



## Enduring Power of Attorney (EPoA) – comparison between Austrian and German Law

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**Abstract:** *With the establishment of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) the treatment of people with disabilities is changing from a protective perspective to a rights-based approach. The Enduring Power of Attorney (EPoA) is an important instrument, which helps with the implementation of the CRPD into national law. As an instrument of self-determined substituted decision-making it is recognised as the best practice model to safeguard the autonomy of people suffering the deprivations of age and other disabilities. This article touches briefly on general supported and substituted decision-making instruments and then goes on to examine the differences and similarities, advantages and disadvantages between Austrian and German laws concerning EPoAs.*

**Keywords:** *Enduring Power of Attorney; United Nations Convention on the Rights of Persons with Disabilities; Guardianship; Living Will; Decision Making.*

### I. Overview

With the establishment of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)<sup>1</sup> a paradigm shift is taking place: The treatment of people with disabilities is changing from a protective perspective to a rights-based approach.<sup>2</sup> Supported decision-making should replace substituted decision-making, however “thus far there has been a general failure to understand that the human rights-based model of disability implies this shift from a substituted to a supported decision-making paradigm.”<sup>3</sup> Nevertheless substituted decision-making is still both necessary and in accordance with the CRPD, but only as *ultima ratio*.<sup>4</sup>

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1 The CRPD was ratified by Austria in 2008 without reservations and without interpretative explanations, but under the condition that it was not immediately applicable, but had to be transformed into national Austrian law (*Erfüllungsvorbehalt* according to Art 50 clause 2 lit 4 B-VG); Ganner/Barth, Die Auswirkungen der UN-Behindertenrechtskonvention auf das österreichische Sachwalterrecht, BtPrax 2010, 204 (204 et seq).

2 Lachwitz, Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung, BtPrax 2008, 143 (143 et seqq).

3 Draft General comment on Article 12 of the Convention-Equal Recognition before the Law (13. 9. 2013) Nr 3.

4 Lipp, Guardianship and Autonomy: Foes or Friends? in Arai/Becker/Lipp (eds), Adult Guardianship Law for the 21st Century – Proceedings of the First World Congress on Adult Guardianship Law 2010 in Yokohama, Japan (2013) 103 (108). Some countries like France, Norway, Australia and Canada have declared explicitly within their interpretative explanations that they will not abstain from substituted decision-making instruments, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (31. 1. 2015).

Our legal systems traditionally divide people into two broad groups. On the one hand there are those who are able to take care of themselves, who may decide about their own issues, even if they appear risky and irrational, but who also have to bear the consequences of their decisions. On the other hand there are those who need protection by law and the community and who are therefore not responsible for their decisions and sometimes not even for their acts. But as we have seen throughout history, this protection-based approach often leads to paternalism and restrictions of individual self-fulfilment. The law in books may be fine and mainly in accordance with the CRPD, but there is emerging evidence that the law in action differs significantly from the provisions of the CRPD. This means that, in reality, substituted decision-making still prevails in many cases and situations where supported decision-making could be more frequently used.<sup>5</sup>

The Enduring Power of Attorney (EPoA) is often meant to be the best instrument to guarantee the autonomy of people and it is according to the prevailing opinion within the community investigating and working on the implementation of the CRPD the main legal alternative to guardianship at the moment.<sup>6</sup> But like guardianship it remains a legal instrument for substituted rather than supported decision-making.

Guardianship is the traditional instrument to protect people with mental disabilities from harming themselves, be it personally (medical treatment) or economically (unfavourable contracts). Over the last three decades guardianship has developed significantly and now provides numerous measures to enhance the autonomy of persons with mental disabilities (e.g. duty to detect and – with regard to his or her best interest – comply with the wishes of the person). Guardianship or custodianship (in Germany) should only be considered as an *ultima ratio*. It is subsidiary to all other instruments that are suitable to protect the adult person from any harm resulting from her/his mental or physical condition.<sup>7</sup> Therefore a guardian or custodian must not be appointed if someone else can effectively take care of the individual's important affairs (such as through as EPoA) (§ 268 para. 2 ABGB<sup>8</sup> and § 1896 para. 2 BGB<sup>9</sup>).

