

# THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

## AUSTRIA

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### SECTION 1 – GENERAL

- 1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and ex lege measures if applicable. Also address briefly any interaction between these measures.**

To clarify the range of answers to the questions, it should be noted that in Austria adults with disabilities are the subjects of federal and provincial laws in many ways: with respect to financial and social issues and support benefits such as care allowance and care benefits etc.; in labour laws providing special employment protection, precautionary measures and disability employment regulations; in adult protection law providing for support measures in cases of limited capacity to act and make decisions. In response to the questions in the present questionnaire, only the last will be presented as the factual and legal situation in Austria. The former guardianship law (*Sachwalterrecht*), in the form of the judicial appointment of a guardian to care for adult people who suffer from a mental illness or are mentally disabled and are therefore no longer able to take care of their own affairs, was extended by the Second Protection of Adults Act (*2. Erwachsenenschutz-Gesetz – 2. ErwSchG*)<sup>1</sup> to an adult protection law. The Second Protection of Adults Act was promulgated on 25 April 2017 and has been in force in its essential parts since 1 July 2018. The Second Protection of Adults Act revised substantive and procedural protection of adults as contained in the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch - ABGB*)<sup>2</sup> and other laws, creating substantive and/or procedural points of contact with adult protection.

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<sup>1</sup> Federal Law Gazette I (*Bundesgesetzblatt I - BGBl I*) No. 59/2017

<sup>2</sup> General Civil Code of 11.06.1811, Judicial Law Gazette (*Justizgesetzsammlung – JGS*) No. 946/1811, in the version dated 23.06.2021, Federal Law Gazette I (*Bundesgesetzblatt I - BGBl. I*) No. 121/2021

Conceptually, the current adult protection law has four variants ("four-pillar model"<sup>3</sup>): the enduring power of attorney<sup>4</sup>, the elective adult representation<sup>5</sup>, the statutory adult representation<sup>6</sup> and the court-appointed adult representation<sup>7</sup>. The forms of adult protection are preferred in the following order: first, enduring power of attorney; second, elective adult representation; third, statutory adult representation; finally, court appointed adult representation.<sup>8</sup>

**2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *oneka - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.**

- Relevant person's representative: elective or statutory or court-appointed representation of an adult in need of protection (*Erwachsenenvertreter*<sup>9</sup>).
- Enduring power of attorney: according to its terms an enduring power of attorney is intended to take effect as and when the grantor of the power loses the capacity required to manage his or her affairs (*Vorsorgevollmacht*).
- Adult protection association: an association with advisory and clarifying tasks in adult protection law having been declared suitable for this purpose by the Federal Minister of Justice (*Erwachsenenschutzverein*).
- Patient advocacy: representation of patients who are remanded to a psychiatric ward in proceedings within the institution or under judicial review (*Patientenanzwaltschaft*).
- Resident representative: a representative of persons with mental illnesses or intellectual impairments in old people's and nursing homes, homes for the disabled and in other institutions where mentally ill or mentally disabled persons are permanently looked after or cared for and are subject to restrictions of their freedom (*Bewohnervertreter*).

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<sup>3</sup> Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, The New Adult Protection Law, 2018, p. 6 <https://www.justiz.gv.at/home/service/erwachsenenschutz/informationsbroschueren-41.de.html> (accessed 23.08.2021)

<sup>4</sup> Sections 260 et seq. General Civil Code

<sup>5</sup> Sections 264 et seq. General Civil Code

<sup>6</sup> Sections 268 et seq. General Civil Code

<sup>7</sup> Sections 271 et seq. General Civil Code

<sup>8</sup> Section 274 General Civil Code

<sup>9</sup> Before the Second Protection of Adults Act came into force on 01.07.2018: Guardian (*Sachwalter*)

- Legal proceedings capacity: the capacity of an individual to participate in court proceedings him- or herself or through a self-selected representation (*Prozessfähigkeit*).
  - Decision making capacity: A person is capable of making a decision if he or she can understand the significance and consequences of his or her actions in the respective context, determine his or her will accordingly and act accordingly (*Entscheidungsfähigkeit*).<sup>10</sup>
  - Capacity to act: Capacity to act is the ability of a person to entitle and obligate himself or herself by his or her own actions in the respective legal context (*Handlungsfähigkeit*).<sup>11</sup> Curatorship: court-appointed representation for persons who for certain reasons cannot manage their own affairs (*Kuratel*).
  - Central Austrian Representation Register: electronically maintained register at the Austrian Chamber of Notaries in which all adult representatives must be registered (*Österreichisches Zentrales Vertretungsverzeichnis - ÖZVV*).
  - Patient decree: expression of intention by which a patient refuses medical treatment and which is to take effect if he or she is not capable of making decisions at the time of treatment (*Patientenverfügung*).
- 3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elder abuse, etc.**

The group of people potentially affected is as follows:

According to a micro census survey conducted by Statistics Austria in 2015, nervous and mental problems occur relatively frequently between the ages of 20 and 60 (2.7% among men, 4.2% among women), but are more prevalent at the age of 60 and over (4.6% among men, 5.5% among women). Various mental problems, such as Down Syndrome or Dementia, affected 0.7% of men and 0.7% of women aged 20 to under 60 in 2015. Among those aged 60 and older, slightly more women (1.5%) than men (1.2%) reported permanent mental problems.

Adult protection measures in Austria:

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<sup>10</sup> Section 24 (2) General Civil Code

<sup>11</sup> Section 24 (1) General Civil Code

The Central Austrian Representation Register reports 150.000 enduring powers of attorney (registered), 2.500 elected adult representations and 11.500 statutory adult representations.<sup>12</sup>

Judicial guardianships under the Guardianship Law have increased from approximately 48.000 cases in 2009 to over 60.000 cases in 2015; after 2015, a slight decrease occurred (8%); on 1 January 2019, 50.204 court-appointed adult representations under the Second Protection of Adults Act were recorded, which is a significant decrease compared to previous years.<sup>13</sup>

This trend has continued; a total of 45.709 court-appointed adult representations were registered on 1 January 2020 of whom 41% were assumed by close persons, 29% by representatives of the legal professions, 19% by adult protection associations and 11% by other representatives.<sup>14</sup>

To put this into perspective: In 2021, there were 7,239,083 people over the age of 20 living in Austria.<sup>15</sup> With a total number of about 209,000 adults under an adult protection measure, one can thus speak of a share of about 0.3% of the adult population of Austria.

All measures include a restriction of legal capacity, but only in individual cases and not generally (see questions 8. to 13.).

#### Elderly abuse in Austria:

According to the Federal Ministry of Social Affairs, Health, Care and Consumer Protection, the data identifying the extent of abuse of the elderly in need of representation is inadequate because such cases often go unreported due to lack of consensus about the definitions of abuse.<sup>16</sup>

However, the WHO reports that one in six or approximately 15% of all elderly persons in care experience some form of abuse in community settings (based on 52 studies in 28 countries from diverse regions).<sup>17</sup>

#### **4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.**

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<sup>12</sup> I. KOZA, 2. Erwachsenenschutz-Gesetz in Zahlen, *iFamZ* 2020, p. 23

<sup>13</sup> Second and Third State Report of Austria 2019 on the UN Convention on the Rights of Persons with Disabilities, p. 52

<sup>14</sup> I. KOZA, 2. Erwachsenenschutz-Gesetz in Zahlen, *iFamZ* 2020, p. 24

<sup>15</sup> <https://www.statistik.at/statistiken/bevoelkerung-und-soziales/bevoelkerung/bevoelkerungsstand/bevoelkerung-nach-alter/geschlecht> (accessed 07.08.2023)

<sup>16</sup> Federal Ministry of Social Affairs, Health, Care and Consumer Protection, Gewalt erkennen. Ältere Menschen in Institutionen, 2021, p. 2

[https://www.sozialministerium.at/dam/jcr:3eb9e281-0392-4bac-8fd2d-4bb120f51a10/30112021\\_Gewalt-erkennen\\_Institutionen.pdf](https://www.sozialministerium.at/dam/jcr:3eb9e281-0392-4bac-8fd2d-4bb120f51a10/30112021_Gewalt-erkennen_Institutionen.pdf) (accessed 30.12.2021)

<sup>17</sup> World Health Organization, Regional Office for Europe, Elder Abuse Fact Sheet, 2018, p. 1 [https://www.euro.who.int/\\_data/assets/pdf\\_file/0008/373904/fs-elder-abuse-eng.pdf](https://www.euro.who.int/_data/assets/pdf_file/0008/373904/fs-elder-abuse-eng.pdf) (accessed 30.12.2021)

- Charter of Fundamental Rights of the European Union (*EU-Grundrechte-Charta - GRC*)

The EU Charter of Fundamental Rights entered into force with the Treaty of Lisbon in 2009 and has constitutional status in Austria (as does other EU law).<sup>18</sup> Article 26 of the Charter states that the European Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

- UN Convention on the Rights of Persons with Disabilities (*UN-Übereinkommen über die Rechte von Menschen mit Behinderungen – UN-Behindertenrechtskonvention*)

The UN Convention on the Rights of Persons with Disabilities has been in force in Austria since 26 October 2008.<sup>19</sup> According to Article 12, Austria is obliged to take all necessary measures to provide persons with disabilities with the support they need to exercise their legal capacity. The previously applicable law on guardians had already generally met the requirements of this convention however the law nevertheless needed to be adapted in certain areas (e.g. legal capacity).<sup>20</sup>

This Convention influenced the current legal framework by causing the Second Protection of Adults Act to be enacted.

- Hague Convention on the International Protection of Adults – Hague Convention (*Haager Übereinkommen über den internationalen Schutz von Erwachsenen*)

The Convention on the International Protection of Adults was promulgated in the Austrian Federal Law Gazette on 21 October 2013<sup>21</sup> and is applicable in international situations to the protection of adults who are unable to protect their interests due to an impairment or insufficiency of their personal capacities.

The term "adult protection" is based on the internationally used terms of the Hague Convention.<sup>22</sup>

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<sup>18</sup> Austrian Constitutional Court (*Verfassungsgerichtshof – VfGH*), Judgement of 14.03.2012, U 466/11-18, U 1836/11-13

<sup>19</sup> Federal Law Gazette III No. 155/2008

<sup>20</sup> Explanatory notes to the Governmental Proposal (*Erläuterungen zur Regierungsvorlage*) 1461 of the addenda to the stenographic protocol of the national council (*Beilagen zu den stenografischen Protokollen des Nationalrats*) XXV. legislation period (*Gesetzgebungsperiode – GP*), p. 3

<sup>21</sup> Federal Law Gazette III No. 287/2013

<sup>22</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 81

## 5. Briefly address the historical milestones in the coming into existence of the current framework.

The first version of the General Civil Code of 1811 stipulated these persons who were incapable of properly managing their own affairs due to lack of years, infirmity of mind or other circumstances were to be placed under the special protection of the law. These persons were placed under curatorship by the court, which affected not only property management but also other measures such as medical care.

