

# THE NEW AUSTRIAN ADULT PROTECTION LAW OF 2018

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**Abstract:** on 1st of July 2018 the new Austrian Adult Protection Law (*Erwachsenenschutzrecht*) replaced the former Guardianship Law (*Sachwalterrecht 1984*). The main goal was to strengthen the autonomy of people with mental illness or comparable impairment. Austria ratified the UN-Convention on the Rights of Persons with Disabilities in 2008. Subsequently several aspects of the Austrian Guardianship Law were criticized by various institutions. This led to a reform process initiated by the Ministry of Justice. For the first time people with disabilities were part of the reform process and therefore the new law is still strongly accepted by them. The changes are comprehensive. Paternalistic aspects, like the automatic loss of the capacity to conclude contracts, were abolished and the autonomy has been strengthened, e.g. through the commitment to supported decision making. A 4-pillar model was created, consisting of the Enduring Power of Attorney and the Elective, Statutory and Court-appointed Representation. All forms of representation are registered in the Central Austrian Representation Register. Adult Protection Associations serve as the central point of contact for affected persons and relatives. The duties of the courts are limited to the appointment of representatives as a last resort, if alternatives or other forms of representation are not possible or available, as well as to the control of adult representatives.

**Keywords:** adult protection law; guardianship; enduring power of attorney; self-determination; UNCRPD; legal capacity; supported decision-making; elective representation; statutory representation; court-appointed representation; adult protection associations; Central Austrian Representation Register.

## I. INTRODUCTION

The main reason for the adoption of the new adult protection law lies in the UN Convention on the Rights of Persons with Disabilities (UNCRPD), in the first Austrian state report to the UN Committee in 2010 and in the more than 20 recommendations of the UN Committee, which criticised the guardianship in many ways<sup>1</sup>. For example: „27. The Committee notes with concern that in 2012, approximately 55,000 Austrians [of 8.4 million] were under guardianship, half of whom were under guardianship in respect of all aspects of life.

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<sup>1</sup> CRPD/C/AUT/CO/1; see also BIZEPS — Zentrum für Selbstbestimmtes Leben, “Recommendations for action of the UN State Audit of Austria”, “<https://www.bizeps.or.at/bizeps-uebersetzung-der-handlungsempfehlungen-der-un-staatenpruefung-oesterreichs/>”, accessed on 22/01/2020; cf. also BARTH, Peter, “Das 2. Erwachsenenschutz-Gesetz”, in iFamZ 2017, p. 143.

The Committee is concerned particularly because Austrian guardianship laws appear to be old-fashioned and out-of-step with the provisions of article 12 of the Convention.”

The statements of the Committee were very critical and partly exaggerated. Already in 2006 the Austrian guardianship law was amended comprehensively. Regulations for the Enduring Power of Attorney and the *ex-lege* representation by family members were introduced and the autonomy of concerned people has been strengthened, e.g. with the duty to determine and take into account their wishes.

Nonetheless the Austrian Law still was not in accordance with the purpose of the UNCRPD and therefore the introduction of the new Adult Protection Law was a necessary step.

In particular, the still existing automatic restriction of the legal agency with the appointment of a guardian (§ 280 ABGB<sup>2</sup> old version, Austrian Civil Code), the required approval of the guardian on marriage (§ 3 Marriage Act old version) and the lack of instruments to protect against abuse in measures affecting the exercise of legal capacity and legal agency (e.g. the power of representation exercised by family members and the Enduring Power of Attorney), but also the supported decision-making process, which is only rudimentarily rooted in the law, were in contradiction or at least in a tense relation to the requirements of Art. 12 UN-CRPD.

In the reform process, the Ministry of Justice involved all relevant social groups, especially people with disabilities. Over a period of more than two years (end of 2013 until June 2016), working groups of varying size and composition, usually with the participation of self-representatives, took place regularly. This reform process was scientifically monitored with regard to its participatory approach<sup>3</sup>.

In addition, judicial control — the obligation to report to the court and to obtain approval from the court in important matters — was clearly extended in the case of Statutory Representation and at least slightly extended in the case of the Enduring Power of Attorney. This means that many of the wishes of self-advocates and organisations representing people with disabilities expressed in the reform process, as well as recommendations of the Committee on the UNCRPD, have been implemented.

With the expansion of the Adult Protection Associations and their expanded functions, there has been a partial shift from the courts to the Adult Protection Associations, which is to be welcomed in principle. After all, it is often not exclusively a question of legal aspects, but of a holistic assessment of the psychosocial situation.

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<sup>2</sup> Allgemeines Bürgerliches Gesetzbuch.

<sup>3</sup> In detail on this subject LAMPLMAYR, Alexander; NACHTSCHATT, Eva, *Observing Legislative Processes: Implementation of the CRPD: Innsbrucker Beiträge zur Rechtstatsachenforschung*, Innsbruck: Innsbruck University Press, 2016, pp. 70-82; in full text freely accessible: <https://www.uibk.ac.at/rtf/unbrk/>, accessed on 22/01/2020.

In order to support the implementation of the reform, the Ministry of Justice has worked out so-called “consensus papers” with various sectors. These include guidelines for banks, health professionals and homes. The aim is to inform the involved parties about the new legal situation and to promote legal certainty for individuals and institutions<sup>4</sup>. This is probably due to the realisation that legal texts alone do not change the behavioural patterns practised over decades in dealing with sick persons and persons in need of support.

## II. OVERVIEW OF THE NEW SYSTEM

There are now four *forms of representation (4-pillar model)*: the 2018 reform transformed the leading *guardianship system* into *Court-appointed Representation*, and the *representation of family members* into *Statutory Representation*. The *Enduring Power of Attorney* was retained and only slightly amended. However, the *Elective Representation* was completely newly created. This is a kind of “light” Enduring Power of Attorney.

With the *person’s Representation Directive* (§ 244 ABGB; formerly “Guardian Directive”) one can propose a person in advance who is later appointed by the court as a Court-appointed Representative if one is needed. It can also be used to object to representation by certain persons and to appoint any person who may then act as Statutory Representative. Without being named in a person’s Representation Directive Statutory Representation is only possible for relatives.

The tasks of the *Adult Protection Associations* have been considerably expanded. Before a Court-appointed Representative can be appointed, it is now mandatory for an out-of-court “*clearing*” procedure to be carried out by an adult protection association, in which possible alternatives to representation must be examined.

The automatic *limitation of the legal agency* (especially of the contractual capacity) with the appointment of a guardian (now: person’s representative) has been abolished. However, the court order of a “*requirement for approval*” has been newly created for the Court-appointed Representation of adults. In these cases, the person concerned needs the approval of the representative for the conclusion of certain legal transactions.

The *medical treatment* and *permanent relocation of the place of residence* of mentally ill or comparably impaired persons has been completely revised (§§ 254 and 257 ABGB).

In the *Central Austrian Representation Register* (*Österreichisches Zentrales Vertretungsverzeichnis, ÖZVV*), led by the notary chamber, all forms of representation are registered, as well as contradictions against them and

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<sup>4</sup> General information on the Adult Protection Law and the individual consensus papers can be found here: *Austrian ministry of justice*, “[www.justiz.gv.at/erwachsenenschutz](http://www.justiz.gv.at/erwachsenenschutz)”, accessed on 22/01/2020.

person's Representation Directive. Registrations can be made by the adult-protection-associations, notaries, lawyers and the courts.