## II. Living Will

A central principle of health care is the patient's free and informed consent. It is safeguarded by different legal instruments on the international level, such as the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the European Convention on Bioethics (which Austria did not attend), the CRPD, as well as on the national level (ABGB, BGB, StGB, in particular § 110 öStGB – *Eigenmächtige Heilbehandlung*).

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5 Müller, Entwicklungsbedarf des Sachwalterrechts aufgrund der UN-Behindertenrechtskonvention, iFamZ 2013, 241 (243).

6 Lipp/Bagniewski/Dankert/Newell, Representation Agreement in British Columbia (Kanada) – ein Modell für Deutschland? BtPrax 2013, 217; Löhnig/Schwab/Henrich/Gottwald/Kroppenberger (eds), Vorsorgevollmacht und Erwachsenenschutz in Europa (2011).

7 Such instruments are a Living Will, a Power of Attorney, Substitution by Family Members, other substitutions by law (e.g. concerning the deprivation of liberty; *Patientenanwaltschaft* and *Bewohnervertretung* in Austria) as well as social and psychological support of any kind.

8 Barth/Ganner, Grundlagen des materiellen Sachwalterrechts, in Barth/Ganner (eds), Handbuch des Sachwalterrechts<sup>2</sup> (2010) 33 (50 et seqq with further references).

9 *Jurgeleit in Jurgeleit* (ed), Betreuungsrecht. Handkommentar<sup>3</sup> (2013) Einleitung Rn 7 und § 1896 BGB Rn 1, 2, 111.

A Living Will enables people to freely make informed decisions on a certain medical treatment in advance. If a Living Will exists, it takes priority over an EPoA and is binding for an attorney. In Germany, a Living Will is regulated in §§ 1901a et seq BGB, in Austria a Living Will is regulated by the *Patientenverfügungsgesetz*.

Austrian law provides two types of Living Wills:<sup>10</sup>

- the "Binding Living Will" (*Verbindliche Patientenverfügung*) with a lot of formal requirements<sup>11</sup> but recognised as an actual will of the patient, which the physician is bound to, and
- the "Relevant Living Will" (*Beachtliche Patientenverfügung*), which includes information given by the patient (written, oral or conduct implying an intent) in advance concerning his or her medical treatment; the Living Will is "relevant" which means that a substitute (attorney or guardian) has to decide on behalf of the presumed will of the patient according to this Relevant Living Will.

In Germany, a *Patientenverfügung* (Living Will) is any written document containing an individual's decisions in advance about their consent to or the refusal of a medical treatment. If the described situation in the Living Will corresponds to the real situation, it has to be recognised as the actual will of the patient.<sup>12</sup> Notably in this case – and this is different from the Austrian system – an attorney or a custodian is necessary to enforce this will of the patient.<sup>13</sup> So if the requirements in form and content are fulfilled there is no room left for a decision by another person.

### III. Substitution by Family Members

In addition to the Enduring Power of Attorney the Substitution by Family Members is another alternative to guardianship provided under Austrian law.<sup>14</sup> The implementation of this instrument was also discussed in Germany but was dismissed because of the danger of abuse. In Austria, there is no evidence of abuse at the moment. On the one hand this does not categorically mean that there is none but on the other hand abuse may also exist without the instrument of the *ex-lege* Substitution by Family Members. The question, which cannot be answered here is whether or not the Substitution by Family Members facilitates abuse more readily than other instruments.

At the moment, the adoption of the Substitution by Family Members is being discussed again in Germany. But the EPoA, according to German law, already covers some parts of the Austrian

10 *König/Pesendorfer*, *Patientenverfügung*, in *Barth/Ganner* (eds), *Handbuch des Sachwalterrechts*<sup>2</sup> (2010) 379 (379 et seqq).

11 Duty to medical and juridical advice, exact description of medical treatment which is refused and has to be renewed every five years.

12 *Warmuth in Sonnenfeld* (ed), *Die Patientenverfügung – Gesetzliche Neuregelung durch das 3. BtÄndG* (2010) 69.

13 So if no EPoA exists a custodian has to be appointed by court. The physician has to decide about the indication of a medical treatment and the custodian, if this correlates with the (presumed) will of the patient. If custodian and physician therefore do not reach an agreement, the custodian has to decide according to the (presumed) will of the patient which needs an additional approval by court (§§ 1901b and 1904 BGB); *Jurjeleit* (ed), *Betreuungsrecht. Handkommentar*<sup>3</sup> (2013) § 1901a BGB Rn 3 f, § 1901b BGB Rn 9 et seqq and § 1904 BGB Rn 9 et seqq.

