and other loans. The conservator designated with financial care may represent me in the capacity of authorized representative in all matters in which legal representation is possible."

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