

Restriction due to Mental Illness among the Conditions Requiring Guardianship

Vesayeti Gerektiren Hallerden Akıl Hastalığı Sebebiyle Kısıtlama

 Ceyda Çınar

Ministry of Justice, Bakırköy Courthouse Bahçelievler Annex Building, Istanbul, Türkiye

ABSTRACT

This study aims to examine guardianship, which is the legal protection provided to people who lose the power of discernment due to mental illness, in terms of mental illnesses.

In the article, mental illnesses that require guardianship within the scope of Article 405 of the Turkish Civil Code and mental illnesses that may cause restrictions within the scope of the legal regulation, and also the effects of mental illnesses determined within the scope of the legal regulation on the restrictions on individuals were examined.

It was determined that the mental illnesses examined necessitate guardianship under Article 405 of the Turkish Civil Code.

In conclusion, this study concludes that guardianship is an important legal tool to protect individuals who have lost the power of discernment due to mental illness and also the effective usage of this tool is important. Therefore, further research in this field will provide healthier results in terms of evaluating the effectiveness of existing legal regulations.

ÖZET

Bu çalışma ile, akıl hastalığı nedeniyle ayırt etme gücünü yitiren kişilere sağlanan yasal koruma olan vesayetin akıl hastalıkları açısından incelenmesi amaçlanmıştır.

Makalede, Türk Medeni Kanunu'nun 405. maddesi kapsamında vesayet gerektiren akıl hastalıkları, yasal düzenleme kapsamında kısıtlamalara neden olabilecek akıl hastalıkları ve ayrıca yasal düzenleme kapsamında belirlenen akıl hastalıklarının bireyler üzerindeki kısıtlamalara olan etkileri incelenmiştir.

İncelenen akıl hastalıklarının, Türk Medeni Kanunu'nun 405. maddesi uyarınca vesayet gerektirecek düzeyde olduğu belirlenmiştir.

Sonuç olarak, bu çalışma ile vesayetin akıl hastalığı nedeniyle ayırt etme gücünü yitiren bireyleri korumak amacıyla önemli bir yasal araç olduğu ve bu aracın etkin kullanımının önemli olduğu sonucuna varılmıştır. Bununla birlikte, bu alanda daha fazla araştırma yapılması, mevcut yasal düzenlemelerin etkinliğini değerlendirmek açısından daha sağlıklı sonuçlar elde edilmesini sağlayacaktır.

Keywords:

Mental Illnesses
Guardianship
Restriction

Anahtar Kelimeler:

Akıl Hastalıkları
Vesayet
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OVERALL CONCEPT OF GUARDIANSHIP

The institution of guardianship has taken its place in our legislation by being transferred from the Swiss Civil Code to the Turkish Civil Code numbered 4721. Guardianship as named by the Family Law Book of the Turkish Civil Code, in a narrow sense, is an institution that aims to protect the interests of minors who are not under parental authority and persons who need to be restricted for reasons specified in the law. What is meant by the regulations on guardianship law in a broad sense are the regulations regarding guardianship bodies in all other laws other than the Turkish Civil Code (1).

The term “guardianship” originates from the Arabic root “wşy” and is defined in the Justice Ministry Legal Dictionary as “an institution regulated by private law that aims to protect the rights of minors or interdicted people and has the character of a public service” (2). According to Akıntürk, the term “guardianship” refers to

the institution directed at protecting individuals who are not under parental authority and those who are incapable of managing themselves and their property for various reasons (3).

Although there are similar doctrinal views on the definition of guardianship, its legal nature is controversial. Some authors consider guardianship as a branch of private law, while others argue that it operates within the boundaries of both public and private law (1). The view we agree with, as the majority does, is that the institution of guardianship is a public institution. The fact that in our legislation tasks such as placing a person under guardianship, selecting and appointing a guardian, guardian being able to carry out the transactions of persons under guardianship with the permission of the guardianship and supervision authority, determining whether the guardian has fulfilled his responsibilities within the scope of supervision, whether they should be dismissed from their duties, and making

Correspondence: Ceyda Çınar, T.C. Adalet Bakanlığı Bakırköy Adliyesi Bahçelievler Ek Binası, Fevzi Çakmak, Ahmet Taner Kışlalı Cd. No: 6, 34194 Bahçelievler/İstanbul **E-mail:** ceydagungormus@hotmail.com

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decisions regarding the termination of guardianship fall within the jurisdiction of the guardianship and supervisory authorities, which are the Peace Civil Courts and the Civil Courts of First Instance, demonstrates that guardianship is indeed a public institution.