The *terminology* has been changed. The new terminology (adult protection law) follows international trends: cf. for example, the Hague Convention on the Protection of Adults and the Swiss Adult Protection Law 2013. The term "mental disability", which was previously used and was often perceived as discriminatory by those affected, has been replaced. Now the law speaks of a mental illness or a "comparable impairment" (instead of "mental disability") to describe personal requirements in the person represented for adult representation. The adult representative took the place of the guardian.

The legal *control system for deprivations of liberty* in institutions was amplified. Deprivations of liberty due to mental illness or comparable impairments are exclusively regulated by public law. For psychiatric hospitals it is the *Austrian Hospitalisation Act* and for nursing homes, homes for the disabled and hospitals the *Austrian Nursing Home Residence Act*, which is a Hospitalisation Act "light". With the 2nd Adult Protection Law (2nd ErwSchG), the Nursing Home Residence Act (HeimAufG) is extended to *inpatient facilities for children and adolescents*. This closes a legal loophole that has long been complained about.

### III. LEGAL CAPACITY AND LEGAL AGENCY<sup>5</sup>

#### 1. General aspects

Austrian Law provides legal capacity in the meaning of *legal standing* (the ability to hold rights and duties) for everyone regardless of his mental ability, even for unborn children (Nasciturus, § 22 ABGB). But legal agency (the ability to exercise those rights and duties) depends on the specific decision-making-ability of a person at the moment of the decision. Therefore it depends on the individual and sometimes varying cognitive abilities.

The criterias of the so called "Entscheidungsfähigkeit" (decision-making-capacity) were defined by the new law: „A person is capable of making decisions if he understands the meaning and consequences of his actions in the respective context, can determine his will in accordance to this realization and can act accordingly. In case of doubt, this is presumed for adults"; § 24 (2) ABGB. The requirements for the decision-making-capacity are therefore as follows: (1) Ability to understand the reason and meaning of the planned legal act (capacity to perceive); (2) Ability to determine the will according to this understanding (capacity to form the will); (3) Ability to behave accordingly (capacity to control behaviour)<sup>6</sup>.

<sup>5</sup> See "General Comment on Art. 12 CRPD", "<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>", accessed on 25/02/2020.

<sup>6</sup> Cf. legislative materials: ErlRV 1461 BlgNR 25. GP., p. 9, "[https://www.parlament.gv.at/PAKT/VHG/XXV/II/\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/_01461/fname_608002.pdf)", accessed on 04/02/2020.

## 2. Contractual capacity

### a. Requirement for approval

The automatic withdrawal of contractual capacity was eliminated by the 2nd ErwSchG — almost without replacement. “The legal agency of a represented person is not restricted by an Enduring Power of Attorney or adult representation.” (§ 242 (1) ABGB). At the same time, however, the possibility for the court to order a requirement for approval was created. This essentially corresponds to the requirement of consent with the representative (*Einwilligungsvorbehalt*) in German law<sup>7</sup>.

The requirement for approval can only be ordered at the Court-appointed Representation and only in case of serious and substantial danger for the person to be represented. In case of the Elective Representation, it can at least be agreed at the request of the person to be represented (§ 265 (2) ABGB).

If there is a requirement for approval, the transaction is provisionally ineffective and can be subsequently approved by the representative (and in the case of extraordinary operations pursuant to § 258 (4) ABGB additionally by the court (§ 865 (5) ABGB).

### b. Legal transactions of everyday life

Persons of full age do not require any kind of cognitive ability to conclude legal transactions of everyday life if these do not exceed their living conditions (§ 242 (2) ABGB). The only requirement is that they fulfil their contractual obligations, e.g. by paying the purchase price.

In any case, the “contractual capacity” of the cognitive impaired person is limited by the fact that the transaction may not exceed their living conditions. It therefore depends on the person’s individual income and asset situation whether a transaction is concluded or not.

In order to protect the person concerned, the representative may restrict the assets at free disposal of the represented person. If this is the case, the represented person can no longer fulfil his or her contractual obligations and the contract is not concluded. In addition, a requirement for approval for these transactions can be ordered (in the case of the Court-appointed Representation) or agreed upon (in the case of the Elective Representation). In these cases, despite fulfilment of the contractual obligations by the represented person, the transaction requires approval by the adult representative.

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<sup>7</sup> As in the case of the requirement of consent under German law, the ordering of a requirement for approval does not require that the represented person lacks contractual capacity; cf. LIPP, Volker, *Freiheit und Fürsorge: Der Mensch als Rechtsperson*, Tübingen, Mohr Siebeck, 2000, p. 173.

### c. Allocation of cash

Adult representatives, but not persons authorised by an Enduring Power of Attorney must in any case satisfy the needs appropriate to the living conditions of the represented person with the available income and assets (§ 258 ABGB). The focus should be on the standard of living of the represented person and not on the increase in assets<sup>8</sup>.

Satisfying reasonable needs also includes ensuring that the represented person has the necessary financial resources for legal transactions of everyday life. For this purpose, the represented person must be (regularly) given the necessary cash or be given the necessary access to a bank account. In particular, it is intended that a „supervised account“<sup>9</sup>, an „everyday account“<sup>10</sup> or an assistance card or assistance app<sup>11</sup> is set up, so that only certain amounts can be withdrawn within certain periods. The amount of financial resources to be made available depends on the living conditions of the represented person.

### 3. Entitlement to take legal actions

A major exception of the new concept of legal agency, according to which there should be no restriction by the existence of a Statutory Representative, is the entitlement to take legal actions. According to § 1 (2) ZPO, a person is not capable to be a party in those proceedings that fall within the sphere of an adult representative or in the sphere of a person authorised by an Enduring Power of Attorney<sup>12</sup>. This provision contradicts the principles of the reform, according to which a constitutive restriction of the legal agency is to be avoided,

<sup>8</sup> Legislative materials: ErlRV 1461 BlgNR 25. GP., p. 34, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)”, accessed on 04/02/2020.

<sup>9</sup> **Two accounts are opened with a partner bank in the name of the person concerned: an incoming account and an outgoing account.** A third party (such as an adult representative) is authorized to sign on the incoming account. Only the person affected has access to the disbursement account. The important payments (for example, for the institution) are transferred from the incoming account, the rest goes to the disbursement account and is at the free disposal of the person affected.

<sup>10</sup> This “everyday account” is fed by an already existing current account (e.g. salary or pension account) of the represented person and enables the represented person to make withdrawals or dispositions independently, whereby the assistance of other persons who are not authorised to represent can also be called upon.

<sup>11</sup> A third person can use a bank card or an application on a smartphone to make purchases and errands for the person concerned with their money. These are documented via the card/code and the person concerned receives SMS confirmations. It can also be provided for amounts exceeding a certain asset limit (e.g. EUR 300.-) to be charged back to the account; see, for example, the information on the website of the *Vienna Debt Counselling Service*, “<https://sozialinfo.wien.at/content/de/10/SearchResults.do?pattern=assistenz-card>”, accessed on 26/04/2018.

<sup>12</sup> In the adult protection procedure, however, the persons concerned have special procedural rights. In particular, they may carry out procedural acts irrespective of their procedural capacity; cf. § 116a AußStrG.

and in my opinion it also contradicts the provisions of the UNCRPD<sup>13</sup>. A factual justification does not appear. Why should a limitation of the legal agency be more necessary in procedural law than the limitation of contractual capacity in general legal relations?