14 *Barth/Kellner*, *Die Vertretungsbefugnis nächster Angehöriger*, in *Barth/Ganner* (eds), *Handbuch des Sachwalterrechts*<sup>2</sup> (2010) 461 (461 et seqq); *Schauer*, *Vorsorgevollmacht und gesetzliche Angehörigenvertretung nach dem SWRÄG 2006*, *iFamZ* 2006, 148 (151 et seqq).

Substitution by Family Members because of the less formal requirements. In most cases people expect to be substituted by family members if there is a need and therefore grant them a Power of Attorney through an oral agreement or by conduct implying intent. This is an EPoA according to German but not to Austrian law. As a side note, Switzerland also established the Substitution by Family Members in 2013.<sup>15</sup>

In Austria, The Substitution by Family Members was established in 2007 (§§ 284b–e ABGB) and allows specific people to substitute a person with mental disabilities in a restricted field of matters automatically when that person loses their decision-making capacity. It comes into effect without any judicial procedure (*ex lege*). Only registration in the Austrian Central Substitution Register (*Österreichisches Zentrales Vertretungsverzeichnis*) is obligatory.<sup>16</sup> The registration requires a personal medical attendance report which confirms that the concerned person has lost his/her decision-making capacity.

People with representation power are typically parents, children over 18 years, the spouse and registered homosexual partner if she or he has been living in the same domestic household with her/his partner for at least three years. The power to represent is restricted to daily dealings,<sup>17</sup> contracts about nursing needs and “simple” medical treatment. Medical treatment entailing serious consequences is excluded.<sup>18</sup>

#### IV. Comparison of Guardianship and Enduring Power of Attorney

There are both advantages and disadvantages in having an EPoA in comparison with guardianship or custodianship. In general, the EPoA respects the autonomy of persons to a larger extent because it works without intervention by the state or other people.

The main difference seems to be that with an EPoA the substitute (attorney) can be chosen freely while the guardian is normally appointed by a court. Although in reality, the guardian can also be chosen by the ward. The Sachwalter-Betreuungsverfügung (§ 279 para. 1 ABGB;<sup>19</sup> § 1897 para. 4 BGB<sup>20</sup>) enables every person to name a guardian in advance. If this decision is made on the basis of sound decision-making capacity, the court is bound to the decision, if the chosen person is willing to take over the guardianship and if the appointment is not against the best interest of the ward. Hence the result here is very similar to that of an EPoA. Even if the person lacks decision-making capacity, the judge has to consider the wishes of the ward at the time. This means that the ward may propose a certain person as guardian at any time during the proceeding.

15 Häfeli, Grundriss zum Erwachsenenschutzrecht (2013) 76 et seqq; Boente, Reform des Erwachsenenschutzes in der Schweiz, BtPrax 2013, 175; Taban, Das neue Schweizer Erwachsenenschutzrecht – Die wichtigsten Regelungen im Rechtsvergleich mit Österreich, iFamZ 2012, 80 (81 et seqq); Wolf, Erwachsenenschutz und Notariat, ZBGR 2010, 73.

16 But the violation of this rule does not lead to any legal consequences because the law does not provide any. Hence the power to substitute will come into effect with or without registration; Ganner, Grundzüge des Alten- und Behindertenrechts<sup>2</sup> (2014) 116.

17 “Daily dealings” are such which are usual for the specific person with disabilities according to the own income and property; see Barth/Kellner in Barth/Ganner 474 et seqq.

18 That is the case if important organs are concerned or if the treatments may cause physical or mental consequences for the patient for more than 24 days (= grievous bodily harm; § 84 StGB); Barth/Dokalik, Personensorge, in Barth/Ganner (eds), Handbuch des Sachwalterrechts<sup>2</sup> (2010) 147 (185 et seqq).

19 Barth/Ganner in Barth/Ganner 59 et seqq.

20 *Jurgeleit* in *Jurgeleit*, Betreuungsrecht<sup>3</sup> § 1897 BGB, Rn 28 et seqq; Lipp, Die Betreuungsverfügung als Instrument privater Vorsorge, in Sonnenfeld (ed), Nichtalltägliche Fragen aus dem Alltag des Betreuungsrechtes (2006) 177.