In the decisions of the Supreme Court, it is emphasized that the guardianship institution is a public institution by mentioning that placing people under guardianship is related to public order and that even if the plaintiff does not come, a decision must be made by going into the merits of the case by the principle of *ex officio* investigation. (Supreme Court 2nd Civil Chamber, Decision dated 03/07/2000, No: 7365-9079)

GENERAL INFORMATION ABOUT MENTAL ILLNESSES

In the Dictionary of the Turkish Language Association, mental illness is defined as the general term for diseases that manifest themselves with deficiencies or disorders in abilities such as thinking, understanding, comprehension, decision-making, taking precautions, establishing relationships with others, etc. (4) According to the American Psychological Association, mental illness is defined as “any condition characterized by cognitive and emotional disturbances, abnormal behavior, impaired functioning, or any combination of these” (5). While defining mental illness, the Association referred to the DSM book, which is the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.

Until the end of the 18th century, mentally ill people were in a system where they were stigmatized and those who exhibited abnormal behavior that the public did not expect were morally controlled by punishment. Mentally ill individuals were viewed as people who had been possessed by demons or had been struck by the devil according to the religious beliefs of the period. Since the 19th century, steps have been taken towards the development of medicine, separating from the authority of the church, efforts have been made to explain that events such as people’s declarations that they are prophets and their ecstasies originate from the mind and soul (6). Since the 19th century, views on treating mentally ill patients under humane conditions have developed, and mental health departments have been opened in universities in the USA and Europe (7).

The development of psychiatry among Turks occurred after Islam with the establishment of treatment places following the rituals of Shaman belief (8). To categorization and identification of psychiatric illnesses, the Diagnostic and Statistical Manual of Mental Disorders (DSM) by the American Psychiatric Association and the International Classification of Diseases (ICD) by the World Health Organization guides are followed. In Europe and our country, psychiatric illnesses are categorized based on the International Classification of Diseases and Related Health Problems (ICD) by the World Health Organization, and classifications have been made in terms of mental illnesses in ICD-11 (9).

According to ICD-11, mental illnesses are classified as follows:

- Neurodevelopmental disorders

- Schizophrenia or other primary psychotic disorders
- Catatonia
- Mood disorders
- Disorders associated with anxiety or fear
- Obsessive-compulsive or related disorders
- Disorders specifically associated with stress
- Dissociative disorders
- Feeding or eating disorders
- Elimination disorders
- Body distress or bodily experience disorders
- Substance use or addictive disorders
- Impulse control disorders
- Disruptive or antisocial behavior disorders
- Personality disorders and related personality traits
- Paraphilic disorders
- Factitious disorders
- Neurocognitive disorders
- Mental or behavioral disorders associated with pregnancy, childbirth, or the puerperium
- Sleep-wake disorders
- Sexual dysfunctions
- Gender incongruence (10)

Although ICD 11 criteria are used as a basis in the characterization of mental illness in psychiatry, mental illnesses that affect the ability to discernment are subject to evaluation in terms of guardianship law (11).

MENTAL ILLNESS FROM THE PERSPECTIVE OF GUARDIANSHIP LAW

According to Turkish Civil Code (TCC) Article 405, any adult who, due to mental illness or mental weakness, is unable to perform their duties requires constant assistance for protection and care, or poses a danger to the safety of others, shall be restricted. Administrative authorities, notaries, and courts who learn of a situation necessitating the placement of someone under guardianship must immediately inform the competent guardianship authority. The diseases that require evaluation from the perspective of guardianship law and affect a person’s decision-making ability include psychoses, mental retardation, psychoneuroses, personality disorders, and organic psychoses.

In practice, the most common reasons for guardianship are schizophrenia, dementia, mental retardation, and bipolar disorders (12). A statistical study conducted in 2017 examined the records of 810 individuals referred to a training and research hospital, and it was found that reports indicating the need for a legal representative were issued for 81.7% of them (13). The same study indicated that 31% of the referred individuals were diagnosed with dementia, 28% with a psychotic disorder, 8.1% with bipolar disorder, and 15.2% with intellectual disability. It was emphasized that reports indicating the need for guardianship were issued for 76.8% of the cases (13).