An incapacitation law was enacted in 1916 that provided that mental illness or mental weakness with resulting inability to manage one's own affairs constituted a condition precedent for either full or partial incapacitation (*Entmündigungsordnung*).<sup>23</sup>

The 1983 Federal Law on Guardians for Disabled Persons (*Bundesgesetz vom 2. Februar 1983 über die Sachwalterschaft für behinderte Personen*)<sup>24</sup> replaced the provisions of the incapacitation regulations that had been in force since 1916 and replaced the legal institution of incapacitation with that of guardianship. This was also the beginning of the expansion of the group of persons to be called upon for guardianship, such as representation by specially trained persons within the framework of an "association guardianship".

Accordingly, an Association Guardians and Patient Advocates Act (*Ver-einssachwalter- und Patientenanwaltsgesetz*)<sup>25</sup> was enacted in 1990, that defined the requirements for associations for the appointment of guardians and patient advocates - according to the Compulsory Admission Act (*Unterbringungsgesetz – UbG*)<sup>26</sup> that was enacted at the same time.

With the 2006 Amendment to the Guardianship Law (*Sachwalterrechts-Änderungsgesetz 2006 - SWRÄG 2006*)<sup>27</sup>, attempts were made to reduce the ever-increasing number of guardian appointments by means of alternative forms of representation, primarily through the introduction of an enduring power of attorney. Due to the obligations arising from the Hague Convention, an Adult Protection Act (*Erwachsenenschutzgesetz*)<sup>28</sup> was enacted in 2013 that regulated the procedure for recognition and enforcement of foreign decisions for the protection of the person or the property of adults.

After a comprehensive reform process<sup>29</sup> the current Second Protection of Adults Act was enacted in 2017 that subsequently brought about certain formal (especially terminological) changes in the relevant substantive laws through two Adult Protection Amendment Acts in 2018.

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<sup>23</sup> Imperial Law Gazette (*Reichsgesetzblatt -RGBl*) No. 207/1916

<sup>24</sup> Federal Law Gazette No. 136/1983

<sup>25</sup> Federal Law Gazette No. 156/1990; now: Adult Protection Association Act (*Erwachsenenschutzvereinsgesetz – ErwSchVG*), Federal Law Gazette I No. 59/2017

<sup>26</sup> Federal Law Gazette No. 155/1990 in the version of Federal Law Gazette I No. 131/2017

<sup>27</sup> Federal Law Gazette I No. 92/2006

<sup>28</sup> Federal Law Gazette I No. 158/2013

<sup>29</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 1

**6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.**

The law on guardians was characterised by the desire to maintain a functioning legal system and led to the fact that guardians were appointed more and more frequently and often without restrictions.<sup>30</sup> The current adult representation focuses as much as possible on preserving the self-determination of the adult in need of protection.<sup>31</sup> An evaluation of the law is planned for 2024.<sup>32</sup>

In 2012, the Austrian Federal Government adopted the "National Action Plan on Disability 2012-2020", which defined a comprehensive strategy of Austrian disability policy for the best possible implementation of the UN Convention on the Rights of Persons with Disabilities.<sup>33</sup> This action plan has been extended until 31 December 2021 and was evaluated in 2020 by the University of Vienna.<sup>34</sup> It mentions the participatory implementation of the Second Protection of Adults Act as an example of success.<sup>35</sup>

The evaluation study examines to what extent the National Action Plan on Disability (hereafter abbreviated to NAP) 2012-2020 of the Austrian Federal Government was suitable for implementing the UN Convention on the Rights of Persons with Disabilities in Austria through targeted national measures. For this purpose, the evaluation analysed documents and conducted interviews with experts outside and inside the administration.

A key finding was that it is difficult to attribute changes for persons with disabilities to the NAP and to distinguish between the effects of the NAP and the effects

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<sup>30</sup> G. KATHREIN, Das neue Erwachsenenschutzrecht - eine Einführung, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 3

<sup>31</sup> Federal Ministry of Justice, Adult Protection Law, information brochure ("*Informationsbroschüre*"), 2021, 2<sup>nd</sup> edition, p. 7 <https://www.justiz.gv.at/home/service/erwachsenenschutz/informationsbroschuere~41.de.html> (accessed 23.08.2021)

<sup>32</sup> Report of the Minister of Justice to the National Council of April 2021, III-376 of the addenda to the stenographic protocol of the national council, XXVII. legislation period, p. 6

<sup>33</sup> Federal Ministry of Labour, Social Affairs, Health and Consumer Protection (*Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz - BMASGK*), National Action Plan on Disability 2012-2020, edition 2019, available in English: <https://www.sozialministerium.at/Themen/Soziales/Menschen-mit-Behinderungen/Nationaler-Aktionsplan-Behinderung.html> (accessed 28.08.2021)

<sup>34</sup> Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, Evaluation of the National Action Plan on Disability 2012-2020, 2020, p. 258 <https://www.sozialministerium.at/Themen/Soziales/Menschen-mit-Behinderungen/Nationaler-Aktionsplan-Behinderung.html> (accessed 30.12.2021)

<sup>35</sup> Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, Evaluation of the National Action Plan on Disability 2012-2020, 2020, p. 273 <https://www.sozialministerium.at/Themen/Soziales/Menschen-mit-Behinderungen/Nationaler-Aktionsplan-Behinderung.html> (accessed 01.02.2022)

of the UNCRPD. Developments recorded as positive, such as the reform of the Adult Protection Act, are attributed to the UNCRPD rather than the NAP.<sup>36</sup>

The evaluation mandate was also extended to include a survey on initial trends and impacts of the COVID-19 pandemic on persons with disabilities in order to derive recommendations for sustainable and participatory crisis management. In addition to the immediate effects of the crisis, such as a lack of orientation due to unavailable immediate guidelines or unavailable protective clothing that affected some people with disabilities particularly severely and led to (continued) isolation and an increase in exclusion tendencies. Particular challenges are described for people with mental illnesses and with regard to the provision of personal assistance.<sup>37</sup>

The CRPD Committee noted in their concluding observations<sup>38</sup> on Austria's first report in September 2013 that the National Disability Action Plan (2012 to 2020) is an excellent way to bring laws, policies and practices in line with the United Nations Convention on the Rights of Persons with Disabilities. It is also positively noted that sign language has been included in the Austrian Federal Constitution. Austria was also one of the first states to establish a monitoring body under Article 33 of the Convention and guarantees persons with psychosocial and intellectual disabilities the right to vote and be elected.

However, the Committee also notes several shortcomings in its concluding observations. There is concern that the German translation of the Convention on the Rights of Persons with Disabilities does not accurately reflect the meaning of the Convention and may lead to decisions that are inconsistent with the Convention. The Committee notes that Austria has a federal system of government and is concerned that this has led to an undue fragmentation of policy, particularly as the regions (“Länder”) are responsible for the provision of social services. The Committee recommends strengthening anti-discrimination laws by expanding the range of available legal remedies to include those legal remedies that require a change in the behaviour of those who discriminate against persons with disabilities, such as injunctions. Furthermore, the Committee notes that substantive equality between women and men has not yet been achieved. Women with disabilities face multiple forms of discrimination on the basis of their gender and disability and are at risk of sexual violence and abuse. The Committee also notes that very few awareness-raising campaigns seem to be conducted in Austria to counter negative and outdated stereotypes about persons with disabilities that fuel discrimination. The Committee recommends that the State party replace substituted decision-making with supported decision-making for persons with disabilities and increase its efforts to ensure that persons with disabilities have access to supported decision-making and are not placed under guardianship. The Committee calls on the

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<sup>36</sup>Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, Evaluation of the National Action Plan on Disability 2012-2020, 2020, p. 16 <https://www.sozialministerium.at/Themen/Soziales/Menschen-mit-Behinderungen/Nationaler-Aktionsplan-Behinderung.html> (accessed 01.02.2022)

<sup>37</sup> Federal Ministry of Labour, Social Affairs, Health and Consumer Protection, Evaluation of the National Action Plan on Disability 2012-2020, 2020, p. 36 <https://www.sozialministerium.at/Themen/Soziales/Menschen-mit-Behinderungen/Nationaler-Aktionsplan-Behinderung.html> (accessed 01.02.2022)

<sup>38</sup> <https://broschuere.service.sozialministerium.at/Home/Download?publicationId=391> (accessed 07.08.2023)



State party to take all necessary legislative, administrative and judicial measures to ensure that no one is detained against their will in any type of mental health facility.

On 12 October 2018, the CRPD Committee handed over to Austria a list of issues with 45 questions. The answers were drawn up from the contributions of all of the federal ministries and all of the Länder, and form Austria's combined second and third country report.<sup>39</sup>

A second National Action Plan on Disability is to be implemented between 2022 and 2030.<sup>40</sup>

## **7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.**

There are currently no pending reform projects regarding adult protection in Austria. The transitional regulations from guardianship law to adult protection law were relevant until the middle of 2019. However, as part of the European Union, Austria is involved in the 2021-2030 European Disability Rights Agenda. This Agenda serves the implementation of the UN Convention on the Rights of Persons with Disabilities within the EU with several flagship initiatives and main topics.<sup>41</sup> The Compulsory Admission Act is currently undergoing a reform in order to adapt it to the provisions of the Second Protection of Adults Act. A ministerial draft is before the National Council.<sup>42</sup> The aim is, among other things, to strengthen the self-determination of patients and to orient medical treatment more strongly towards the will of the patient.

The Austrian Parliament emphasized the rights of the person in need of protection including, inter alia, severely limiting the use of force, limitation of commitment, ensuring patients' right to counselling, and establishing a plan for the future well-being of the patient after release.<sup>43</sup>

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<sup>39</sup> <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=728> (accessed 07.08.2023)

<sup>40</sup> Presentation by the Federal Minister of Labour, Social Affairs, Health and Consumer Protection to the Council of Ministers of 10.12.2020, No. 2020-0.738.350 (42/16)

<sup>41</sup> Austrian Council for People with Disabilities (*Österreichischer Behindertenrat*), European Disability Rights Agenda 2021-2030 <https://www.behindertenrat.at/2021/04/eu-behindertenstrategie-2021-2030/> (accessed 25.08.2021); further information according to this issue available at the European Disability Forum (EDF) <https://www.edf-feph.org/a-new-journey-for-disability-rights-the-european-disability-forum-welcomes-the-new-disability-rights-strategy-2021-2030/> (accessed 25.08.2021)

<sup>42</sup> Explanatory notes to the Governmental Proposal 97/ME of the national council, XXVII. legislation period, p. 11

<sup>43</sup> Explanatory notes to the Governmental Proposal 97/ME of the national council, XXVII. legislation period, p. 9

## SECTION II – LIMITATIONS OF LEGAL CAPACITY

- 8. Does your system allow limitation of the legal capacity of an adult?  
N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.**
- a. on what grounds?**
  - b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**
  - c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
  - d. can the limited legal capacity be restored and on what grounds?**
  - e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**
  - f. are there any other legal instruments,<sup>44</sup> besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

**a. on what grounds?**

Minors and persons who, for a reason other than not having attained their majority are unable to take proper care of all or some of their affairs themselves, are under the special protection of the law. They are defined as persons entitled to protection (“*schutzberechtigte Personen*”).<sup>45</sup>

The General Civil Code regulates the personal rights of minors on the one hand and of "other persons entitled to protection" on the other. Other persons entitled to protection are thus defined as those who, for a reason other than being a minor, are not able to manage all or some of their affairs properly themselves. A person can no longer manage his or her own affairs properly if he or she lacks decision-making capacity (“*Entscheidungsfähigkeit*”) and/or capacity to act (“*Handlungsfähigkeit*”).<sup>46</sup>

Capacity to act is defined as the capability of a person by his or her actions to commit to legal obligations or to receive benefits. Unless otherwise provided, it

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44 Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

45 Section 21 (1) General Civil Code

46 M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 24, marg. No. 5

presupposes the capacity to make decisions. Capacity to act may also be determined according to context in individual cases.<sup>47</sup>

A person is capable of making a decision if he or she can understand the meaning and consequences of his or her actions in the relevant context, if he or she can form his or her will and act accordingly. In case of doubt capacity to make decisions is presumed in the case of adults.<sup>48</sup>

Decision-making capacity thus corresponds to the previous used term “persons capacity to understand and evaluate” (“*Einsichts- und Urteilsfähigkeit*”).<sup>49</sup>

**b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**

The limitation of legal capacity is defined in the Sections 239-276 of the General Civil Code.