A clear advantage of the EPoA is the opportunity to make certain decisions in advance, such as who will get the house or car if the principal has to move into a nursing home, which medical treatment should be conducted under specific circumstances etc. The choice to accept or refuse a certain medical treatment may also be the subject of a Living Will.<sup>21</sup> Hence this author would highly recommend combining an EPoA with a Living Will. The problem is that Living Wills are ignored in many cases (e.g. by physicians and/or family members),<sup>22</sup> can be diminished by appointing an attorney who has the mandate to enforce any decisions made in the Living Will.<sup>23</sup> This is explicitly the obligation of the custodian in Germany (§ 1901a para. 1 BGB), but also a duty of the guardian in Austria.

Last but not least, an attorney has more freedom than a guardian concerning decisions in important property matters. A guardian is especially limited when it comes to investing in companies (partially) owned by the ward because the guardian's only purpose is the best interest of the represented person. Therefore investments are bound to the life expectancy of the ward. Attorneys in contrast only have to follow the will of the principal, which can be expressed in the EPoA and can include financial investments in the interest of a company, partners and other persons (e.g. family).

A significant difference to guardianship, and ultimately a disadvantage of the EPoA, is that an attorney is not accountable by anyone.<sup>24</sup> In Austria, an attorney, unlike to a guardian, does not even need any additional authorisation from a court or an additional personal medical attendance report from a physician in order to make a decision about important medical treatments. In Germany, the attorney needs, like the custodian, judicial approval for important medical treatments or refusing them (§ 1904 BGB), for deprivations of liberty, compulsory treatments (§ 1906 BGB) and for several matters concerning property. However, if someone is concerned by this issue, she or he can appoint a supervisor for the attorney and/or provide the duty within the EPoA to get a second opinion if certain important matters have to be dealt with.<sup>25</sup> Moreover, if someone suspects an attorney of abuse he or she may go to court, where the matter has to be proven. If abuse has occurred, either the court or the guardian, who would have been appointed for the time being, may cancel the EPoA.

## V. Comparison of EPoA: Austria and Germany

### A. Legal Framework for Personal Matters

In Austria and Germany Powers of Attorney concerning property and financial matters of the grantor have been in use since the 19th century. Both the ABGB and BGB provide the opportuni-

21 This is true for German law, but in Austria the Patientenverfügungsgesetz (PatVG) only provides the opportunity to refuse a certain medical treatment. Everything else, such as the selection of a special medical treatment, cannot be part of a Living Will, but only of an EPoA; *König*, Allgemeines zur Patientenverfügung, in *Barth/Ganner* (eds), *Handbuch des Sachwalterrechts*<sup>2</sup> (2010) 380 (381); *Albrecht*, Vorsorgevollmacht und Patientenverfügung als Instrumente der vorsorgenden Rechtspflege, in *Löhnig/Schwab/Henrich/Gottwald/Kroppenberger* (eds), *Vorsorgevollmacht und Erwachsenenschutz in Europa* (2011) 45 (45 et seqq).

22 E.g. OGH 9 Ob 68/11g *Zak 2012/762 (Kletecka)* = *ÖJZ 2012/116 (Rohrer)* = *iFamZ 2013/14 (Ganner)* = *ÖJZ EvBl 2013/60 (Rohrer)* = *RdM 2013/74 (Kopetzki)* = *JBl 2013, 106* = *EF-Z 2013/3 (Bernat)* = *EF-Z 2013/22* = *RZ 2013/2* = *RZ 2013/EÜ 54*.

23 *Löhnig*, Probleme der Vorsorgevollmacht nach deutschem Recht, in *Löhnig/Schwab/Henrich/Gottwald/Kroppenberger* (eds), *Vorsorgevollmacht* 15 (19).

24 The guardian is checked by court regularly, in general every year. *Löhnig* in *Löhnig/Schwab/Henrich/Gottwald/Kroppenberger* 24 et seqq.