Determining whether a person has a mental illness requires expertise, and according to Turkish Civil Code Article 409 of the law, a decision on restriction due to mental illness or mental weakness can only be made based on an official health committee report. According to this law, simply classifying the illness in the DSM or ICD is not sufficient; rather, the crucial aspect is whether the psychiatric illness affects the person’s decision-making ability.

The legislator places significant importance on the health report issued for mental illness or mental weakness and also in the jurisprudence of the Supreme Court, it has been stated that a comprehensive report from a fully equipped hospital with a psychiatrist should be obtained for individuals for whom guardianship is requested based on alleged mental illness. (Supreme Court 2nd Civil Chamber Decision dated 15.01.2001, No: 15160-471) Furthermore, the Supreme Court has ruled that in case of discrepancies among the reports obtained by the court, the individual subject to restriction should be re-evaluated along with the previous report to obtain a new report. (Supreme Court 2nd Civil Chamber Decision dated 12.11.2003, No: 14266-15439)

In the event of discrepancies between the health report from a fully equipped hospital and the report prepared by the Institution of Forensic Medicine's specialized department, these discrepancies will be conclusively resolved by the Institution of Forensic Medicine's General Board with the participation of expert members by Article 15 of Law No. 2659 on the Institution Forensic Medicine. However, by Decree Law No. 703 dated 02/07/2018 which is Decree-Law Concerning Amendments to Certain Laws and Decree Laws to Comply with the Amendments to the Constitution, some changes were made in the law and the Forensic Medicine Institution Law No. 2659 was renamed "Law on Some Regulations Related to the Forensic Medicine Institution". The duties and powers of Forensic Medicine Institute were rearranged with the "Presidential Decree on the Organization of Ministries, Relevant, Related Institutions and Organizations and Other Institutions and Organizations" dated 15.07.2018 and numbered 4. With this amendment regarding the Forensic Medicine Institute the repealed Article 15 was replaced by Article 16 of Decree No. 4. According to this article;

Forensic Medicine Supreme Councils;

- a) Works given by forensic medicine specialized boards and specialized offices, but whose reasons are stated by the courts, judgeships, and prosecutor's offices and which are not sufficiently convincing due to their scope.
- b) Works does not be decided unanimity by forensic medicine specialty boards,
- c) Contradictions that arise between the reports and opinions of forensic medicine specialty boards,
- d) Contradictions that arise between the reports and opinions of forensic medicine specialty boards and specialized offices,
- e) Conflicts that arise between the reports and opinions given by forensic medicine specialty boards and health institutions other than the Forensic Medicine Institute as a committee, examines the issue with the participation of expert members and makes a final decision.

Within the scope of the article, any contradictions that arise between the reports provided regarding mental illness and mental weakness, which is our subject of study, and the reports given by the specialized boards or departments, will be decided by the forensic medicine higher boards.

Issuing a decision on guardianship due to mental illness or mental weakness without an official health committee report may lead to the annulment of the decision if an

appeal is lodged. In the official health board report; Observations about the person, diagnosis of the disease, medical evaluations and ultimately whether there is a situation that affects the ability to distinguish due to disease should be determined (14). The committee responsible for preparing the report should avoid making legal evaluations and acting as a judge.

Although the term "mental weakness" is used in the law, mental weakness is a legal rather than a medical concept. There is no distinction made in the law regarding the illness that eliminates discerning power and mental weakness. Given that there is no practical difference in terms of applied provisions and outcomes, the content of the concepts of mental and psychological illness is important. For a person to be placed under guardianship due to mental illness, this condition must be continuous (15).

According to Article 409 of the Turkish Civil Code, a decision based on mental illness or mental weakness can only be made with an official health committee report, and the judge may hear the individual subject to restriction after taking the committee report into account. In practice, if there is a finding in the health report that it is not beneficial to hear the person due to mental illness, the judge may decide not to hear the person. Indeed, if the person's mental illness is advanced, their testimony during a trial may negatively affect their illness and hinder obtaining accurate statements. However, it would be appropriate for the court to hear from an individual placed under guardianship due to mental illness or mental weakness if there is a request for the removal of guardianship after the person has been placed under guardianship.