**c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**

The limitation of legal capacity does not automatically affect all aspects of legal capacity; however the limitation of decision-making capacity shall be determined individually in each case.<sup>50</sup>

**d. can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?**

A represented person may revoke an adult representation with the exception of a court-appointed adult representation. The legal capacity is not merely restored by revoking the authorization for representation but it must be registered in the ÖZVV. However, a court-appointed adult representation (or an enduring power of attorney or an elected adult representation) can be revoked by the court on the grounds set forth in section 246 (3) of the General Civil Code.

**e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**

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<sup>47</sup> Section 24 (1) General Civil Code

<sup>48</sup> Section 24 (2) General Civil Code

<sup>49</sup> G. KATHREIN, Das neue Erwachsenenschutzrecht - eine Einführung, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 8

<sup>50</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 24, marg. No. 18

Capacity to act is not lost in all contexts merely by the appointment of an adult representation.<sup>51</sup> Indeed, a general loss of capacity to act by law would also contradict the UN Convention on the Rights of Persons with Disabilities.<sup>52</sup> However, the legal effect of certain defined acts of the represented person may be made dependent on the approval of his or her adult representative or the court (“*Genehmigungsvorbehalt*”), to the degree it is necessary to avert a serious and substantial danger to the represented person, regardless of whether decision-making capacity exists in the specific case or not.<sup>53</sup>

**f. are there any other legal instruments, besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

Restriction of the personal rights of vulnerable adults by limiting their rights of freedom of movement (forced accommodation or prevention of change of location) is provided for in the Residential Homes Act (*Heimaufenthaltsgesetz – HeimAufG*)<sup>54</sup> and in the Compulsory Admission Act.

Residential Homes Act:

The Residential Homes Act regulates the prerequisites and reviews restrictions of liberty in old people's and nursing homes, homes for the disabled and other facilities in which at least three mentally ill or mentally disabled persons can be permanently looked after or cared for. However, the Residential Homes Act does not regulate the admission, care and supervision or treatment and handling of other personal rights of residents of old people's and nursing homes and other facilities.

Compulsory Admission Act:

The Compulsory Admission Act applies to hospitals and departments of psychiatry in which persons are kept in a closed area or otherwise subjected to restrictions on their freedom of movement (“*Unterbringung*”).

**9. Briefly describe the effects of a limitation of legal capacity on:**

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**
- d. donation and wills;**
- e. civil proceedings and administrative matters (e.g. applying for a passport);**

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<sup>51</sup> Section 242 (1) General Civil Code

<sup>52</sup> M. SCHAUER, Das UN-Übereinkommen über die Behindertenrechte und das österreichische Sachwalterrecht, *iFamZ* 2011, p. 260

<sup>53</sup> P. BARTH, Das neue Konzept der Handlungsfähigkeit und die vier Säulen im Erwachsenenschutzrecht, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 24

<sup>54</sup> Federal Law Gazette I No. 11/2004 in the version of Federal Law Gazette I No. 59/2017

### **a. property and financial matters;**

Representation in matters of personal care as well as representation in matters of property extend only to those matters. The person in need of protection may object to an act of representation which may be undertaken only if the welfare of the represented person would otherwise be significantly endangered. Court approval is required in important matters of property or personal care out of the ordinary course. Transactions outside the ordinary course of business include: the sale or encumbrance of real estate; the establishment or acquisition, including under inheritance law, of an enterprise including its conversion, sale or dissolution; the conversion including under inheritance law of a company or partnership; the waiver of a right of inheritance; the unconditional acceptance or decline of an inheritance; the acceptance of gifts subject to encumbrances or the rejection of a gift offer; the investment of money with the exception of the types regulated in section 216 and 217 of the General Civil Code and the filing of a lawsuit and all procedural dispositions that concern the subject matter of the proceedings. However, according to section 167 (3) of the General Civil Code, the receipt of declarations of intent and documents for service are not included.<sup>55</sup>

Regarding management of financial transactions, section 239 (2) of the General Civil Code provides for the creation of a "supervised account" ("*betreutes Konto*")<sup>56</sup> offered by social welfare associations to facilitate payments of important obligations (rent, electricity, insurance, etc.).

Supervised accounts consist of an incoming account and payment account. The representative pays important bills from the incoming account and forwards the balance of money to the disbursement account which the person in need of protection may then dispose of.<sup>57</sup>

### **b. family matters and personal rights (e.g. marriage, divorce, contraception);**

The action of a representative exercising highly personal rights (drawing up a will, marriage, acknowledgement of paternity, adoption) is void ab initio.<sup>58</sup> In the event of legal guardianship or legal representation, parents generally retain their rights including rights of custody. There is no provision for automatic loss of custody. If a parent explicitly loses decision-making capacity in certain areas of legal representation, for example in asset management, the court can on a case-by-case basis restrict or withdraw the custody of the parent for the affected areas.<sup>59</sup>

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<sup>55</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 258, marg. No. 20

<sup>56</sup> Second and Third State Report of Austria 2019 on the UN Convention on the Rights of Persons with Disabilities, p. 48

<sup>57</sup> P. BARTH, Das neue Konzept der Handlungsfähigkeit und die vier Säulen im Erwachsenenschutzrecht, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 18

<sup>58</sup> G. KATHREIN, Das neue Erwachsenenschutzrecht - eine Einführung, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 10

<sup>59</sup> Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice – The New Adult Protection Law, p. 14

Lawful marriage presupposes the capacity to make decisions as part of the legal capacity to marry,<sup>60</sup> if this capacity is lacking, a marriage is void.<sup>61</sup> Likewise in cases of divorce by mutual consent the law requires that both parties have decision-making capacity. On the other hand, a representative, if specifically authorized and if necessary to safeguard the welfare of the representative person, may file a petition for divorce in a contested divorce action on behalf of the person who lacks decision-making capacity. It should be noted that a mental illness alone no longer constitutes grounds for divorce, whereas an incurable, serious contagious or disgusting illness continues to constitute such grounds, this however is regarded in the literature as being repugnant to the principle of equality.<sup>62</sup> However, section 50 of the Marriage Act provides the right of divorce for a spouse whose marriage is so deeply disrupted by the behaviour of the other spouse which, although the behaviour cannot be considered marital misconduct because rooted in mental illness or comparable impairment, nevertheless can constitute grounds for divorce if a restoration to a previous state of cohabitation cannot be expected.

The use of oral contraception does not fall under the term of medical treatment for lack of medical indications. Therefore, instead of the §252 of the General Civil Code the §250 of the General Civil Code marks the relevant statute. If the affected person does not have decision-making capacity, the authorization of the representative for the administration of oral contraceptives is permissible if required to preserve the well-being of the affected person. The representative has a duty to inform the adult in need of protection and if required to open possibilities of external consultations.<sup>63</sup>

### **c. medical matters;**

Medical treatment of adults with decision making capacity can only be authorized by himself or herself. Medical treatment of adults lacking decision making capacity requires the permission of their adult representatives.

The reason and consequences of medical treatments shall be explained to the person lacking decision making capacity insofar as he is capable of understanding. There is a medical obligation to make efforts to establish decision-making capacity (e.g. by consulting relatives, close persons, confidants or experts) in the cases of persons who are incapable of making decisions.<sup>64</sup>

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<sup>60</sup> Section 1 (1) Austrian Marriage Act (*Ehegesetz*), German Imperial Law Gazette (*deutsches Reichsgesetzblatt, dRGBL*) No. 837/1938 in the version dated 25.04.2017, Federal Law Gazette I No. 59/2017

<sup>61</sup> A. DEIXLER-HÜBNER, *Erwachsenenschutz in der Personensorge*, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 67

<sup>62</sup> A. DEIXLER-HÜBNER, *Erwachsenenschutz in der Personensorge*, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 69

<sup>63</sup> P. BARTH and M. MARLOVITS in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 302

<sup>64</sup> I. KOZA, *Einwilligung in die medizinische Behandlung*, *iFamZ* 2017, p. 171

Objections to treatment, or to continuation of treatments generally, when made by persons in need of adult representation, shall prevail unless overruled by court order.<sup>65</sup>

#### **d. donation and wills;**

While persons possessing the required legal capacity may legally execute testamentary dispositions, persons lacking legal capacity may not execute testamentary dispositions with the help of a representative as representation is excluded by law from drafting a testamentary disposition.<sup>66</sup>

#### **e. civil proceedings and administrative matters (e.g. applying for a passport);**

A person in need of protection lacks legal capacity to represent himself or herself in those civil proceedings that are contained within the scope of authority of an adult representative or an attorney whose power of attorney has already become effective.<sup>67</sup> In cases involving several legal representatives, the legal representative who initiated the first procedural act shall represent the person in need of protection in the proceeding.

According to Section 9 of the General Administrative Procedures Act (*Allgemeines Verwaltungsverfahrensgesetz - AVG*<sup>68</sup>) the legal capacity in administrative proceedings is determined by the general rules of the general civil code. According to Section 242 (1) of the General Civil Code a person in need of protection does not lose his or her capacity to act when a representative is appointed. A person in need of protection retains his or her capacity in administrative procedural acts.<sup>69</sup> Therefore, a person in need of protection can take independent valid procedural actions (e.g. apply for a passport) even if adult representation exists.<sup>70</sup> A representative may represent the adult in need of protection in administrative proceedings.<sup>71</sup> In administrative proceedings, the principle of procedural economy collides with the adult protection law requirement of extensive respect for autonomy of action.<sup>72</sup>

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<sup>65</sup> P. BARTH and M. MARLOVITS in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzes*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 229/230

<sup>66</sup> Section 564 General Civil Code

<sup>67</sup> Section 1 (2) Code of Civil Procedure (*Zivilprozessordnung - ZPO*), Imperial Law Gazette No. 113/1895 in the version of Federal Law Gazette I No. 148/2020

<sup>68</sup> Federal Law Gazette No. 51/1991 in the version of Federal Law Gazette I No. 58/2018

<sup>69</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 22

<sup>70</sup> H.P. ZIERL, M. SCHWEIGHOFER and S. WIMBERGER, *Erwachsenenschutzrecht*, 2<sup>nd</sup> edition, LexisNexis, Wien 2018, marg. No. 621

<sup>71</sup> Section 269 (1) number 1 General Civil Code

<sup>72</sup> M. UITZ, Zweifelhaftigkeit Prozessfähigkeit eines Volljährigen im Verwaltungsverfahren, *iFamZ* 2021, p. 28

**10. Can limitation of legal capacity have retroactive effect? If so, explain?**

A retroactive restriction is alien to Austrian adult protection law; the powers of representation only come into effect upon registration in the Central Austrian Representation Register or, in the case of court-appointed adult representation, upon court decision.<sup>73</sup>

Adults who lack legal capacity to enter into a legal transaction but who do not have an attorney or adult representative nevertheless cannot enter into an obligation, nor can they confirm an inchoate transaction.<sup>74</sup>

**11. Which authority is competent to decide on limitation or restoration of legal capacity?**

The "guardianship court" ("*Pflegschaftsgericht*"), i.e. the locally competent district court determined from the place of residence of the person in need of protection has jurisdiction over proceedings under the adult protection law.<sup>75</sup>

**12. Who is entitled to request limitation or restoration of legal capacity?**

The initiative to appoint an enduring power of attorney or an adult representative may come from the person in need of protection himself or herself or be suggested by a third party (court-appointed adult representation).<sup>76</sup> In applications to revoke, terminate or object to a representation, the application also may be made by the person in need of protection himself or herself or by a third party.