25 *Ganner*, *Vorsorgevollmacht*, in *Barth/Ganner* (eds), *Handbuch des Sachwalterrechts*<sup>2</sup> (2010) 345 (349, 365 et seq).

ty to readily appoint an attorney. An oral authorisation or even conduct implying this intent is sufficient (§§ 1002 et seq ABGB, §§ 167 et seq BGB).

In the 1980's and 1990's EPoAs also became rather popular for personal matters such as which medical treatments to undertake and when as well as an instrument to organise all the important issues associated with old age and serious illness.<sup>26</sup> But it was not clear if all personal matters were covered by the legal provisions. That is why in 1999 Germany clarified its position and stated that the *Vorsorgevollmacht* could also cover medical treatment (§ 1904 BGB). Again in 2009, the legislator explicitly acknowledged the long established practice that the *Vorsorgevollmacht* in health care allows the attorney to consent to or to withhold life-sustaining medical treatment (§ 1901a BGB). Moreover, since 1999, the BGB provides that an attorney may be granted the power, under certain circumstances and with the permission of the custodianship court, to place the grantor in a closed institution and consent to measures depriving him of his liberty (§ 1906 BGB). Recently, in February 2013, an amendment (to § 1906 BGB) opened up the possibility to grant the power to consent to compulsory treatment, again under specific conditions and with the permission of the custodianship court.

In Austria, the main reason to make a legal amendment was to safeguard the interests of the grantor. At times, grantors of an attorney can control the attorney, give him or her directives and revoke his or her power at any time. However, the problem arises that EPoAs are used mainly in situations where the grantor is not able to do this because he has lost decision-making capacity with the passage of time, hence more formal requirements seemed to be necessary. The Enduring Power of Attorney (*Vorsorgevollmacht*) was therefore regulated in Austria by a special statutory provision in 2007 in the civil code.<sup>27</sup> While both regulations, the "normal" mandate as well as the EPoA, have to be applied concurrently, the regulation of the EPoA is a *lex specialis* to the normal mandate, so if the regulations conflict, those concerning the EPoA take priority.<sup>28</sup>

## B. Coming into Effect and Scope

There are some differences concerning how EPoAs come into effect. In Austria, EPoAs come into effect automatically with the loss of the decision-making ability.<sup>29</sup> That is what the law provides for in Austria (§ 284f para. 1 ABGB), however a different time or another condition can be determined by the principal. In Germany, EPoAs usually come into effect immediately. Only where personal matters such as health care, deprivation of liberty and compulsory treatment are concerned is the legal situation similar to Austria. These measures can only be ordered by the attorney if the grantor has lost his or her decision-making capacity.<sup>30</sup>

All matters that can be subject to guardianship, which are in general terms all financial and personal (health care, change of domicile etc.) matters of the principal, can also be subject to an EPoA. Only in strictly personal (*höchstpersönlichen*) matters, a substitution – even by an attorney – is

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26 Wildeman, Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities, *Journal of Law, Medicine & Ethics* 2013, 48.

27 Schauer, *Schwerpunkte des Sachwalterrechtsänderungsgesetzes (SWRÄG 2006)*. Teil 2, *ÖJZ* 2007, 217 (219 et seqq).

28 Ganner in *Barth/Ganner* 347.

29 But the loss for a short temporary period is not enough; Schwimann, *Neuregelung im Obsorge-, Kuratel- und Sachwalterrecht*, *EF-Z* 2006, 68 (70).

30 *Jurgeleit-Kieß*, *Betreuungsrecht*<sup>3</sup> § 1904 BGB Rn 28 et seqq and § 1906 BGB Rn 48.

banned by law.<sup>31</sup> These matters include the creation of wills, a Living Will, the execution of an EPOA, the right to vote and marriage.

In Austria, an attorney is not allowed to decide about the deprivation of liberty or compulsory treatments. This has to be decided under a public law regime by certain persons who are appointed by law.<sup>32</sup>

### C. Requirements

The execution of an EPOA is strictly personal, so substitution is not possible.<sup>33</sup> At the moment of the execution, the principal needs to be in possession of decision-making capacity.<sup>34</sup>

In Austria, all EPOAs have to be in writing and the scope must be described in detail (§ 284 et seq ABGB). Two forms are provided for by the law: (1) The *EPOA for simple matters*<sup>35</sup> that are not important in practice and the *EPOA for important matters*. It may only be established by a solicitor, notary or a court who have to inform the ward about both the consequences and possibility of cancellation. The act of informing has to be documented in the warrant of attorney. Important matters which make it obligatory to fulfil the formal requirements of the EPOA for important matters are: (1) Medical treatment with normally serious consequences; (2) the permanent change of domicile and (3) important property matters.