The last paragraph of Article 409 of the Turkish Civil Code states that when an official health committee report is required for restriction based on mental illness or mental weakness, if necessary, Article 436 of the same law may apply. By regulating that a decision can only be made after obtaining an official health committee report for individuals with mental illness or mental weakness in the fifth paragraph of Article 436, the importance of an official health committee report for restriction due to mental illness or mental weakness is once again emphasized. The article states that "to ensure the preparation of the official health committee report; it is indicated that samples such as blood or similar biological samples, hair, saliva, nails, etc., can be taken from the person's body." The Constitutional Court, with its decision dated 25/01/2023 and numbered 2020/30 main case, 2013/12 decision, declared unconstitutional the provision of Article 436/6 of the Civil Code, which allows placement in a health institution for up to 20 days based on a physician's report, due to the absence of a legal remedy that can be applied against the decision of placement in a health committee and the lack of legal safeguards that could lead to arbitrariness.

Mental illness and mental weakness alone are not sufficient for a guardianship decision to be made; the existence of one of the situations specified in the law, such as inability to perform one's duties, requiring constant assistance for one's protection and care, or endangering the safety of others, is also required.

INABILITY TO MANAGE ONE'S AFFAIRS

Article 405 of the Turkish Civil Code lists one of the conditions for being placed under guardianship due to mental illness or mental weakness as the inability to manage one's affairs. Since it is not possible for a person to completely be unable to manage their affairs, the concept in this article should be understood as inadequacy in performing tasks, as described in Article 335 of the previous Civil Code. The law has not made a regulation regarding which jobs are within the scope, and these should be understood as jobs that, if not done, may cause significant consequences in a person's life (16).

Examples of situations where tasks cannot be performed include not being able to manage one's finances, not being able to withdraw one's salary from the bank, not being able to go to the doctor, or not being able to handle social security-related procedures.

It is important to emphasize that the reason for not being able to manage one's own affairs must be due to mental illness or mental weakness, and inexperience or lack of knowledge about the tasks to be performed does not constitute grounds for guardianship.

CONTINUOUS NEED FOR ASSISTANCE FOR PROTECTION AND CARE

According to Article 405 of the Civil Code, for a person to be restricted due to mental illness or mental weakness, it is necessary for them to continuously require assistance for protection and care. For instance, a person can do his economic affairs properly, but cannot go to the hospital and receive treatment due to his epileptic seizures. Another example of this condition is that a bipolar patient who works to earn an income has suicidal thoughts due to his attacks and therefore needs personal care.

POSING A DANGER TO THE SAFETY OF OTHERS

Article 405 of the Civil Code regulates guardianship protection for the person's protection or the ability to perform their affairs, but it also adds the condition of endangering the safety of others for the protection of society as a whole.

According to Riemer, with this social condition, society is protected against people who tend to commit illegal acts (17).

The possibility of a person's illness leading to an attack on third parties may lead to guardianship. This provision should not be narrowly interpreted, as one of the most important aims of guardianship law is to ensure the protection of the individual in a two-way manner, meaning not only criminal acts but also any behavior that could endanger society should be understood.

A study found that the behaviors most expected from mentally ill individuals by others are negative emotions and problems related to personal care, and aggressive behavior is the most disturbing (18).

The situation of endangering the safety of others specified in the article should not be expected to occur due to an event, and a guardianship decision should be made due to the dangers that may arise from the side effects of the disease or the drugs used for the disease.

Mentally ill people, who are the people most addressed by the guardianship institution and who need to be protected the most, can be placed under guardianship under the conditions listed in Article 405 of the law.

CONCLUSION

Guardianship, regulated in the family law book of Turkish Civil Code No. 4721, is an institution that has the reasons specified in the law and aims to protect the interests of people who need to be protected. Considering the severity of the consequences of guardianship, a very sensitive evaluation was made by the legislator and the situations requiring guardianship were listed in a limited manner.

In our study, the concept of guardianship is explained in general, and mental illness, which is one of the conditions requiring guardianship within the scope of Article 405 of the Turkish Civil Code is examined. Additionally, it aims to reveal the criteria for detecting mental illness, the importance of official health board reports in determining this situation, and the conditions for receiving guardianship due to mental illness by the guardianship authority.

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