**13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:**

- a. a requirement of legal representation of the adult;**
- b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
- c. requirement of a specific medical expertise / statement;**
- d. hearing of the adult by the competent authority;**
- e. the possibility for the adult to appeal the decision limiting legal capacity.**

**a. a requirement of legal representation of the adult;**

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<sup>73</sup> Section 245 General Civil Code

<sup>74</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 54

<sup>75</sup> Section 104a, Section 109 Court Jurisdiction Act (*Jurisdiktionsnorm – JN*), Imperial Law Gazette No. 111/1895 in the version of Federal Law Gazette I No. 148/2020

<sup>76</sup> Section 117 (1) Non-Contentious Proceedings Act (*Außerstreitgesetz - AußstrG*), Federal Law Gazette I No. 111/2003 in the version of Federal Law Gazette I No. 38/2019



Procedure for the appointment of a court appointed adult representative:  
Legal representation is required in cases for limitation or restoration of legal capacity after the proceeding is resumed based on the outcome of the initial hearing.<sup>77</sup> If the best interests of the person concerned so require, the court shall appoint a temporary adult representative with immediate effect to take care of urgent matters for the duration of the proceedings.<sup>78</sup>

**b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**

The law gives people of close relation participation to procedures for limitation or restoration of legal capacity of an adult in need of protection.<sup>79</sup> Family members do not automatically become a party to the procedures. People of close relations include: Spouses, registered partners, parents and his or her kids of full age.<sup>80</sup> They have only partial rights concerning the proceeding. They must be notified of the proceedings and have a right to object to the person named as a court appointed adult representative. They do not, however, have the right to object to appointment of an adult representation or to the scope of authority of the representative.<sup>81</sup>

In case of court appointed representation: After the initiation of proceedings the court must commission a recognised adult protection association (Section 1 of the Adult Protection Association Act) with the task of a clarification procedure to assess alternatives to court-appointed adult representation ("clearing").<sup>82</sup> In contrast to the previous legal practice, the clearing procedure is mandatory and - in the sense of Article 12 of the UN Convention on the Rights of Persons with Disabilities - is intended to avoid appointments of representatives by the court when possible.<sup>83</sup>

**c. requirement of a specific medical expertise / statement;**

A medical report shall be obtained by the court if it deems it necessary or if the person concerned so requests.<sup>84</sup>

**d. hearing of the adult by the competent authority;**

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<sup>77</sup> Section 119 Non-Contentious Proceedings Act

<sup>78</sup> Section 120 (1) Non-Contentious Proceedings Act

<sup>79</sup> Section 127 (1) Non-Contentious Proceedings Act

<sup>80</sup> T. BAUER/M. HENGL in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 866

<sup>81</sup> Section 127 (3) Non-Contentious Proceedings Act

<sup>82</sup> Section 117a Non-Contentious Proceedings Act

<sup>83</sup> E. GITSCHTHALER and M. SCHWEIGHOFER, *Erwachsenenschutzrecht*, 2. *Erwachsenenschutzgesetz*, Manz, Wien 2017, p. 194

<sup>84</sup> Section 120a Non-Contentious Proceedings Act

Section 118 (1) of the Non-Contentious Proceedings Act requires that the affected adult be heard during proceedings limiting capacity.

- e. the possibility for the adult to appeal the decision limiting legal capacity.**

The person in need of protection may appeal the court's order of appointment.<sup>85</sup>

**14. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:**

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**
- d. donations and wills;**
- e. civil proceedings and administrative matters (e.g. applying for a passport).**

- a. property and financial matters;**

Since civil law favours principles of self-determination by persons in need of protection rather than representation of the individual, persons in need of protection may also continue to participate in legal transactions with the support of close relatives, unless representation is unavoidable in order to safeguard their rights and interests.<sup>86</sup>

Legal transactions by incompetent adults are wholly without effect unless they have been done with an authorized representative or adult representative. In such a case the legal transaction is effective upon the approval of the representative and, if necessary, of the court<sup>87</sup> unless the transaction concerns one of daily life that does not exceed the living circumstances of the incompetent adult. The transaction then becomes legally effective upon the fulfilment of the obligations of the incompetent adult.<sup>88</sup>

In cases done without an authorized representative or adult representative the legal transaction becomes effective upon the approval of the representative and, if necessary, of the court. Until such approval is granted the other party is bound by his

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<sup>85</sup> Section 116a (1) Non-Contentious Proceedings Act

<sup>86</sup> F. PARAPATITS in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 241, marg. No. 11

<sup>87</sup> Section 865 (3) General Civil Code

<sup>88</sup> Section 242 (3) General Civil Code

or her contractual declaration but he or she may set a reasonable deadline for the representative to grant approval.<sup>89</sup>

A legal transaction of daily life which does not exceed the income and assets condition of an adult incapable of decision-making becomes legally effective upon his or her fulfilment of the obligations under the transaction providing however, that no order limiting the person's power of consent has been entered.<sup>90</sup> The legal transactions affected are dependent upon living circumstances, income and assets, and may include daily shopping, going to restaurants, buying clothes, or even booking and paying for a holiday trip.<sup>91</sup>

In a case in which a legal representative for financial matters of a bank's customer exists and the customer orders a payment without authorization of the representative, the bank, because of the presumption that legal incapacity exists if a representative has been appointed will, by the weight of opinion, be held harmless for damages incurred by the incompetent adult as a result of the bank's failure to pay.<sup>92</sup>

#### **b. family matters and personal rights (e.g. marriage, divorce, contraception);**

Adults in need of protection who lack decision-making capacity cannot exercise rights of a highly personal nature (e.g. marriage). These rights cannot be assigned to a representative.<sup>93</sup>

But even in the case of personal rights to which only the entitled person is entitled, and which are thus highly personal, the enforcement of rights is not always "hostile to representation" according to the case law (e.g. petition for divorce).<sup>94</sup>

As already stated with regard to question 9 b., a representative of an adult who lacks decision-making capacity can only make the decision on oral contraception on behalf of the adult only if the welfare of the person concerned so requires.

#### **c. medical matters;**

Medical treatment of a person of full age who is not capable of making decisions requires the consent of his or her representative whose sphere of activity includes this matter. The representative shall be guided by the will of the represented person. In case of doubt, it is to be assumed that the person wishes a medically indicated treatment.<sup>95</sup>

#### **d. donations and wills;**

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<sup>89</sup> Section 865 General Civil Code

<sup>90</sup> Section 242 (3) General Civil Code

<sup>91</sup> J. WEITZENBÖCK, *Vorsorgevollmacht und Erwachsenenvertretung*, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 45

<sup>92</sup> R. BOLLENBERGER, *Erwachsenenschutz und Bankgeschäfte*, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 108

<sup>93</sup> Supreme Court, Judgement of 10.05.2005, 5 Ob 94/05t

<sup>94</sup> Supreme Court, Judgement of 28.03.2012, 2 Ob 48/12s

<sup>95</sup> Section 253 (1) General Civil Code

According to general consensus, the provisions concerning legal transactions and concerning capacity are to be applied by analogy to acts similar to transactions such as so-called acts of volition and communication of intent.<sup>96</sup>

Only oneself can declare one's last will, appoint the heir and may not leave these declarations to a third person. Mere affirmation of the proposal of a third person is likewise not sufficient.<sup>97</sup> If the deceased person has declared his or her last will in a state that precludes testamentary capacity, for example under the influence of a mental illness, the testamentary disposition is invalid.<sup>98</sup>

**e. civil proceedings and administrative matters (e.g. applying for a passport).**

Certain legal and procedural acts before administrative authorities require the approval of the adult representative and the court if necessary to avert a serious and substantial danger to the represented person (“*Genehmigungsvorbehalt*”). The subject of approval remains in force regardless of a replacement of the assigned adult representative. The court shall revoke the approval if it is no longer required.<sup>99</sup>

**15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?**

The appointment of several court-appointed adult representatives for one person is possible according to section 243 (3) of the General Civil Code. But their powers of representation must relate to different matters and may not - even partially - overlap.<sup>100</sup> However, the possibility of multiple appointments does not entitle the person concerned to have several adult representatives appointed. It is a matter of discretion for the court to decide on a case-by-case basis whether the best interests of the person concerned require multiple appointments or not.<sup>101</sup> According to the Second Protection of Adults Act, the person concerned has no right to choose the court-appointed adult representative. Only the best interests of the person concerned are determinative.<sup>102</sup>

Thus, the person concerned does not have the possibility to determine for himself or herself whether several adult representatives are to be appointed by the court and for which matters they are to act in each case – even if he or she expresses

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<sup>96</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 53

<sup>97</sup> Section 564 General Civil Code

<sup>98</sup> Section 567 General Civil Code

<sup>99</sup> Section 242 (2) General Civil Code

<sup>100</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 243, marg. No. 21

<sup>101</sup> Supreme Court, Judgement of 19.12.2018, 8 Ob 164/18b; 6 Ob 143/19a

<sup>102</sup> Supreme Court, Judgement of 31.08.2018, 6 Ob 145/18v; 8 Ob 164/18b; 1 Ob 72/20z; 3 Ob 76/20b; 2 Ob 129/20i

corresponding wishes. Here, the case law still follows the old and actually outdated principle of care and does not observe the requirement of empowerment.

### **SECTION III – STATE-ORDERED MEASURES**

#### *Overview*

- 16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure. Pay attention to:**
- a. can different types of state-ordered measures be applied simultaneously to the same adult?**
  - b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
  - c. does your system provide for interim or ad-hoc state-ordered measures?**

There are two forms of state-ordered measures: court-appointed adult representation or the appointment of a curator.

#### Court-appointed adult representation (*Gerichtliche Erwachsenenvertretung*):

A court-appointed adult representation shall be appointed by the court upon the request of a person of full age or by the court, ex officio, if he or she is incapable of dealing with his or her affairs without detriment to himself or herself due to mental illness or comparable impairments and if the applying adult has no representative for this purpose, is unwilling or unable to choose one and statutory adult representation is not provided for.<sup>103</sup>

According to the principle of subsidiarity<sup>104</sup>, persons of full age who are limited in their decision-making capacity due to a mental illness or a comparable impairment require representation for participation in legal transactions only if they have provided representation for themselves or if representation is required in order to safeguard their rights and interests.