In the administrative procedure, however, there is no restriction on procedural capacity. Rather, persons with a representative remain procedurally capable in administrative law due to the new legal situation (especially § 24 and § 242 (1) ABGB in conjunction with § 9 AVG (General Administrative Law Act))<sup>14</sup>.

#### IV. THE NEW 4-PILLAR-MODELL

##### 1. Tabular presentation

	Enduring Power of Attorney	Elective Representation	Statutory Representation	Court-appointed Representation
<b>Personal Requirements</b>	<ul style="list-style-type: none"> <li>• full decision-making capacity</li> </ul>	<ul style="list-style-type: none"> <li>• limited decision-making capacity</li> <li>• Enduring Power of Attorney is no longer possible</li> </ul>	<ul style="list-style-type: none"> <li>• Mental illness or a comparable impairment to the decision-making capacity</li> <li>• Risk of disadvantage</li> <li>• There is no Enduring Power of Attorney and no Elective Representation</li> <li>• No registered contradiction</li> </ul>	<ul style="list-style-type: none"> <li>• Mental illness or a comparable impairment to the decision-making capacity</li> <li>• Risk of disadvantage</li> <li>• No other form of representation</li> </ul>
<b>Formal Requirements</b>	Written deed in front of a notary public, a lawyer or an adult protection association	Written deed in front of a notary public, a lawyer or an adult protection association	A "next of kin" commissions a notary, lawyer or an adult protection association	legal proceeding and court order
<b>Entry into force</b>	By registration in the Central Austrian Representation Register (ÖZVV) by a notary public, lawyer or an adult protection association on presentation of a medical certificate on the loss of the decision-making capacity of the person to be represented.			With court order; nevertheless the registration in ÖZVV is necessary.

<sup>13</sup> Different opinion: legislative materials ErlRV 1461 BlgNR 25. GP. 79, "[https://www.parlament.gv.at/PAKT/VHG/XXV/II/II\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/II_01461/fname_608002.pdf)", accessed on 04/02/2020.

<sup>14</sup> Cf. PARAPATITS, Felicitas, PERNER, Stefan, „Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz“, in *iFamZ 2017*, p. 165.

<b>Representative competence</b>	<ul style="list-style-type: none"> <li>• According to the Enduring Power of Attorney</li> <li>• No restriction</li> </ul>	<ul style="list-style-type: none"> <li>• By arrangement</li> <li>• No restriction</li> <li>• Co-decision agreement is possible</li> <li>• Agreement of a requirement for approval is possible</li> </ul>	<ul style="list-style-type: none"> <li>• As required (risk of disadvantage)</li> <li>• No restriction</li> <li>• Ends automatically after 3 years but can be extended</li> </ul>	<ul style="list-style-type: none"> <li>• Appointed by the Court</li> <li>• No restriction</li> <li>• Ends automatically after 3 years but can be extended</li> </ul>
<b>Representative</b>	Selected person	Selected related person	„Next of kin“ <sup>15</sup>	Judicially appointed person
<b>Judicial control</b>	<ul style="list-style-type: none"> <li>• No ongoing judicial control, especially no judicial reporting obligation</li> </ul>	<ul style="list-style-type: none"> <li>• Annual life situation report and presentation of wealth</li> <li>• The period may be judicially extended</li> </ul>		<ul style="list-style-type: none"> <li>• Annual life situation report and accounting obligation</li> </ul>
		In principle, relatives have any accountability requirement.		
<b>Judicial approval required</b>	If the represented person objects to medical treatment			
	<ul style="list-style-type: none"> <li>• In case of permanent transfer of residence abroad</li> </ul>	<ul style="list-style-type: none"> <li>• In case of property matters that are not part of the orderly business management</li> <li>• In case of permanent transfer of residence abroad</li> </ul>		

## 2. General aspects

All forms of adult representation (including the Enduring Power of Attorney) must be registered with the ÖZVV (Central Austrian Representation Register; see VIII.). Registration is a *prerequisite* for all forms of representation, with the exception of the Court-appointed Representation. Without registration, therefore, no power of representation will come into force. Only in the case of Court-appointed Representation of adults is this effected by the court order becoming legally effective.

In the case of registration of an Elective or Statutory Representation, a *medical certificate* is required, which certifies the loss of the decision-making capacity of the person to be represented<sup>16</sup>. The same applies if, in the case of a preventive Enduring Power of Attorney, the occurrence of the preventive case, therefore the coming into effect of the power of attorney due to the loss of decision-making ability of the person giving the power of attorney is to be registered.

Enduring Powers of Attorney, Elective and Statutory representatives can be established and registered with notaries public and lawyers as well as with Adult Protection Associations.

For the *revocation* of an Enduring Power of Attorney, an Elective Representation or for the *objection* against a Statutory Representation neither the

<sup>15</sup> Parents and grandparents, children and grandchildren of full age, siblings, nieces and nephews of the person of full age, their spouse or registered partner and their partner if the latter has lived with them in the same household for at least three years, as well as the person designated by the person of full age in an adult Representation Directive; § 268 Abs 2 ABGB.

<sup>16</sup> Legislative materials ErlRV 1461 B1gNR 25. GP., p. 95, "https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\_01461/fname\_608002.pdf", accessed on 04/02/2020.



decision-making capacity nor any special form are required. The mere ability to express oneself on the basis of a “natural” formation of will is sufficient. This has been the case in the past and also applies to living wills.

Certain persons are not allowed to act as representatives authorised by an Enduring Power of Attorney or as adult representatives. § 243 ABGB provides three *reasons for the exclusion* in this regard: (1) if the person himself is in need of protection, that is a person who does not have full decision-making capacity; (2) if a beneficial exercise of representation to the welfare of the adult person is not to be expected, e.g. due to a criminal conviction; (3) if the potential person authorised by an Enduring Power of Attorney or the person’s representative is in a dependent relationship or in a comparably close relationship with an institution in which the adult person is staying or is being cared for. This applies in particular to employees of nursing homes, but not to relatives.

Adult representations and Enduring Powers of Attorney are largely assumed by private individuals (relatives or volunteers). They may not assume more than 15 Enduring Powers of Attorney and adult representations (§ 243 (2) ABGB).

Only if such are not available or if special legal matters need to be dealt with, professional representatives (lawyers, notaries public or Adult Protection Associations) are used.

Austria is a contracting state to the *Hague Convention on the Protection of Adults*. International jurisdiction and the proper law in these countries — including Portugal — are determined by the habitual residence of the adult person<sup>17</sup>.

### 3. Enduring Power of Attorney (Vorsorgevollmacht)

The provisions on the Enduring Power of Attorney (§§ 260 to 263 ABGB) are *lex specialis* to the power of attorney in general civil law (§§ 1002 ABGB)<sup>18</sup>.

Enduring Powers of Attorney must be issued in writing by a notary public, lawyer or an adult protection association. The principal must have full contractual capacity. If the notary public, the lawyer or an employee of the Adult Protection Association has reasonable doubts about the decision-making ability of the principal at the time of the establishment of the Enduring Power of Attorney, he must demand the submission of a medical certificate on this subject<sup>19</sup>. If such a document is not submitted, or if it does not clearly show

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<sup>17</sup> TRAAR, Thomas, “Internationales Erwachsenenschutzrecht”, in BARTH, Peter/ GANNER, Michael (eds.), *Handbuch des Erwachsenenschutzrechts*, Vienna: Linde, 2019, p. 952 ff.