Whether the EPOA concerns simple or important matters, the selected attorney is not allowed to have a close relationship to the institution the person is living in (e.g. nursing home; § 284f para. 1 ABGB) and the attorney is not allowed to pass the mandate to another person for decisions on medical treatment or change of domicile.<sup>36</sup> As far as other matters are concerned, delegation is only possible if the principal did not prohibit this in the EPOA.

In Germany, only powers in personal matters must be granted explicitly and in writing (§ 1904 para. 2 and 5 as well as § 1906 para. 3, 4 and 5 BGB).<sup>37</sup> A general EPOA “for all affairs” or “all personal matters” will therefore not be sufficient, even if it is done in writing and signed by the grantor. The EPOA must specifically include medical treatment, compulsory treatment, or deprivation of liberty in its scope.<sup>38</sup>

### D. Duties and Obligations of the Attorney

31 *Barth/Dokalik in Barth/Ganner* 163 et seqq; *Roglmeier/Lenz*, Die neue Patientenverfügung (2009) 45.

32 If the person lives in a home for the elderly or for people with disabilities, the deprivation of liberty can be conducted there according to the Heimaufenthaltsgesetz (HeimAufG); *Strickmann*, Heimaufenthaltsrecht<sup>2</sup> (2012). All other measures of force (deprivation of liberty and compulsory treatment) have to be conducted in a psychiatric facility according to the Unterbringungsgesetz (UBG); *Kopetzki*, Grundriss des Unterbringungsrechts<sup>3</sup> (2012).

33 ErlRV 1420 BlgNR 22. GP 28; *Schauer*, iFamZ 2006, 149.

34 *Coeppicus*, Patientenverfügung, Vorsorgevollmacht und Sterbehilfe (2009) 120; *Bauer/Klie*, Patientenverfügungen/Vorsorgevollmachten – richtig beraten?<sup>2</sup> (2005) 60 et seq; *Ganner in Barth/Ganner* 353.

35 It can be compiled by being (1) written and signed by one's own hand, (2) written by someone else and signed by one's own hand and witnessed by three people who cannot be authorised, (3) written by someone else and notarised or (4) with a notarial deed (*Notariatsakt*); *Schauer*, iFamZ 2006, 149.

36 The purpose of this regulation (§ 284h clause 3 ABGB) is to avoid misuse and to guarantee that important issues are decided by the person whom the grantor placed his confidence in.

37 *Bauer/Klie*, Patientenverfügungen/Vorsorgevollmachten<sup>2</sup> 59 et seq.

38 §§ 1904 and 1906 BGB; *Kieß in Jurgeleit*, Betreuungsrecht<sup>3</sup> § 1904 BGB Rn 64 et seqq and § 1906 BGB Rn 74 et seqq.

There are no important differences between Austria and Germany as far as the duties and obligations of an attorney are concerned. An attorney primarily has to act according to the will of the principal as expressed in the mandate, which is normally non-remunerated. That means that the will expressed in the EPoA has to be carried out even if this is against the “objective best interest” of the principal.<sup>39</sup> The will that the principal expresses after losing decision-making capacity also has to be taken into consideration, but the main determiner in these cases is the expressed will in the EPoA and if there is none, the best interest of the principal (*Wohl des Vollmachtgebers*). An attorney, like a guardian, has the obligation to perceive and fulfil the wishes of the principal and to protect him or her from harm (*Wunschermittlungspflicht*; § 284h para. 1 in conjunction with § 281 para. 1 and 2 ABGB; § 1901 para. 3 BGB).<sup>40</sup>

### E. Control

Contrary to a guardian, an attorney is in general not subject to a court. In Germany an attorney sometimes needs, just as a guardian, judicial approval for certain measures. That is the case with

- deprivations of liberty,
- compulsory treatment (§ 1906 BGB),
- medical treatments (§ 1904 BGB), if the attorney and attending doctor do not agree about the will of the patient and if there is a reasonable danger that the medical treatment could cause the death or severely damage the health of the patient and
- several matters concerning property (§§ 1821f and 1907f).<sup>41</sup>

In Austria, an attorney never needs judicial approval. Only in cases of proven abuse can a court or guardian cancel the EPoA.