Preliminarily it must be determined whether the adult can properly deal with matters himself or herself despite his or her impairment. If it is determined that representation is required, a designated representation (enduring power of attorney or elective adult representation) has priority. However, if an elective adult representative has not been chosen or no enduring power of attorney has been executed, then statutory adult representation goes into effect. Finally, if statutory representation does not take effect, the court shall appoint an adult representative.

In contrast to the former practice concerning the appointment of guardians, court-appointed adult representation may no longer be made for all matters but only for individual matters or at most for certain types of matters (which must also

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<sup>103</sup> Section 271 General Civil Code

<sup>104</sup> Sections 239, 240 General Civil Code

be precisely specified);<sup>105</sup> a purely precautionary appointment is no longer possible.<sup>106</sup>

If an enduring power of attorney exists for a specific matter, an adult representation cannot be made at the same time.<sup>107</sup>

If the attorney fails to perform his or her duties properly, the court shall order his or her removal and appoint a court-appointed adult representative.<sup>108</sup>

Since the procedure for court-appointment of an adult representative potentially requires a prolonged amount of time ("clearing procedure" by the adult protection association, initial hearing, appointment of legal counsel, if necessary, expert opinion and oral hearing), a "temporary relevant person's representative for the court proceeding" may be appointed limited to the duration of the procedure.<sup>109</sup> This representation must also be registered in the Central Austrian Representation Register.<sup>110</sup>

#### Curatorship (*Kuratel*):

If a person cannot manage his or her own affairs because he or she has not yet been conceived, is unborn, absent or unknown and if these affairs cannot be managed by another representative and if the interests of this person are endangered as a result, a curator is to be appointed for him or her.<sup>111</sup>

A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative ("collision"). In the second case, the legal representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them ("collision curator").

A curator of an absent or unknown person shall be appointed to protect the claims of a third party enforcing legitimate claims arising out of his or her relationship with the absent or unknown person ("absent curator").

### *Start of the measure*

### *Legal grounds and procedure*

## **17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.**

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<sup>105</sup> M. ROTH, *Außerstreitverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 213

<sup>106</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council XXV. legislation period, p. 43

<sup>107</sup> Section 240 (2) General Civil Code

<sup>108</sup> Section 246 (3) General Civil Code

<sup>109</sup> Section 120 Non-Contentious Proceedings Act

<sup>110</sup> M. ROTH, *Außerstreitverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 217

<sup>111</sup> Sections 277 et seq. General Civil Code

In the case of court-appointed adult representation:<sup>112</sup>

- Personal requirements: person of full age who, due to a mental illness or a comparable impairment, cannot manage certain affairs without risk of detriment to himself or herself.

While alcohol and drug consumption, because it is a temporary impairment, is not categorized as a “comparable impairment,” substance abuse can lead to chronic damage, e.g. organic brain damage or alcohol or drug infused psychosis that fall under the term of a comparable impairment and can lead to loss of decision-making and therefore to a court appointed adult representation.<sup>113</sup>

A physical impairment is grounds for a measure only when it is accompanied by a mental illness or a comparable impairment regarding decision-making capacity.<sup>114</sup>

- Absence of representation: attorney or elective or statutory adult representative.

In the case of curatorship:<sup>115</sup>

The person cannot manage his or her own affairs due to specified reasons (i.e. not yet conceived, unborn, absent or unknown), other representation is not possible, and the person's interests are endangered.

## **18. Which authority is competent to order the measure?**

The guardianship court (“*Pflegschaftsgericht*”), i.e. the district court locally competent according to the place of residence of the person in need of protection, is competent for proceedings.<sup>116</sup>

## **19. Who is entitled to apply for the measure?**

The procedure for the appointment of a court-appointed adult representative shall be either

- a) at the request of the person in need of protection himself or herself, or
- b) ex officio, e.g. upon notification to that effect.<sup>117</sup>

A curator is to be appointed by the court if the requirements are met.<sup>118</sup>

## **20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?**

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<sup>112</sup> Section 271 General Civil Code

<sup>113</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 33

<sup>114</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 34

<sup>115</sup> Section 277 General Civil Code

<sup>116</sup> Section 104a, section 109 Court Jurisdiction Act

<sup>117</sup> Section 117 (1) Non-Contentious Proceedings Act

<sup>118</sup> Section 109 Court Jurisdiction Act

### Adult protection proceedings:

A court appointed adult representative requires the person in need of protection to be unwilling or unable to choose a representative. His consent is therefore not needed. However, the court shall take the needs and wishes of the person in need of protection into consideration.<sup>119</sup>

The person in need of protection may file motions independently, he or she must also be served with all decisions (“*Beschlüsse*”) and he or she retains the right to appeal these decisions.<sup>120</sup>

### Curatorship proceedings:

Due to the nature of curatorship, unborn, not yet conceived, absent or unknown persons in need of protection cannot participate in curatorship proceedings.

The curator acts in the interest of the represented person, therefore his actions take precedence over all other interests.

The court shall transfer the curatorship to another person at the request of the curator or ex officio if the curator dies, does not have the required suitability or is unreasonably burdened by the curatorship or the interest of the represented person otherwise requires it for other reasons.<sup>121</sup>

The court shall remove the curator on application or ex officio if the prerequisites for his or her appointment cease to exist; if these prerequisites cease to exist only for part of the transferred matters, the scope of action shall be restricted. The scope of action shall be extended if necessary.<sup>122</sup>

## **21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:**

- a. a requirement of legal representation of the adult;**
- b. availability of legal aid;**
- c. participation of family members and/or of vulnerable adults’ organisations or other CSO’s;**
- d. requirement of a specific medical expertise / statement;**
- e. hearing of the adult by the competent authority;**
- f. the possibility for the adult to appeal the order.**

### Appointment of a court-appointed adult representative:

After the initiation of proceedings the court must commission a recognized adult protection association (Section 1 of the Adult Protection Association Act) with the task of a clarification procedure to assess alternatives to court-appointed adult representation (“clearing”).<sup>123</sup> In contrast to the previous legal practice, the clearing procedure is mandatory and - in the sense of Article 12 of the UN Convention on

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<sup>119</sup> Section 273 (1) General Civil Code

<sup>120</sup> Section 116a Non-Contentious Proceedings Act

<sup>121</sup> Section 284 (1) General Civil Code

<sup>122</sup> Section 284 (2) General Civil Code

<sup>123</sup> Section 117a Non-Contentious Proceedings Act



the Rights of Persons with Disabilities - is intended to avoid appointments of representatives by the court when possible.<sup>124</sup>

The number of cases has steadily increased, especially since the “old” guardianships must also be reviewed by the end of 2023. The association “Vertretungsnetz” reports in its annual report 2022 that the number of clearing procedures has doubled compared to the old legal situation.<sup>125</sup>

According to section 4a of the Adult Protection Association Act the association has to clarify on behalf of the court in particular,

- which of the person’s affairs are to be managed,
- how the capacity of the person concerned to independently manage his or her affairs in legal dealings is assessed, if necessary, including consideration of current documents on the state of health of the person concerned,
- whether the person concerned is provided with support which he or she requires in order to exercise his or her capacity to act in accordance with section 239 (2) of the General Civil Code,
- the person’s personal and social environment,
- possible alternatives to adult representation,
- whether elective or statutory adult representation is possible,
- reasons for discontinuing or continuing the proceedings for the appointment or renewal of a court-appointed adult representative,
- whether the court should appoint close associates as adult representatives, and
- whether there are any indications for an order conditioning the (inchoate) capacity of a represented person to subsequent approval in order to avert a serious and substantial danger to the represented person.

#### **a. requirement of legal representation of the adult;**

The vulnerable adult does not need representation to apply for a procedure. If the proceedings are to be continued on the basis of the results of the initial hearing, the court shall provide for legal counsel for the person concerned in the proceedings.<sup>126</sup>

#### **b. availability of legal aid;**

The court proceedings are free of charge. Only the fee for an expert opinion must be paid by the person concerned. If his or her income is very low or the proceedings are discontinued, the state pays these costs.<sup>127</sup>

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<sup>124</sup> E. GITSCHTHALER and M. SCHWEIGHOFER, *Erwachsenenschutzrecht, 2. Erwachsenenenschutz-Gesetz*, Manz, Wien 2017, p. 194

<sup>125</sup> <https://vertretungsnetz.at/publikationen> (accessed 07.08.2023)

<sup>126</sup> Section 119 Non-Contentious Proceedings Act

<sup>127</sup> Section 124 Non-Contentious Proceedings Act

**c. participation of family members and/or of vulnerable adults' organisations or other CSO's;**

Relatives of the person in need of protection (unless the person objects) shall be informed of the initiation of proceedings, shall be heard in the proceedings and may appeal the appointment of a court-appointed adult representative.<sup>128</sup>

If applicable, a social welfare or disability assistance institution acting on behalf of the person concerned shall be informed of the referral and asked for its opinion. The association shall report to the court on the result of the clarification as soon as possible, however not longer than five weeks. The clarification may be made only from a social welfare perspective but not, for example, from a medical or legal perspective and may not include counselling or care for the adult in need of protection.<sup>129</sup>

**d. requirement of a specific medical expertise / statement;**

A medical report shall be obtained by the court if it deems it necessary or if the person concerned so requests.<sup>130</sup>

**e. hearing of the adult by the competent authority;**

The adult in need of protection shall be present at an initial hearing by the court after a clearing procedure<sup>131</sup> and shall also be present at the subsequent hearing.<sup>132</sup> Section 118 (1) of the Non-Contentious Proceedings Act requires that the affected adult be heard during proceedings limiting his or her capacity.