<sup>18</sup> GANNER, Michael, “Vorsorgevollmacht”, in BARTH, Peter/ GANNER, Michael (eds.), *Handbuch des Erwachsenenschutzrechts*, Vienna: Linde, 2019, p. 594 ff.

<sup>19</sup> Cf. Legislative materials ErlRV 1461 BlgNR 25. GP 40, “[https://www.parlament.gv.at/PAKT/VHG/XXVI/II\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/II_01461/fname_608002.pdf)”, accessed on 04/02/2020.

that the principal has full decision-making capacity, the registration in the Central Austrian Representation Register must be refused (§ 263 (2) ABGB)<sup>20</sup>.

The matters for which the Enduring Power of Attorney is to be granted must be specified according to their nature (§ 261 ABGB). However, a power of attorney *limited to a specific class of transactions* is sufficient in any case, for example, also for banking transactions and transactions involving real estate.

The person issuing the Enduring Power of Attorney must provide the principal with detailed and comprehensible information — in particular about the legal consequences and the possibility of revocation — when issuing the power of attorney.

The power of representation only comes into force upon registration of the loss of the decision-making capacity of the principal in the Central Austrian Representation Register. The loss of the principal's decision-making capacity must be certified by a medical attest. The Enduring Power of Attorney can be used as a general power of attorney even before this, if it is formulated according to general civil law.

In two cases the representative needs a court authorisation. Enduring Power of Attorney That's the fact for decisions on the permanent transfer of residence abroad and on medical measures, if they are to be taken against the wishes of the person without decision-making capacity (§§ 258 (4) and 254 (1) ABGB).

There is no *regular judicial control* of the attorney, as it is the case with other forms of adult representation. However, the person granting the Enduring Power of Attorney may revoke the Enduring Power of Attorney at any time, i.e. also in a state of incapacity to make a decision, and other persons may apply to the court for a review at any time if they suspect misuse of the Enduring Power of Attorney . The court has the possibility to revoke the power of attorney and, if necessary, to constitute a Court-appointed Representative.

With the 2018 amendment, the Enduring Power of Attorney has become less important because the Elective and Statutory Representation also allows representation in all matters — the previous representation by relatives was limited to simple matters — and its establishment and registration is easier. However, an Enduring Power of Attorney still makes sense, especially if larger assets are available and are to be determined autonomously. Because the person authorised by an Enduring Power of Attorney does not require court approval in asset matters, he has more room for manoeuvre than other representatives, who always require court approval in matters of extraordinary asset management. Particularly in the case of investments in companies or the sale of real estate, judicial approval is often not granted because they do not directly serve the well-being of the principal.

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<sup>20</sup> Legislative materials ErlRV 1461 BlgNR 25. GP 38, "[https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)", accessed on 04/02/2020.

#### 4. Elective Representation (*Gewählte Erwachsenenvertretung*)

The Elective Representation is a completely new instrument of the adult protection law in Austria created by the 2018 reform. It is essentially an „Enduring Power of Attorney light“.

In contrast to the Enduring Power of Attorney, which requires full decision-making and contractual capacity for its establishment, a reduced decision-making capacity is sufficient for the *Elective Representation*. The represented person only needs to be “able to understand the meaning and consequences of a power of attorney in broad terms and to act accordingly”<sup>21</sup>. The Elective Representation has some similarities with the Representation Agreement as provided for in section 7 of the *Representation Agreement Act* (standard provisions) in Canada (British Columbia)<sup>22</sup>.

The reason for the creation of this instrument is that many people postpone their plans to establish an Enduring Power of Attorney until their decision-making capacity is no longer sufficient. The Elective Representation creates the possibility of choosing an autonomous representation even with a reduced decision-making capacity.

In the hierarchy of adult protection law, however, an Elective Representation is subsidiary and subordinate to an Enduring Power of Attorney and can therefore only be established if an Enduring Power of Attorney can no longer be established due to an existing illness or comparable impairment to a person’s decision-making capacity.

The *Elective Representation* is also subject to a much more extensive judicial control (see diagram above) and approval requirement than the Enduring Power of Attorney, because due to the reduced decision-making capacity of the represented person, his or her ability to control the Elected Representative is reduced in comparison to the person authorized by an Enduring Power of Attorney .

In contrast to the Enduring Power of Attorney, where full private autonomy prevails, the Elected Representative must be a “close” person. Thus, a personal close relationship is assumed, but not a specific family status.

The Elective Representation can be limited to “co-decisions” in two ways (§ 265 (2) ABGB). Firstly, in such a way that the adult representative can only carry out legally effective representative acts with the consent of the person represented. Moreover, vice versa, in such a way that the person represented can only make legally effective decisions with the consent of the representative (§ 265 (2) ABGB).

In practice, a relative, who is also willing to exercise the Elective Representation, accompanies the person concerned to the adult protection associa-

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<sup>21</sup> Cf. Supreme Court ruling: OGH 21/05/2015, 1 Ob 91/15m.

<sup>22</sup> In detail on this subject LIPP, Volker, BAGNIEWSKI, Katharina, DANKERT, Benjamin, NEWELL, Rebecca, „Das Representation Agreement in British Columbia (Kanada) — ein Modell für Deutschland?“, in *BtPrax* 2013, pp. 217 ff.

tion, notary public or lawyer. There, after appropriate consultation, an agreement on the Elective Representation is concluded between the person to be represented and the relative and it is registered in the Central Austrian Representation Register.

## 5. Statutory Representation (Gesetzliche Erwachsenenvertretung)

The Statutory Representation of adults (§§ 268 to 270 ABGB) is the power of representation of next of kin (this is also the designation until 1.7.2018)<sup>23</sup>. It is based neither on the active, autonomous selection of the representative by the person to be represented, such as in the case of an Enduring Power of Attorney or Elective Representation, nor on a court decision, such as in the case of Court-appointed Representation<sup>24</sup>. It is based on the legal presumption that, if persons are no longer able to manage their own affairs, they wish to be represented by their closest relatives. However, this presumption of law can be rebutted, in particular by drafting an objection in advance or afterwards against representation by certain close relatives.

In the case of Statutory Representation, the power of representation is granted by law to a certain group of persons without the suitability of these persons being examined. Their suitability is assumed by law. The basic idea of the regulation is that representation by trusted persons within a functioning family association is the best for everyone, and in particular for the person concerned, and in any case would best meet the needs of everyone and the reality of life<sup>25</sup>. The associated risk of abuse (being at the mercy of someone within the family without judicial control) was frequently discussed in connection with the establishment of this legal institution and also caused some dissent<sup>26</sup>. These critical voices seem to have been silenced in the meantime, without the concerns having been dispelled by well-founded empirical studies. However, no cases of abuse worth mentioning have become public so far.

The risk of abuse is relatively low in representation in health matters, because the self-interests of the representatives almost never play a role here. In asset management affairs, however, there is naturally a considerable risk of abuse, because next of kin as representatives regularly benefit from the income and assets of their ancestors — who often need representation.

The Statutory Representative's power of representation can cover all necessary property and health matters. Before the 2018 reform, the scope of

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<sup>23</sup> The power of representation no longer comes into effect *ex-lege*, i.e. automatically with the loss of decision-making capacity by the person to be represented, but only upon registration in the ÖZVV.

<sup>24</sup> This form of representation has existed in Austria since 2007.

<sup>25</sup> Legislative materials ErlRV 1461 BlgNR 25. GP. S. 41, "[https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)", accessed on 04/02/2020.