### F. Registration

The coming into effect as well as the termination, revocation and cancellation of EPoAs can be registered in the Austrian Central Substitution Register (*Österreichisches Zentrales Vertretungsverzeichnis*; ÖZVV; § 140h *Notariatsordnung*).<sup>42</sup> This register is operated by the Austrian Notary Chamber (*Österreichische Notariatskammer*) and the registration is completely optional.

Although the registration of the coming into effect is only possible with a personal medical attendance report from a physician which declares that the principal has lost decision-making capacity, the registration is not a premise for the coming into effect of the EPoA.

The Austrian Central Substitution Register only shows the number of EPoAs currently registered. But as there is no legal obligation to register EPoAs, the actual number in Austria is unknown. Furthermore the Austrian Central Substitution Register does not provide information on how many of the registered EPoAs came into effect or how many are actually being used. This certainly means that many more EPoAs exist than are registered. A similar problem occurs regarding the Substitution by Family Members.

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39 ErlRV 1420 BlgNR 22. GP 29; Ganner in *Barth/Ganner* 369.

40 Albrecht in *Löhnig/Schwab/Henrich/Gottwald/Kroppenberger* 47 et seq; *Barth/Ganner* in *Barth/Ganner* 92 et seqq; *Kieß* in *Jurgeleit, Betreuungsrecht*<sup>3</sup> § 1901 BGB Rn 34 et seqq, 39.

41 BT-Drucks. 16/8442, 19.

42 Ganner in *Barth/Ganner* 374.



At the end of 2013 some 36,302 EPOAs were registered in the ÖZVV, whilst in Germany the number is approximately 2.2 million.<sup>43</sup> Given that registration in Germany is also optional, one could reasonably expect the number of unregistered EPOAs to also be in the millions. Since 2005, there has been a Central Register for Advanced Instruments at the German Federal Chamber of Public Notaries on a statutory basis (§§ 78a–c *Bundesnotarordnung*).<sup>44</sup>

## G. Registration

Being in possession of clear decision-making ability is not necessary to revoke an EPOA in Austria.<sup>45</sup> Rather, the capacity to simply build a natural will and to express that (*Äußerungsfähigkeit*) is sufficient for this to occur. This can lead to problems as this makes it relatively easy to revoke an EPOA, however once revoked the person without mental capacity is unable to renew the former EPOA. If an EPOA is revoked a normal mandate still exists, because the revocation of mandates according to §§ 1002 et seq ABGB requires decision-making capacity. But with a normal mandate an attorney is not able to make important decisions whereas usually a guardian has to be appointed.

By contrast, in Germany the revocation of an EPOA requires the same decision-making capacity as its execution.<sup>46</sup>

## VI. Conclusion

In general, there are very few specific differences in the regulations concerning EPOAs when comparing German and Austrian law. Both kinds of “Vorsorgevollmacht” are mainly designed with family members or other persons close to the grantor in mind. On the one hand, it is more difficult to execute an EPOA in Austria than in Germany because of the numerous formal requirements. On the other hand the high formal requirements in Austria lead to more autonomy for the attorney than is provided for in Germany (no judicial approvals even for important issues).

An EPOA is an important instrument which helps with the implementation of the CRPD into national law. As an instrument of self-determined substituted decision-making (the main purpose of the CRPD is the autonomous and therefore if necessary substituted decision-making) it is recognised as the best practice model to safeguard the autonomy of people suffering the deprivations of age and those with other disabilities. Many of the employed supported decision-making models, such as *Circle Networks* (New Zealand), *Microboards* (Canada),<sup>47</sup> *Personal Ombudsman* (Sweden), *Personal Assistance*, *Person of Trust* (Belgium and Austria)<sup>48</sup> and especially the *Representation Agreement* (British Columbia, Canada)<sup>49</sup> work in a similar way or do not offer more autonomy

43 Information of the *Österreichische Notariatskammer* and *Deinert*, *Betreuungszahlen 2012*, *BtPrax* 2013, 242 (the figure here is not current as the German data is from 30.9.2013)

44 <http://www.vorsorgeregister.de/> (31. 1. 2015).