**f. the possibility for the adult to appeal the order.**

The person in need of protection may appeal the court's order of appointment.<sup>133</sup>

Appointment of a curator:

If the requirements of section 277 of the General Civil Code are met, the court shall appoint a curator.<sup>134</sup>

**22. Is it necessary to register, give publicity or any other kind of notice of the measure?**

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<sup>128</sup> Section 127 Non-Contentious Proceedings Act

<sup>129</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 85

<sup>130</sup> Section 120a Non-Contentious Proceedings Act

<sup>131</sup> Section 118 (1) Non-Contentious Proceedings Act

<sup>132</sup> Section 121 (2) Non-Contentious Proceedings Act

<sup>133</sup> Section 116a Non-Contentious Proceedings Act

<sup>134</sup> Sections 279, 280 General Civil Code

### Court-appointed adult representation:

Notice of the appointment of the court-appointed adult representative shall be given in an appropriate manner to those persons and agencies who have a valid interest in it, according to the record of the proceedings, particularly including the information provided by the adult representative.<sup>135</sup>

The court shall arrange for the court-appointed adult representative and the order conditioning the capacity (e.g. reservation of approval) to be entered in the public books and registers. In addition, it shall enter the appointment in the Central Austrian Representation Register.<sup>136</sup>

The Central Austrian Representation Register is an electronically maintained register set up at the Austrian Chamber of Notaries<sup>137</sup> in which all adult representations must be entered. Entries of elective and statutory representation can be made by courts, notary's offices, law firms and adult protection associations, however, court-appointed adult representation can be entered by the guardianship court only. A written request for information regarding the existence of a representation may be submitted to the court, stating one's legal interest.<sup>138</sup>

### Curatorship:

The appointment of the curator, his name and place of residence and a brief statement of the contents of the document to be served, together with the name of the trial court and the matter in dispute, shall be announced by an edict. The edict shall contain the remark that the person for whom the curator has been appointed shall be represented by the curator at his risk and expense until his or her own appearance or at the appointment of a proxy.<sup>139</sup>

The contents of the edict shall be recorded in the edict file ("*Ediktsdatei*").<sup>140</sup>

For the appointment of the curator to become legally effective it must be posted on the court notice board and a subsequent notice of the decree of curatorship must be given to the curator.<sup>141</sup>

## **23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:**

- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
- b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**

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<sup>135</sup> Section 126 (1) Non-Contentious Proceedings Act

<sup>136</sup> Section 126 (2) Non-Contentious Proceedings Act

<sup>137</sup> Section 140b Code on notaries, Imperial Law Gazette No. 75/1871 in the version of Federal Law Gazette I No. 86/2021

<sup>138</sup> Section 130 (3) Non-Contentious Proceedings Act

<sup>139</sup> Section 117 Code of Civil Procedure

<sup>140</sup> <https://edikte.justiz.gv.at/edikte/edikthome.nsf> (accessed 07.08.2023)

<sup>141</sup> Supreme Court, Judgement of 30.04.2020, 5 Ob 203/19t

- c. **is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
  - d. **what are the safeguards as to conflicts of interests at the time of appointment?**
  - e. **can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
  - f. **is a person obliged to accept appointment as representative/support person?**
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- a. **what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**

Court-appointed adult representation:

Section 274 of the General Civil Code lists the people eligible to be representatives (*Berufung*).<sup>142</sup>

Section 273 and 243 of the General Civil Code regulates the suitability of those to act as representatives (*Eignung*).

When appointing a court-appointed adult representative, the court must take the following circumstances into account in accordance with section 273 (1) of the General Civil Code:

- Needs of the person in need of protection
- Desire of the person in need of protection
- Suitability of the adult representative
- The nature and extent of the matters to be managed.

According to section 273 (2) of the General Civil Code, the adult representative to be appointed, or after the appointment, must reveal any conflicts of interest or reasons to deny the appointment.<sup>143</sup>

Pursuant to section 243 (1) of the General Civil Code, no person may be appointed as an adult representative who

- is himself or herself entitled to protection within the meaning of section 21 (1) of the General Civil Code,
- cannot be expected to represent in a manner beneficial to the welfare of the adult, for example because of a criminal conviction, or

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<sup>142</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 768

<sup>143</sup> F. PARAPATITS in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 275, marg. No. 3

- is in a dependent or close relationship to an institution in which the adult person is staying or by which he or she is being cared for.

A person may assume only as many powers of attorney and adult representations as he or she is capable of managing, taking into account the related duties, in particular those respecting personal contact. No person, with the exception of a member of an adult protection association, may assume more than 15 powers of attorney and adult representations. However, a notary or a candidate notary or a lawyer or a candidate lawyer may exceed this number if he or she is actively registered in the list of lawyers or notaries especially qualified to assume powers of attorney and court-appointed adult representation.<sup>144</sup>

The Chamber of Notaries and the Chamber of Lawyers shall each keep a list of members of the Chamber who are suitable to act as adult representatives. Upon application, a member of the Chamber who fulfils certain requirements for adult representation (many years of experience with persons in need of protection, appropriate education/training, professional organisation, etc.), may be entered onto this list. A chamber member who is not registered on the list but is appointed, may decline the appointment under certain circumstances including, for example, a chamber member registered on the list who is willing to act as a representative or if the unlisted member has already taken on more than five court-appointed adult representations.<sup>145</sup>

#### Curatorship:

Persons may not be entrusted with curatorship who are

- entitled to protection within the meaning of section 21 (1) of the General Civil Code or
- cannot be expected to exercise the curatorship in a beneficial manner, for example, because of a criminal conviction.

A legal person (e.g. corporation) or a registered partnership may also be appointed curator. The entity shall inform the court of the individual who will represent the entity in the exercise of curatorship.

A person whom the court intends to appoint as curator shall notify the court without delay of any circumstances that make him or her appear unsuitable for that purpose. If such circumstances arise after the appointment, he or she shall likewise disclose them without delay. If he or she culpably fails to make this disclosure, he or she shall be liable for all damages suffered by the represented person as a result. A person may undertake only as many curatorship as he or she can properly manage, taking into account the duties involved.

The person contemplated by the court may refuse to assume the curatorship unless he or she is required to do so by special statutory provisions. A notary or lawyer may refuse to assume curatorship only if the undertaking cannot reasonably be expected of him or her, taking into account his or her personal, family, professional

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<sup>144</sup> Section 243 (2) General Civil Code

<sup>145</sup> Section 275 General Civil Code

and other circumstances. The right to decline is presumed in the case of more than five curatorship.

**b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**

Court-appointed adult representation:

According to section 274 of the General Civil Code, the potential representative, who has been nominated by the person in need of protection either by means of an adult representative decree, a power of attorney or an elected adult representative, is to be accorded priority in appointing the adult representative.

Curatorship:

When selecting the curator, the interests of the represented person, the suitability of the curator and the matters to be attended to shall be taken into account.

**c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**

If the person in need of protection has not chosen a representative either by means of an adult representative decree, a power of attorney or an elected adult representative, a person close to the person in need of protection and suitable for the task shall be appointed.

If there is no such person close to the person in need of protection, an adult protection association within the meaning of section 1 of the Adult Protection Association Act is to be appointed.

If this too is not possible, a notary or lawyer or another suitable person shall be appointed.

Curatorship:

In matters requiring predominantly legal knowledge a notary, or a candidate notary, or a lawyer, or a candidate lawyer is to be preferred.

**d. what are the safeguards as to conflicts of interests at the time of appointment?**

Court-appointed adult representation:

A person whom the court intends to appoint as an adult representative shall notify the court without delay of any circumstances that make him or her appear unsuitable for that purpose. If such circumstances arise after the appointment, he or she shall likewise disclose them without delay. If he or she culpably fails to make this

disclosure, he or she shall be liable for all damages suffered by the represented person as a result.<sup>146</sup>

A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative (“collision”). In the second case, the legal representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them (“collision curator”).

Curatorship:

A person whom the court intends to appoint as curator shall notify the court without delay of any circumstances that make him or her appear unsuitable for that purpose. If such circumstances arise after the appointment, he or she shall likewise disclose them without delay. If he or she culpably fails to make this disclosure, he or she shall be liable for all damages suffered by the represented person as a result.<sup>147</sup>

**e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**

The appointment of several court-appointed adult representatives for one person is possible according to section 243 (3) of the General Civil Code. But their powers of representation must relate to different matters and may not - even partially -- overlap.

**f. is a person obliged to accept appointment as representative/support person?**

Court-appointed adult representation:

According to section 274 of the General Civil Code the adult representative is to be appointed by the court only with his or her approval.

Curatorship:

The person contemplated by the court may refuse to assume the curatorship unless he or she is required to do so by special statutory provisions. A notary or lawyer may refuse to assume curatorship only if the undertaking cannot reasonably be expected of him or her, taking into account his or her personal, family, professional and other circumstances. The right to decline is presumed in the case of more than five curatorship.

***During the measure***

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<sup>146</sup> Section 273 (1) General Civil Code

<sup>147</sup> Section 280 General Civil Code

## *Legal effects of the measure*

### **24. How does the measure affect the legal capacity of the adult?**

#### Court-appointed representation of adults:

The person in need of protection retains the capacity to act. However, for certain legal transactions or procedural acts, the court may order a "reservation of approval" ("*Genehmigungsvorbehalt*") by the adult's representatives and/or the court.<sup>148</sup> The court must make a concise description of the legal transactions or procedural acts, without issuing regulations that are too general or too detailed.<sup>149</sup> The person in need of protection loses the capacity to act in procedural matters that fall within the scope of an appointed adult representation.<sup>150</sup>

#### Curatorship:

The curator has the right and the duty to perform all actions that are necessary to manage the assigned matters. In doing so, the curator must safeguard the interests of the represented person to the best of his ability.

The curator may assign duties to others in the administration of the assigned matters.<sup>151</sup>

## *Powers and duties of the representatives/support person*

### **25. Describe the powers and duties of the representative/support person:**

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- b. property and financial matters;**
- c. personal and family matters;**
- d. care and medical matters;**
- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**
- g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- h. is there any right to receive remuneration (how and by whom is it provided)?**

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<sup>148</sup> Section 242 (2) General Civil Code

<sup>149</sup> E. GITSCHTHALER and M. SCHWEIGHOFER, *Erwachsenenschutzrecht, 2. Erwachsenenenschutz-Gesetz*, Manz, Wien 2017, p. 71

<sup>150</sup> Section 1 (2) Code of Civil Procedure

<sup>151</sup> M. ROTH, *Außerstreitverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 200



The duties of a court appointed representative are comparable to those of other representatives. The main focus lies in supporting and securing the well-being of the represented person. This includes, but is not limited to, the satisfaction of the reasonable needs and living conditions of the represented person, including providing necessary financial means for legal transactions in daily life. The curator has the right and the duty to perform all activities that are necessary to manage the transferred assigned matters. In doing so the curator shall safeguard the interests of the represented person to the fullest extent.<sup>152</sup> The curator may be represented by a proxy when dealing with the assigned matters.

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- b. property and financial matters;**
- c. personal and family matters;**
- d. care and medical matters;**

Court-appointed adult representation:

An attorney or adult representative shall timely notify the represented person of contemplated decisions concerning his or her person or property and shall give him or her reasonable time to comment on them. The statement of the represented person shall be given due consideration unless this would significantly endanger his or her well-being.<sup>153</sup>

In personal matters the adult representative may in principle undertake an act of representation only with the consent of the person in need of protection except in cases in which the well-being of the person in need of protection would otherwise be significantly endangered. In important personal matters court approval must be obtained.<sup>154</sup>

The action of a representative exercising highly personal rights (drawing up a will, marriage, acknowledgement of paternity, adoption) is void ab initio.<sup>155</sup> In cases of divorce by mutual consent the law requires that both parties have decision-making capacity. On the other hand, a representative, if specifically authorized and if necessary to safeguard the welfare of the representative person, may file a petition for divorce in a contested divorce action on behalf of the person who lacks decision-making capacity.<sup>156</sup>

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<sup>152</sup> Sections 281 - 283 General Civil Code

<sup>153</sup> Section 241 (2) General Civil Code

<sup>154</sup> Section 250 General Civil Code

<sup>155</sup> G. KATHREIN, Das neue Erwachsenenschutzrecht - eine Einführung, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 10

<sup>156</sup> A. DEIXLER-HÜBNER, Erwachsenenschutz in der Personensorge, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 69

In principle, the adult representative is not required to personally care for the represented person but the adult representative must provide for necessary medical and social care.<sup>157</sup>

Personal care is based on individual rights. These include the right to: life, freedom, privacy etc.<sup>158</sup>

If the person in need of protection indicates that he or she does not agree to an act regarding personal care then the act needs to remain undone unless the well-being of the person concerned is threatened.<sup>159</sup>

Medical treatment is to be clarified in advance with the person in need of protection by the adult representative appointed for this purpose;<sup>160</sup> in case of doubt, consent to treatment is to be presumed, unless there is a valid patient decree to the contrary.<sup>161</sup>

In case of imminent danger to life or health, consent of the adult representative is not required for the time being, but must be obtained as soon as possible.<sup>162</sup>

Court approval must be obtained if the adult representative and the person in need of protection disagree over treatment.<sup>163</sup>

In case of imminent danger judicial authorization is not required.<sup>164</sup>

The adult representative may consent to sterilization only if there is a danger to the life or health of the person in need of representation if the treatment is not done; in addition, court approval must be obtained.<sup>165</sup>

The adult representative may approve medical interventions for research purposes within narrow limits only (e.g. direct benefit for the person in need of protection). Approval by the ethics committee or court authorization is required. Judicial authorization is required in case of refusal by the person in need of protection.<sup>166</sup>

### Curatorship:

Due to the nature of a curatorship, it is not possible to act together with the person concerned as he or she is either not yet conceived, unborn, absent or of unknown identity.<sup>167</sup>

Acts of the curator in property matters require court approval if they are outside the ordinary course of business.<sup>168</sup>

The curator acts in the interest of the represented person, therefore his actions take precedence over all other interests.