<sup>26</sup> E.g. SCHAUER, Martin, „Schwerpunkte des Sachwalterrechts-Änderungsgesetzes (SWRÄG 2006) (Teil II)“, in *ÖJZ 2007/6*, p. 226.

the power of representation was limited to minor property matters and simple medical treatment because of the risk of abuse. With the reform, the power of representation for Statutory Representatives has now been significantly extended. It is argued that the limited scope of action has led to problems in practice, particularly with regard to banking transactions<sup>27</sup>. This means that the Statutory Representative has the same range of powers of representation as all other forms.

The group of „next of kin“ who may act as Statutory Representatives is the following: parents and grandparents, children and grandchildren of full age, siblings, nieces and nephews, spouse or registered partner and a cohabitant, if the latter has lived in the joint household for at least three years, as well as the person designated by the person to be represented in a Representation Directive (§ 268 (2) ABGB).

All „next of kin“ named here can therefore, if they are convinced that the person in question requires representation, apply to the Adult Protection Association, notary public or lawyer for the registration of the power of representation in the Central Austrian Representation Register. First come, first serve. Only one person can be registered as a representative for a specific matter (e.g. asset management). If other persons are not satisfied with this, they can apply to the court to dismiss a certain person as an adult representative, which may only be done if the existing representation isn't in the best interest of the represented person.

The representation by relatives may be objected to at any time, in advance or already after the power of representation has become effective by the person to be represented (§ 246 (1) 5 ABGB). Decision-making capacity is not required for this, but a „natural“ will and certain seriousness. The objection becomes effective upon registration in the Central Austrian Representation Register (ÖZVV).

The Statutory Representation of adults is, like the Court-appointed Representation, limited to three years and ends automatically if it is not renewed before (§ 246 (1) 5 ABGB).

## 6. Court-appointed Representation

Court-appointed Representation of adults (§§ 271 to 276 ABGB) is the *ultima ratio* and therefore, in terms of subsidiarity, subordinate to all other forms of adult protection (Enduring Power of Attorney, elected and Statutory

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<sup>27</sup> PESENDORFER, Ulrich, „Angehörigenvertretung und Bankgeschäfte“, in *iFamZ* 2013/5, p. 239; Schweighofer, Michaela, „Das 2. Erwachsenenschutz-Gesetz — Gerichtliche Erwachsenenvertretung statt Sachwalterschaft“, in *EF-Z* 2017/5, p. 196; legislative materials ErlRV 1461 BlgNR 25. GP., p. 42, [https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf), accessed on 04/02/2020.

Representation of adults)<sup>28</sup>. The powers of the Court-appointed Representative are limited to specific acts of representation. It is no longer possible to entrust the representative with “all matters” on a blanket basis<sup>29</sup>. It is also no longer possible to appoint a Court-appointed Representative for an indefinite period. The Court-appointed Representation of adults ends automatically after three years, as does the Statutory Representation.

The court appoints a person as Court-appointed Representative after the conclusion of a judicial procedure in which the conditions for the appointment of a representative are examined. The court proceedings are initiated by the suggestion of persons who consider the appointment of an adult representative to be necessary. Subsequently, in a clearing procedure (see below), the competent adult protection association will determine for the court whether the appointment of a legal adult representative is absolutely necessary or whether there are any alternatives. In general, a medical expert opinion on the person concerned is also obtained.

As Court-appointed Representatives professional representatives, i.e. Adult Protection Associations, as well as lawyers and notaries public (including the respective professional candidates) are predominantly appointed. For the other forms of representation, relatives and acquaintances are acting on a voluntary basis. Aside the Court-appointed Representation only in the case of an Enduring Power of Attorney payment of the representative is possible.

Lawyers and notaries (including the respective future professionals) are legally obliged to take over Court-appointed Representations (§ 275 ABGB). There is no upper limit for those who have applied to be entered on the “List of lawyers or notaries particularly suitable for the assumption of Enduring Powers of Attorney and Court-appointed Representations” of the Chamber of Notaries and Lawyers. For those who are not in the list, the obligation to take over Court-appointed Representations is limited up to five representations<sup>30</sup>.

There is no corresponding legal obligation for Adult Protection Associations to take over Court-appointed Representations. Nevertheless, the assumption of Court-appointed Representation is an essential task of these associations. The only possible reason for excuse can therefore, due to the predominant financing by the federal government (Ministry of Justice), in fact only lie in the lack of (especially personnel) capacity of the association.

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<sup>28</sup> Legislative materials ErlRV 1461 BlgNR 25. GP., p. 43, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II/01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/01461/fname_608002.pdf)”, accessed on 04/02/2020; of course, this was already the case before the 2nd ErwSchG.

<sup>29</sup> The guardianship for „all matters“ was by far the most common form (more than 50%), even if the law intended otherwise; legislative materials ErlRV 1461 BlgNR 25. GP., p. 2, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II/01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/01461/fname_608002.pdf)”, accessed on 04/02/2020.

<sup>30</sup> The obligation for lawyers and notaries public to take over is not forced or compulsory labour within the meaning of Art. 4 (2) ECHR; ECHR, 18/10/2011, 31950/06.

## V. ADULT PROTECTION ASSOCIATIONS AND CLEARING

### 1. Adult Protection Associations

Adult Protection Associations (formerly: guardian associations) have been an essential factor in Austrian adult protection law since 1984. The Adult Protection Associations are organised as associations under private law, but are mainly financed by the Ministry of Justice. They are not a public authority. There are currently, regionally distributed, four Adult Protection Associations in Austria<sup>31</sup>. Their suitability is determined by decree of the Ministry of Justice<sup>32</sup>. Only one association can be responsible for a specific field of activity in a given area.

The 2018 amendment considerably extended the tasks of Adult Protection Associations. They are now supposed to be the „central hub of legal care, support and representation“ for persons of full age (Adult Protection Association Act — *ErwSchVG*). The former tasks consisted of taking over the role of guardians (Court-appointed Representation), in the training and advanced training of voluntary adult representatives and, in general, in counselling and representation in the event of restrictions of freedom in psychiatry and in inpatient nursing institutions and institutions for people with disabilities (see VII. Deprivations).

The following new tasks were added in 2018:

- \* the Clearing, i.e. the out-of-court clarification in advance of a possible appointment of a Court-appointed Representative; see below;
- \* comprehensive free advice in the field of adult protection, in particular advice on the Enduring Power of Attorney, other forms of adult representation and alternatives thereto, as well as advice during an upright representation;
- \* the establishment of an Enduring Power of Attorney or an agreement on elected representation<sup>33</sup>;
- \* the registration of Enduring Powers of Attorney, Elected and Statutory Representatives, anticipated Representation Directives, their coming

<sup>31</sup> (1) *VertretungsNetz* — *Sachwalterschaft*, patient advocacy, residents' representation; (2) *Niederösterreichischer Landesverein für Sachwalterschaft und Bewohnervertretung*; (3) *Institut für Sozialdienste: ifs Sachwalterschaft*; (4) *Salzburger Hilfswerk*, association for guardianship.

<sup>32</sup> Federal Act on Adult Protection Associations (*Erwachsenenschutzvereinsgesetz* — *ESchuVG*); so far „*Vereinssachwalter-, Patientenanzwalts- und Bewohnervertretergesetz*“, Austrian Federal Law Gazette: BGBl. Nr. 156/1990 in the version BGBl. I Nr. 92/2006, “<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002937>”, accessed on 04/02/2020.