45 ErlRV 1420 BlgNR 22. GP 4; *Ganner* in *Barth/Ganner* 363.

46 *Coepicus*, *Patientenverfügung* 121, 133.

47 *Circle Networks* and *Microboards* are counsel group made up of family members, friends, social workers and other supporters who give the person with disabilities the necessary information and help to assist the person to make a “reasonable” decision on his or her own.

48 *Personal Ombudsman*, *Personal Assistance* and *Person of Trust* are usually individual persons who support the individual with disabilities and encourage him or her to make “reasonable” decisions on his or her own.

49 The *Representation Agreement* is an EPOA with two modes: the “standard powers” and the “broader powers” (also called non-standard provisions). The “standards powers” come into effect without the legally effective consent of the grantor. Decision-making capacity is not necessary. Its scope is restricted to not very important mat-

than an EPoA.<sup>50</sup> From this author's point of view it is, therefore, the most suitable instrument to accomplish the purposes of the CRPD as far as it concerns the aged, people with progressive degenerative illnesses or people with physical or mild intellectual disabilities.<sup>51</sup> It is a widely known legal instrument in most countries and useable on an international level.<sup>52</sup>

Obstacles for a wider-spread use in Austria seem to stem from the following: the form recommended by the Ministry of Justice is quite complicated; hence people are discouraged from executing an EPoA. Although one could argue that a declaration designed to cover such a wide range of often serious and unforeseen events in a person's future should be necessarily complicated.<sup>53</sup> Some people are also discouraged by the costs which arise from the execution of an EPoA by an attorney or notary. It was found that an EPoA is still not that well known in Austria. Austrians are generally not well informed about the instruments they can set up (EPoA, Living Will). Additionally, Austrians – perhaps to a greater degree than people in other countries – seem to be unwilling to take their future into their own hands, but rather prefer to rely on state institutions to take care of their problems if and when they arise.

In Germany, it may be seen as a weak point of an EPoA that attorneys who are family members may operate without sufficient checks and balances<sup>54</sup> whilst on the other hand, attorneys-at-law do not have enough personal contact with the principal.<sup>55</sup>

Nevertheless, in general an EPoA is an appropriate and valuable instrument to both increase and improve autonomous decision-making for people with disabilities and should therefore be more heavily promoted within the implementation process of the CRPD.

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ters. The "broader powers" enables the attorney to also decide about institutionalisation and termination of life sustaining measures, but require legally effective consent of the grantor; see *Lipp/Bagniewski/Dankert/Newell*, Das Representation Agreement in British Colombia (Kanada) – ein Modell für Deutschland? *BtPrax* 2013, 217.

50 For more information about these models see *Ganner*, Modelle unterstützter Entscheidungsfindung, *iFamZ* 2014, 67

51 For other people with severe mental disabilities other instruments, including substituted decision-making, may be necessary.

52 The Hague Convention on the International Protection of Adults (13. 1. 2000) provides regulations determining which national law is applicable, see *Lipp* in *Rixecker/Säcker/Oetker* (Hrsg), Münchener Kommentar zum Bürgerlichen Gesetzbuch X<sup>6</sup> (2015) Art 24 EGBGB Anh I, *ErwSÜ*.

53 A number of forms may be found on the internet; the official form of the Austrian Ministry of Justice may be available at: [http://www.justiz.gv.at/web2013/file/2c948485246bff6f0124b96dd98b412f.de.0/formular\\_vorsorgevollmacht.pdf](http://www.justiz.gv.at/web2013/file/2c948485246bff6f0124b96dd98b412f.de.0/formular_vorsorgevollmacht.pdf) (31. 1. 2015).

54 E.g. *Löhnig* in *Löhnig/Schwab/Henrich/Gottwald/Kroppenberger* 24 et seqq.

55 In Austria no distinction is made between attorneys-at-law and notaries, who are obliged to assume no more than five guardianships by law (§ 274 Abs 2 ABGB). The legal application against this rule with the argument that this is "forced labour" and therefore a violation of Art 4 Abs 2 ECHR was rejected by the European Court of Human Rights; EGMR 18. 10. 2011, 31950/06, *Graziani-Weiss*.