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<sup>157</sup> Section 251 General Civil Code

<sup>158</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 28

<sup>159</sup> Section 250 (2) General Civil Code

<sup>160</sup> Section 253 (1) and (2) General Civil Code

<sup>161</sup> Section 253 (4) General Civil Code

<sup>162</sup> Section 253 (3) General Civil Code

<sup>163</sup> Section 254 General Civil Code

<sup>164</sup> F. PARAPATITS in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 254, marg. No. 26

<sup>165</sup> Section 255 General Civil Code

<sup>166</sup> Section 256 General Civil Code

<sup>167</sup> Section 277 (1) General Civil Code

<sup>168</sup> M. ROTH, *Außerstreiverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 200

The court shall transfer the curatorship to another person at the request of the curator or ex officio if the curator dies, does not have the required suitability or is unreasonably burdened by the curatorship or the interest of the represented person other-wise requires it for other reasons.

The court shall remove the curator on application or ex officio if the prerequisites for his or her appointment cease to exist; if these prerequisites cease to exist only for part of the transferred matters, the scope of action shall be restricted. The scope of action shall be extended if necessary.<sup>169</sup>

**e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

Court-appointed adult representation:

The adult representative shall act in such a way to further the will and preferences of the adult in need of protection and therefore shall preserve his or her right to self-determination.<sup>170</sup>

Curatorship:

The Curator shall act in the best interest of the person concerned.<sup>171</sup>

**f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**

Court-appointed adult representation:

The adult representative shall submit a report on the life situation of the represented person to the court within four weeks after the commencement of his or her power of representation<sup>172</sup> and thereafter annually to report on

- the nature and frequency of personal contacts between the represented person and the adult representative,
- his or her place of residence,
- his or her mental and physical condition and
- the matters dealt with in the past year and those to be dealt with in the coming year.<sup>173</sup>

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<sup>169</sup> Section 284 (1 and 2) General Civil Code

<sup>170</sup> Section 241 (1) General Civil Code

<sup>171</sup> Section 281 (1) General Civil Code

<sup>172</sup> Section 130 (1) Non-Contentious Proceedings Act

<sup>173</sup> Section 259 (1) General Civil Code

- If the adult representative is entrusted with the care of property, he or she must also prepare an initial report on the property and subsequently submit an accounting ("*Pflegschaftsrechnung*").<sup>174</sup>

The adult representative shall contact the person in need of protection at least once a month.<sup>175</sup> Adult representatives are bound to secrecy with regard to their representation activities but they may provide information to spouses, registered partners or cohabitants as well as to parents and children of the represented person, unless the represented person does not consent or if providing information would be detrimental to the well-being of the person in need of protection.<sup>176</sup>

Curatorship:

The curator is bound to secrecy, except vis-à-vis the court, regarding to all facts entrusted to him or becoming known to him in the exercise of his duties.

- g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**

Court-appointed adult representation:

In principle, the adult representative is not required to physically care for the represented person but the adult representative must provide for necessary medical and social care.<sup>177</sup>

The adult representative must have as much personal contact with the adult as reasonably required.<sup>178</sup>

Curatorship:

Since the person concerned is absent, such obligations do not come into consideration.

- h. is there any right to receive remuneration (how and by whom is it provided)?**

Court-appointed adult representation:

The court-appointed adult representative is to be paid an annual compensation of 5 per cent of the represented person's income after deduction of taxes and duties. An additional 2 per cent of the value exceeding € 15,000 must be paid. These amounts can be reduced by the court under certain circumstances (low expenditure, particularly high assets), but in the case of high expenditure they can be

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<sup>174</sup> Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice – The New Adult Protection Law, p. 24

<sup>175</sup> Section 247 General Civil Code

<sup>176</sup> Section 248 General Civil Code

<sup>177</sup> Section 251 (1) General Civil Code

<sup>178</sup> Section 247 General Civil Code

increased up to a total of 10 per cent of the income and up to a total of 5 per cent of the additional assets valued in excess of € 15,000.<sup>179</sup>

The adult representative is entitled to reimbursement of expenses for cash expenses, actual expenses, liability insurance etc.

There are (also) no constitutional objections from the perspective of the principle of equality against the legislature requiring the person concerned, for whom services have been provided by a court-appointed adult representative, to finance the service in accordance with his or her income and assets. This applies in any case if it is ensured that what is reasonable for the person concerned on the one hand and the limit of adequacy of the compensation according to the services rendered on the other hand are not exceeded.<sup>180</sup>

#### Curatorship:

The curator's compensation shall amount to five per cent of the assets covered by the curatorship plus any value added tax paid. Liabilities shall not be taken into account when determining the value of the assets. If the curator is active for less than a full year his or her compensation shall be reduced accordingly.

The court shall reduce the compensation thus calculated if it considers this appropriate for special reasons; in particular if the activity involves only a small expenditure of time and effort due to its nature or scope or if the person represented has especially large assets. The court may assess the compensation to the extent of 10 per cent of the assets covered by the curatorship if the curator has rendered special services to the preservation or increase of the assets or if he or she has been active for an extraordinary short period of time due solely to the nature of the matter entrusted to him or her and the compensation calculated would therefore be unreasonably low.

If the trustee uses his or her special professional knowledge and skills for matters that would otherwise have to be entrusted to a third party that would require payment, he or she shall be entitled to additional appropriate remuneration. However, claims for additional remuneration shall not apply to the costs of legal representation if the person for whom the curator was appointed qualifies for legal aid or if these costs are reimbursed by the opposing party in accordance with statutory provisions.

The cash expenses necessary for the appropriate exercise of the curatorship, the actual expenses and the reasonable costs of a liability insurance policy taken out to cover liability under section 282 (2) of the General Civil Code shall be reimbursed to the curator insofar as they are not borne directly by third parties under statutory provisions. If the curator cannot reasonably be expected to provide proof of individual items, an appropriate lump sum shall be reimbursed.

## **26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**

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<sup>179</sup> Section 276 General Civil Code

<sup>180</sup> Austrian Constitutional Court, Judgement of 06.12.2021, G275/2021

- a. **if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- b. **if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

Court-appointed adult representation:

No matter shall have more than one representative. If the person in need of protection cannot manage a certain matter himself or herself or through the support of relatives or close persons, either an attorney or an elective or a statutory or a court-appointed adult representative shall act. In the appointment of an adult representative, the court may terminate an enduring power of attorney or a statutory or elective adult representative.<sup>181</sup> If the acting representative does not act or acts in breach of duty or if the welfare of the represented person requires it, the court must terminate his or her appointment.<sup>182</sup>

Adult representation cannot take place as long as an attorney is active.<sup>183</sup>

Although several adult representatives may be appointed for one person, each matter may have only one representative.<sup>184</sup> Overlapping sole authority, even over different aspects of the same matter, is excluded as is joint authority.<sup>185</sup>

Curatorship:

The curator is entrusted by the court for a specific representation of interests, therefore several curators for one matter are not permitted.

**27. Describe the organisation of supervision of state-ordered measures. Pay attention to:**

- a. **what competent authority is responsible for the supervision?**
- b. **what are the duties of the supervisory authority in this respect?**
- c. **what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- d. **describe the financial liability of the representative/support person for damages caused to the adult;**

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<sup>181</sup> Section 123 (2) Non-Contentious Proceedings Act

<sup>182</sup> Section 246 (3) number 1 General Civil Code

<sup>183</sup> Section 240 (2) General Civil Code

<sup>184</sup> Section 243 (3) General Civil Code

<sup>185</sup> R. FRITZ in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 668

- e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The appointed adult representatives are required to report the following to the court:<sup>186</sup>

- life situation report according to section 130 (1) of the Non-Contentious Proceedings Act
- annual report according to section 259 (1) of the General Civil Code
- statement of assets according to section 259 (2) of the General Civil Code.

Acts of representation in property matters that are outside the ordinary course of business operations<sup>187</sup> and/or important matters of personal care are subject to court approval.<sup>188</sup>

- f. what competent authority is responsible for the supervision?**

The guardianship court ("*Pflegschaftsgericht*"), i.e. the district court locally competent according to the place of residence of the person in need of protection, is competent for the supervision.<sup>189</sup>

- g. what are the duties of the supervisory authority in this respect?**

Court-appointed adult representation:

The court shall

- order the termination of the attorney or the elective or statutory adult representation,
- appoint a court-appointed adult representative if there is no elective or statutory adult representative available or if the representative fails to act or acts in breach of duty or if the welfare of the represented person otherwise requires it,
- transfer the court-appointed adult representation to another person if the representative dies, is unsuitable or is unreasonably burdened by the representation or the welfare of the represented person otherwise requires it,

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<sup>186</sup> M. SCHAUER in A. KLETEËKA and M. SCHAUER, *ABGB-ON*<sup>1-03</sup> Manz, Wien, section 259, marg. No. 1

<sup>187</sup> Section 258 (4) General Civil Code

<sup>188</sup> Section 250 (3) General Civil Code

<sup>189</sup> Section 104a, section 109 Court Jurisdiction Act

- terminate the court-appointed adult representation if the transferred matter has been settled or the conditions for the appointment pursuant to section 271 of the General Civil Code have ceased to exist; the extent of the termination of the adult representation shall extend only to the matters concerned.

Court-appointed adult representation may be extended as necessary.<sup>190</sup>

As with the appointment of a court-appointed adult representative, proceedings for the extension, limitation, transfer, renewal or termination of the representation may also occur at the request of the person in need of protection, or sua sponte.<sup>191</sup>

#### Curatorship:

The court shall examine at reasonable intervals whether the curatorship is to be changed or terminated.<sup>192</sup>

- h. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**

If the acting representative does not act or acts in breach of duty or if the welfare of the represented person requires it, the court shall terminate his or her appointment.<sup>193</sup>

- i. describe the financial liability of the representative/support person for damages caused to the adult;**

#### Court-appointed adult representation:

An attorney or adult representative is liable to the represented person for any damage caused by his or her fault.