<sup>33</sup> The obligation to set up an Enduring Power of Attorney, an adult Representation Directive or an Elective Representation exists only in accordance with the possibilities — especially in terms of personnel. Enduring Powers of Attorney may only be issued by employees who are legally qualified; cf. legislative materials *ErläutRV 1461 BlgNR 25. GP.*, p. 87, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)”, accessed on 04/02/2020.

into effect and termination as well as the revocation of an Enduring Power of Attorney or elected representation and an objection against a Statutory Representation in the Central Austrian Representation Register (§ 140 NO).

In order to promote autonomous precaution, low cost contributions for the respective measures of the Adult Protection Associations have been set by law<sup>34</sup>.

## 2. Clearing

“Clearing” refers to the out-of-court clarification of whether the appointment of a Court-appointed Representative is absolutely necessary (ultima-ratio principle) and what alternatives may exist<sup>35</sup>. The primary task is to determine in which matters the person concerned needs support or, if necessary, representation and whether people in the personal environment are available for this purpose.

In the clearing procedure (by social workers), the main focus of assessment is on the psychosocial needs of persons concerned, while in the judicial appointment procedures, the medical criteria (expert opinions) are regularly in the foreground. All relevant circumstances, including those in the social environment of the person concerned, should be ascertained.

The aim of the clearing is to strengthen the autonomy of affected persons and „supported decision-making“ in the sense of the UNCRPD, as well as to reduce the number of Court-appointed Representations. Trials, which have been ongoing since 2006, have shown that alternatives to adult representation can be found in four out of ten cases<sup>36</sup>.

Clearing is now mandatory in all procedures for the appointment and renewal of a Court-appointed Representation. The court must commission the respective adult protection association to do so and must carry out easily accessible surveys (such as land register excerpts, company register queries, pending court proceedings, social security information)<sup>37</sup>. In addition, a clearing procedure is also obligatory in the case of a permanent change of residence if the represented person has indicated in the course of the hearing by the

<sup>34</sup> 75€ for the establishment of an Enduring Power of Attorney, 50€ for an adult Representation Directive, 50€ for the registration of a Statutory Representation, 25€ for a home visit in this context; § 4e Erwachsenenschutzvereinsgesetz (ErwSchVG).

<sup>35</sup> Detailed GANNER, Michael, „Selbstbestimmung 2.0 — Österreichische Revision des Erwachsenenschutzes und Clearing Plus“, in: ROSCH, Daniel, MARANTA, Luca (eds.), *Selbstbestimmung 2.0*, 2017, p. 57.

<sup>36</sup> FUCHS, Walter, HAMMERSCHICK, Walter, „Sachwalterschaft und Clearing — Ergebnisse einer empirischen Studie“, in *iFamZ 2014/2*, p. 71 ff; HAMMERSCHICK, Walter, MAYRHOFER, Hemma, „Clearing und Clearing Plus: wirksame Schritte zur Vermeidung von Sachwalterschaft“, in *iFamZ 2016/2*, p. 96.

<sup>37</sup> Legislative materials ERIRV 1461 BlgNR 25. GP., p. 66, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)”, accessed on 04/02/2020.



court — the permanent change of residence requires prior court approval<sup>38</sup> — that he or she rejects the change of residence<sup>39</sup>.

For the procedure, internal guidelines of the association have to be observed, which require the approval of the supervising Ministry of Justice. Accordingly, the person concerned must be informed from the outset and a consensus with him or her must be sought.

## VI. MEDICAL TREATMENT AND RELOCATION OF RESIDENCE

### 1. Medical treatment

The medical treatment was widely newly regulated in §§ 252 to 254 ABGB with the new Adult Protection Law 2018<sup>40</sup>. This was intended above all to comply with the provisions of the UNCRPD, according to which the contracting states must take measures to ensure that “the rights, will and preferences of the person concerned are respected” (cf. e.g. Art. 12 para. 3 UNCRPD).

It is clarified that persons of full age, if they are capable of making decisions, must always consent to treatment themselves, and that consent to treatment is not required in an emergency. In this respect, the legal situation has not changed.

If there are doubts about the ability to make a decision, the attending physician must now initiate a process of supported decision-making. He must “demonstrably endeavour to consult relatives, other close persons, persons in a position of trust and specialists who are particularly experienced in dealing with people in such difficult life situations ... who can support the person of full age in acquiring the ability to make a decision” (§ 252 (2) ABGB). The aim is therefore to ensure or establish the patient’s ability to make decisions in as many cases as possible by means of various forms of support.

In cases in which neither the sole capacity to make a decision nor the incapacity to make a decision is clearly present, a process of supported decision-making must take place. However, the law does not provide any sanctions for the violation of this medical obligation<sup>41</sup>.

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<sup>38</sup> In the case of an Enduring Power of Attorney, this is only the case if a permanent transfer of residence abroad is planned.

<sup>39</sup> See § 257 (3) ABGB in conjunction with § 131 (2) AußStrG und § 4b ErwSchVG.

<sup>40</sup> See also the consensus paper of the health care professions, which contains guidelines for the new legal situation as well as practice-oriented recommendations for specific cases; “<https://www.justiz.gv.at/web2013/home/justiz/erwachsenenschutz/konsenspapiere-mit-institutionen~43.de.html>”, accessed on 22/01/2020; cf. also Koza, Ilse, “Einwilligung in die medizinische Behandlung nach dem 2. Erwachsenenschutz-Gesetz”, in iFamZ 2017/3, p. 169.

<sup>41</sup> It is merely an „effort commitment“; legislative materials ErlRV 1461 BlgNR 25. GP., p. 31, “[https://www.parlament.gv.at/PAKT/VHG/XXV/II\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II_01461/fname_608002.pdf)”, accessed on 04/02/2020.

In the absence of decision-making capacity and if this cannot be achieved even through support, a substitute decision is required. This must be based on the (presumed) will of the patient<sup>42</sup>. If the physician and the representative (person authorised by an Enduring Power of Attorney or adult representative) agree and the patient does not object to the treatment (general consensus), the treatment can be carried out<sup>43</sup>. Also in this case the patient should be informed as far as possible about the essential contents of the medical treatment and asked for his opinion.

If the patient explicitly or even impliedly objects to the treatment, the representative's decision requires court approval (§ 254 ABGB). Since this is a compulsory treatment in the broader sense (treatment against the patient's will), judicial control is required by the person's fundamental rights<sup>44</sup>. However, "genuine" coercive treatment, that is against the patient's active physical resistance, is not permitted in this case either. Such treatment is only possible in psychiatric institutions according to the Hospitalisation Act.

The refusal of a medical treatment by an representative, which a doctor considers to be indicated, does not require court approval. However, if, for example, the attending physician or a relative fears that the welfare of the person concerned will be jeopardised by not accepting or ending treatment, they may turn to the court, which may replace the decision or appoint another representative. "In case of doubt, it must be assumed that the represented person wishes to receive medically indicated treatment" (§ 254 (2) ABGB).

## 2. Relocation of residence

Similar regulations to those for medical treatment apply to the transfer of residence. Any person with decision-making-ability decides exclusively on his or her own (§ 257 (1) ABGB). In doing so he can and should of course be advised and supported by other persons. In particular, representatives are obliged to take measures in the sense of supported decision-making which enable the person concerned to make an autonomous decision.

A proxy decision is only permissible if decision-making-ability cannot be achieved.

But this does not yet justify taking a person to another place against his will by force, i.e. also against his physical resistance. A forced transfer is exclusively permissible to a psychiatric hospital under the law of the Hospitalisation Act (see below VII.).

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<sup>42</sup> An advance health care directive must be observed in this respect; § 253 (4) ABGB.

<sup>43</sup> A differentiation between simple and severe (more than 24 days of health impairment) medical treatment is no longer provided for.

<sup>44</sup> The judicial procedure shall be initiated at the request of the concerned person and his Statutory Representative or at the suggestion of the person treating him (see § 131 (4) Auf&StrG).

A permanent change of residence, e.g. a permanent move to a nursing home, requires prior court approval. However, it is permissible to move temporarily to an inpatient care facility and wait for the court's decision. In this case, however, a de facto possibility of return must remain (§ 257 (3) ABGB). Therefore, the household must not be dissolved beforehand.

Representatives with an enduring power of attorney are exempt from the general court approval requirement in the event of a permanent change of residence. These only require prior court approval if the place of residence is to be moved abroad permanently (§ 257 (4) ABGB)<sup>45</sup>.

## VII. DEPRIVATION OF LIBERTY AND FORCED MEDICAL TREATMENT

In Austria, deprivations of liberty to avoid personal injuries are regulated exclusively under public law in the Hospitalisation Act (Unterbringungsgesetz) for the psychiatric sector and in the Nursing Home Residence Act (Heimaufenthaltsgesetz) for other inpatient facilities (nursing homes, facilities for people with disabilities and hospitals)<sup>46</sup>. Compulsory detention with the consent of the representative (e.g. guardian of a person authorised by an Enduring Power of Attorney) is not permitted. The order for the coercive measure is issued by the head of the psychiatric department (Hospitalisation Act) or by a physician or by personnel commissioned by the institution (Nursing Home Residence Act), who act in this capacity as federal (state) organs. Forced detention under the Hospitalisation Act is subject to mandatory review by a court commission (judge, expert, patients' advocate), and forced detention under the Nursing Home Residence Act is optional, i.e. upon request, also reviewed by a court commission (judge, expert, residents' representative) if the restrictions have not been lifted within four days (Hospitalisation Act) or seven days (Nursing Home Residence Act). However, a subsequent review on application is possible in any case<sup>47</sup>.

With the new Adult Protection Law 2018, the scope of application of the Nursing Home Residence Act has been extended to children and youth facilities. This means that all public and private child and youth welfare institutions fall within the scope of application of the Nursing Home Residence Act. The lack of review of restrictions on freedom in child and youth welfare institutions has been criticised in many cases, in particular by the Ombudsman's

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<sup>45</sup> Barth/Ganner (Hg), Handbuch des Sachwalterrechts, 308 ff.

<sup>46</sup> Detailed GANNER, Michael, (footnote 35), p. 57.

<sup>47</sup> The interests of those affected are protected in particular by existing representations for these areas: the patient advocacy in the Hospitalisation Act and the residents' representation in the Nursing Home Residence; in detail KOPETZKI, Christian, *Grundriss des Unterbringungsrechts*, Wien, Springer Verlag, 2012, 3<sup>rd</sup> edition; STRICKMANN, Gudrun, *Heimaufenthaltsrecht*, Wien, Linde Verlag, 2012, 2nd edition; GANNER, Michael, „Unterbringungsgesetz“ und HOLLWERTH, Johann „Heimaufenthaltsgesetz“ in GITSCHTHALER, Edwin, HÖLLWERTH, Johann (eds.), *AußStrG II*, Wien, Manz Verlag, 2017.

Office and its Human Rights Advisory Board, because it was abstruse that institutions for minors were not subject to comparable controls to those for adults<sup>48</sup>. In the case of minors, however, it is necessary to distinguish between “age-typical measures of education and care” — these are not subject to state control due to the family autonomy guaranteed by Art. 8 ECHR — and those which go beyond this due to illness and are therefore to be treated according to the procedure of the Nursing Home Residence Act.

The six OPCAT commissions<sup>49</sup>, which carry out unannounced inspections of all institutions where restrictions on freedom are imposed, are an additional supervisory body for restrictions of freedom in institutions. However, the staffing of these commissions cannot guarantee close monitoring in these institutions. Rather, they serve as a parallel control system, also in the other institutions under the Nursing Home Residence Act and the Hospitalisation Act.

Forced medical treatment is only permitted in accordance with the Hospitalisation Act and in criminal law<sup>50</sup>. According to §§ 35 f UbG, coercive treatment may not be carried out against the will of a patient who has decision-making-capacity. If a patient has a legal representative (adult representative, representative authorised by an Enduring Power of Attorney, parents in the case of minors), his or her consent is required. Serious medical measures additionally require a court approval in advance. Of course, this does not apply in case of imminent danger. In criminal law (§ 69 of the Austrian Penal Procedure Code), compulsory medical treatment is permissible if “a prisoner, despite having been instructed to do so, refuses to cooperate in a medical examination or treatment that is absolutely necessary under the circumstances of the case”. The forced treatment must be approved by the Ministry of Justice in advance, except in cases of imminent danger. The same applies to the forced feeding of prisoners.

## VIII. THE CENTRAL AUSTRIAN REPRESENTATION REGISTER (ÖSTERREICHISCHES ZENTRALES VERTRETUNGSVERZEICHNIS)

### *a) General aspects*

The Central Austrian Representation Register was introduced in 2006<sup>51</sup> and its establishment, management and supervision was handed over to the

<sup>48</sup> In this respect there is probably also a violation of the principle of equal treatment and thus a violation of the constitution.

<sup>49</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; this is a resolution of the United Nations General Assembly extending the 1984 Convention against Torture to include an international system of inspection of places of forced detention. In Austria, these commissions are located at the Ombudsman's Office.

<sup>50</sup> GANNER, Michael (footnote 47) §35 UbG.

<sup>51</sup> Sachwalterrechts-Änderungsgesetz (SWRÄG 2006).

Austrian Chamber of Notaries (§ 140b Abs 1 NO). The Central Austrian Representation Register is highly relevant for the new Adult Protection Law<sup>52</sup>, as the registration of an Elective or Statutory Representation and the loss of decision-making-ability in the case of an Enduring Power of Attorney are constitutive for the coming into force of the power of representation. The Central Austrian Representation Register contains all representations according to the adult protection law<sup>53</sup>. –Therefore the court must also register court-appointed representations. However, the Central Austrian Representation Register shows the scope of action of the representatives only in the case of Court-appointed and Statutory Representations. In the case of an Enduring Power of Attorney and Elective Representation the scope of action results from the document which is not registered. The Central Austrian Representation Register is not a public register, but can only be inspected by those entitled to do so (see d)). To be able to practice the representation in daily life adult representatives get a confirmation from the Register (see c) but have to show also the document which reflects the power of representation in the case of an enduring power of attorney or an Elective Representation.

The essential regulations concerning the ÖZVV can be found in the Notaries Order (Notariatsordnung). § 140h NO is the central norm, which regulates in particular the type and manner of entries as well as the (instruction and notification) obligations of the persons and offices registering. Another normative basis is the directive of the Austrian Chamber of Notaries for the Central Austrian Representation Register, which specifies in particular the registration processes and types of registration as well as rights of inspection and request<sup>54</sup>.

### **b) Registration**

With regard to the registrations to be made, § 140h (1) and (2) NO:

“(1) The “Central Austrian Representation Register” (ÖZVV) serves for the registration of

1. an Enduring Power of Attorney,
2. an agreement on an Elective Representation,
3. a Statutory Representation,
4. an adult Representation Directive and
5. a Court-appointed Representation of adults.

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<sup>52</sup> TSCHUGGUEL, Wilhelm, „Die Vorbereitungen der Österreichischen Notariatskammer auf das neue Erwachsenenschutzrecht. Neugestaltung des ÖZVV — Liste besonders geeigneter Erwachsenenvertreter — Fortbildungsmaßnahmen“, in *iFamZ 2018*, p. 61.

<sup>53</sup> cf. legislative materials: ErlRV 1461 BlgNR 25. GP 94 ([https://www.parlament.gv.at/PAKT/VHG/XXV/II/I\\_01461/fname\\_608002.pdf](https://www.parlament.gv.at/PAKT/VHG/XXV/II/I_01461/fname_608002.pdf)); § 140h (4) NO.

<sup>54</sup> This was issued on the basis of §§ 140a (2) 8, 140b (5) NO and is published under “<https://www.notar.at/de/aktuelles/oeffentliche-bekannt/#34>”, accessed on 22/01/2020.

- (2) The following shall also be registered
  1. the modification, termination, revocation and other termination of an Enduring Power of Attorney, as well as the occurrence and lapse of the event of an Enduring Power of Attorney,
  2. the modification, termination, revocation and other termination of an Elective Representation,
  3. the declaration to object to the Statutory Representation in advance and the revocation of this declaration as well as the objection to an existing Statutory Representation,
  4. the revocation of the adult Representation Directive,
  5. the modification, transfer, renewal and termination of a Court-appointed Representation of adults and
  6. the modification of personal data.”

In addition to notaries public, lawyers and the guardianship courts, Adult Protection Associations are also entitled to register (§ 240h (3) NO). The minimum contents of the entries are listed demonstratively in subsection 4 leg cit. The registration of further information — the legal materials mention, for example, further contact data — is thus not opposed by the leg cit.

In the case of Court-appointed Representation of adults, the scope of action results directly from the Central Austrian Representation Register. Likewise, the area of activity of the Statutory Representation must be entered in the Central Austrian Representation Register. Since these two forms of representation are only possible for a limited period of time — they end automatically after three years, but can be renewed (§ 246 (1) 5 and 6 ABGB) — the end of the representation must also be entered.

In addition to checking whether a representation already exists for the relevant area of activity, the person registering must check whether the other registration requirements for the respective form of representation are met and verify the identity of the persons involved. § 140h (5) NO provides for a facilitation for the registrant: According to the leg cit, it is the responsibility of the person who is/will be represented or the representative or the authorized person to certify the existence of the requirements. In any case, a medical certificate on the limited decision-making capacity of the person to be represented must be provided. The legislative materials make it clear that a general medical certificate of the existence of a mental illness is not sufficient. This is in line with the principles of the new Adult Protection Law, according to which representation is only possible for those specific areas for which the person is not capable of making decisions and where there is a need for action. The decision-making capacity as defined in § 24 ABGB must be examined specifically with regard to the affected areas of life and not be questioned in general or abstract terms by a medical certificate. If the medical certificate is too general, the registration in the Central Austrian Representation Register is not to be made. Own duties of investigation, beyond existing representations and their fields of activity for the registering party are not mentioned in § 140h (5) NO.

In probate proceedings, the notary public who handles the proceedings on behalf of an adult representative or an adult represented person must register the termination of the Enduring Power of Attorney or adult representation in the Central Austrian Representation Register.

### **c) Confirmation of registration**

According to § 140h (6) NO, the notary public (the registering person or body) must issue a confirmation with the essential information when registering an Elective or Statutory Representation or when registering an Enduring Power of Attorney. This is primarily intended to assist the representative in legal transactions in order to prove his power of representation. The confirmation must contain all the information that must also be given when registering. At the same time as the confirmation, an overview of the rights and obligations associated with the Enduring Power of Attorney or Elective or Statutory Representation must be issued or transmitted. This also includes the obligation not to use the confirmation in legal transactions after termination of the power of representation. The refusal of an entry must also be confirmed.

### **d) Inspection**

The right to inspect the ÖZVV is granted to the person represented or to be represented, the authorised representative or agent, the social insurance and social assistance institutions and other decision-makers in social law matters, insofar as the inspection is necessary for the fulfilment of their statutory duties (§ 140h (8) NO).

Also the registering person or body has a right of inspection. In addition to the right of inspection, the guardianship court is entitled to the provision of further available documents, such as “Enduring Powers of Attorney, revocations, terminations or amendments”.

Persons with a legal interest may submit a written request to the guardianship court in order to obtain, if necessary, information from the court about the pension fund representative or adult representative and their areas of activity<sup>55</sup>. However, they do not have the right to inspect the Central Austrian Representation Register, as the information entered there — some of it is sensitive data (“sensible” data) — is subject to strict data protection regulations.

### **e) Information duties**

The bodies that make entries in the Central Austrian Representation Register have, at most, statutory obligations to provide information. In general, such obligations exist towards the persons concerned regarding the consequences of the registration (§ 140h (6) NO). In addition, the guardianship court must be notified “without delay of the registration of an elected or Statutory Representative” by sending a copy of the medical certificate and, if applicable,

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<sup>55</sup> § 130 (3) AußStrG (Non-Contentious Proceedings Act).

the adult representative agreement. This is a prerequisite for the court to be able to carry out its supervisory duties under § 259 ABGB. In principle, the court must receive an annual report on the life situation of the person represented and on the development of income and assets. This applies to all adult representatives except those entitied by an Enduring Power of Attorney.

## IX. FIRST EXPERIENCES AND CONCLUSIONS

The central intention of the reform was to strengthen autonomy and to enable the persons concerned to lead a largely self-determined life. Paternalism and representative decisions were to be suppressed at the same time. Whether the objectives of the law have been achieved cannot yet be assessed in detail. However, in order to be able to make valid statements on this, I have gathered initial experience on the new Adult Protection Law by means of a questionnaire.

This shows that the staff of Adult Protection Associations, judges and patient representatives in particular are largely positive about the new Adult Protection Law, while lawyers and notaries public are also sceptical. Statutory representation is — not entirely surprisingly — the big hit, but is also seen as problematic by Adult Protection Associations and the judiciary, because it can easily circumvent the autonomy and supported decision-making process and, in particular, limiting the scope of action to absolutely necessary matters may not be sufficiently implemented in practice.

Public authorities and banks often seem to be unaware of the difference to the old legal situation. Banks also reduce their risk by de facto only making payments to the adult representative if the amount involved goes beyond “everyday business”.

“Supported decision making” has so far been used only slightly more frequently than before. This then mostly concerns health matters, whereby the new regulations on medical treatment are often not known to physicians and are therefore not applied at all.

A very central improvement is the extended scope of duties of the Adult Protection Associations. The obligatory clearing before appointing an Court-appointed Representative, the low-threshold access to counselling as well as the establishment and registration of Elective and Statutory representations are particularly positively evaluated.

The same applies to the judicial procedure for the appointment of a court-appointed representative (a) for the abolition of the compulsory presentation at court of persons concerned, (b) for the abolition of the compulsory expert opinion (medical examination) and (c) for the abolition of the compulsory oral hearing.

All in all, the 2nd Adult Protection Law is therefore assessed positively, even if its full potential has not yet been exhausted<sup>56</sup>.

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<sup>56</sup> The results of the survey are published here: *University of Innsbruck*, “<https://www.uibk.ac.at/rtf/>”.