The court may mitigate or waive the obligation to pay compensation insofar as it would be unreasonably harsh on the representative, taking into account all circumstances, in particular the degree of fault or his or her particular closeness to the represented person.<sup>194</sup>

#### Curatorship:

The curator shall be liable to the represented person for damages caused by his or her fault. The court may reduce or waive the obligation to pay compensation insofar as it would be unreasonably harsh on the curator, taking into account all

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<sup>190</sup> Section 246 (3) General Civil Code

<sup>191</sup> Section 128 Non-Contentious Proceedings Act

<sup>192</sup> Section 284 (3) General Civil Code

<sup>193</sup> Section 246 (3) No. 1 General Civil Code

<sup>194</sup> Section 249 (1) General Civil Code



the circumstances, especially the degree of fault or his or her closeness to the person represented.

- j. **describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

Generally, damages are to be compensated for by the individual tortuously causing them. Liability of a person in need of protection must be limited to adults with decision-making capacity.

Adult representatives are not personally liable for damages caused by adults in need of protection because they do not bear supervisory responsibility.<sup>195</sup>

## **28. Describe any safeguards related to:**

- a. **types of decisions of the adult and/or the representative/support person which need approval of the state authority;**

Transactions outside the ordinary course of business are presumptively invalid without court approval.<sup>196</sup>

- b. **unauthorised acts of the adult and of the representative/support person;**

The adult representative is liable for damages caused by his or her unlawful behavior. It is the duty of the adult representative to obtain court approval when required.<sup>197</sup>

Legal transactions of incapacitated adults are without effect unless done with an authorised representative or adult representative for the legal transaction in question. In cases done without an authorized representative or adult representative the legal transaction becomes effective upon the approval of the representative and, if necessary, of the court. Until such approval is granted the other party is bound by his or her contractual declaration but he or she may set a reasonable deadline for the representative to grant approval.<sup>198</sup>

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<sup>195</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenen-schutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 199

<sup>196</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenen-schutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 155

<sup>197</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenen-schutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 190

<sup>198</sup> Section 865 General Civil Code

**c. ill-conceived acts of the adult and of the representative/support person;**

The adult in need of protection is protected from ill-conceived acts of the adult representative as section 249 (1) of the General Civil Code requires that the representative be held liable for damages caused by his or her fault.

As long as the adult in need of protection possesses decision-making capacity and no subject to approval has been ordered, the adult in need of protection is not protected from his own ill-conceived acts.

**d. conflicts of interests**

A person whom the court intends to appoint as an adult representative shall immediately disclose to the court any circumstances that make him or her unsuitable. If such circumstances arise after appointment, he or she shall likewise disclose them without delay. If he or she culpably fails to make this disclosure, he or she is liable for all damages resulting to the represented person.<sup>199</sup> An analogous regulation exists for the curator.<sup>200</sup>

A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative ("collision"). In the second case, the legal representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them ("collision curator").

***End of the measure***

**29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.**

Court-appointed adult representation:

The appointment of a court-appointed adult representative ends with the completion of the assigned matter<sup>201</sup> or at the latest 3 years after appointment (with the possibility of renewal).<sup>202</sup>

Whether a matter for which the court-appointed adult representative has been appointed is "completed" and thus the adult representation is to be terminated or at

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<sup>199</sup> Section 273 (2) General Civil Code

<sup>200</sup> Section 280 (1) General Civil Code

<sup>201</sup> Section 272 (2) General Civil Code

<sup>202</sup> Section 246 (1) No. 6 General Civil Code

least restricted depends very much on the type of matter to be managed.<sup>203</sup> In order to avoid "restriction and extension ping-pong", it must be assessed whether additional matters will arise in the foreseeable future. Accordingly, the transferred matter is "completed" when there is nothing more for the adult representative to manage and there will be nothing more to do in the foreseeable future thus ending the need for representation. For the court to terminate court-appointed adult representation the transferred matters must have been completely settled.<sup>204</sup>

#### Curatorship:

The court shall transfer the curatorship to another person upon application of the curator or ex officio if the curator dies, if he or she is unsuitable or he or she is unreasonably burdened by the curatorship or if the interest of the represented person otherwise requires it.<sup>205</sup>

The court shall remove the curator on application or ex officio if the requirements for his or her appointment cease to exist; if these requirements cease to exist for only a part of the transferred matters, the scope of action shall be restricted. However, the scope of action shall be extended if the transferred matters increase. The curatorship shall expire upon the death of the person represented.

### *Reflection*

#### **30. Provide statistical data if available.**

Judicial guardianships under the Guardianship Law have increased from approximately 48.000 cases in 2009 to over 60.000 cases in 2015; after 2015, a slight decrease occurred; on 1 January 2019, 50.204 court-appointed adult representations under the Second Protection of Adults Act were recorded, which is a significant decrease compared to previous years.<sup>206</sup>

This trend has continued; a total of 45.709 court-appointed adult representations were registered on 1 January 2020 of whom 41% were assumed by close persons, 29% by representatives of the legal professions, 19% by adult protection associations and 11% by other representatives.<sup>207</sup>

#### **31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?**

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<sup>203</sup> F. PARAPATITS in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 272, marg. No. 8

<sup>204</sup> Supreme Court, Judgement of 26.02.2019, 8 Ob 6/19v

<sup>205</sup> Section 284 (1) and (2) General Civil Code

<sup>206</sup> Second and Third State Report of Austria 2019 on the UN Convention on the Rights of Persons with Disabilities, p. 52

<sup>207</sup> I. KOZA, 2. Erwachsenenschutz-Gesetz in Zahlen, *iFamZ* 2020, p. 23

The clearing procedure<sup>208</sup> pursuant to section 117a of the Non-Contentious Proceedings Act is an important procedural step for the appointment of a court-appointed adult representative, as it is intended to explore possible alternatives to the appointment of a representative - having regard to the right of the person in need of protection to self-determination arising from the UN Convention on the Rights of Persons with Disabilities.<sup>209</sup> Experience from practice shows that courts sometimes issue a clearing order without a concrete explanation of the type of procedure and the scope of content.<sup>210</sup> The suitability of the adult representative is not reviewed in a clearing procedure.

## **SECTION IV – VOLUNTARY MEASURES**

### *Overview*

#### **32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.**

Persons of full age who are restricted in their decision-making capacity due to a mental illness or a comparable impairment may either choose their own representation in legal transactions or receive representation if unavoidable for the protection of their rights and interests.<sup>211</sup> If the person himself or herself has made adequate provision for representation before his or her impairment occurred, no adult representative may act on his or her behalf.<sup>212</sup>

- Enduring power of attorney (*Vorsorgevollmacht*)

The person in need of protection can grant an enduring power of attorney before the occurrence of his or her impairment. This power of attorney, according to its contents, is to become effective when the grantor of the power loses his or her decision-making capacity required to manage the matters mentioned therein.<sup>213</sup> Prior to the loss of decision-making capacity, representation can be exercised only via a "simple" power of attorney,<sup>214</sup> however this power of attorney is then restricted when the loss of decision-making capacity occurs and an enduring power of attorney takes effect. Since a "simple" power of attorney cannot be registered

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<sup>208</sup> For further information see question 21

<sup>209</sup> E. GITSCHTHALER and M. SCHWEIGHOFER, *Erwachsenenschutzrecht, 2. Erwachsenenenschutz-Gesetz*, Manz, Wien 2017, p. 193

<sup>210</sup> R. MÜLLER, Clearing im neuen Erwachsenenenschutzrecht, *iFamZ* 2020, p. 25

<sup>211</sup> Section 240 (1) General Civil Code

<sup>212</sup> Section 240 (2) General Civil Code

<sup>213</sup> Section 260 General Civil Code

<sup>214</sup> Sections 1002 et seq. General Civil Code

in the Central Austrian Representation Register,<sup>215</sup> if there is no enduring power of attorney or if the “simple” power of attorney fails to stipulate that it continues to be valid as an enduring power of attorney,<sup>216</sup> it cannot be reinterpreted as an enduring power of attorney.<sup>217</sup>

- Adult representative decree (*Erwachsenenvertreter-Verfügung*)

At a time when the person in need of protection still has at least limited decision-making capacity, he or she can draw up an adult representative decree pursuant to section 244 of the General Civil Code, i.e. designate someone who is to act as adult representative for him or her if necessary or intentionally exclude a specific person.

A person named in the adult representative decree becomes a "next of kin"<sup>218</sup> and thus a legal adult representative<sup>219</sup> and must be given priority by the court in the selection of a court-appointed adult representative pursuant to section 274 (1) of the General Civil Code.

- Elective adult representation (*Gewählte Erwachsenenvertretung*)

If a person of full age cannot manage his or her affairs due to mental illness or a comparable impairment of decision-making capacity and can no longer create an enduring power of attorney but is still capable of understanding the basic meaning and consequences of a power of attorney and of determining his or her will and acting accordingly, and if he or she has no adult representative, he or she may select one or more persons close to him or her as an elective adult representative to manage these affairs.<sup>220</sup>

- Patient decree (*Patientenverfügung*)

A special regulation in the law of medical treatment provides for a "patient decree", a declaration of will by which a patient refuses medical treatment and which is intended to take effect if he or she is not capable of making decisions at the time of treatment.<sup>221</sup>

**33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:**

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<sup>215</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 36

<sup>216</sup> Supreme Court, Judgement of 28.06.2018, 6 Ob 99/18d; 5 Ob 172/18g

<sup>217</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 260, marg. No. 7

<sup>218</sup> M. ROTH, *Außerstreitverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 206

<sup>219</sup> Section 268 (2) General Civil Code

<sup>220</sup> Section 264 General Civil Code

<sup>221</sup> Section 2 (1) Patient Decree Act (*Patientenverfügungsgesetz – PatVG*), Federal Law Gazette I No. 55/2006 in the version of Federal Law Gazette I No. 12/2019

- a. the existence of specific provisions regulating voluntary measures;**
- b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

The provisions on the enduring power of attorney are found in section 260 et seq. of the General Civil Code, the provisions on elected adult representation are found in sections 264 et seq. of the General Civil Code.

**a. Specific provisions**

The enduring power of attorney is a special power of attorney providing for the representation of adults in need of protection that is subject to formal requirements such as to be in writing before a notary, lawyer or adult protection association and becomes effective only upon entry in the Central Austrian Representation Register.<sup>222</sup> The enduring power of attorney is an unilateral act created by the adult in need of protection. Therefore, the person appointed to be the representative is not bound until responsibility is accepted.<sup>223</sup>

These formal requirements apply equally to elective adult representation.<sup>224</sup> The Patient Decree Act establishes the legal basis for the patient decree. The patient decree - like the power of attorney<sup>225</sup> - is a unilateral declaration of will.

The establishment of a trust or a trust-like institution to represent an adult in need of protection as a voluntary measure is alien to Austrian law.

**b. General provisions**

A civil law power of attorney for representation in a specific matter<sup>226</sup> requires legal capacity on the part of the principal, but is otherwise not bound by any formal requirements.<sup>227</sup>

**34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.**

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<sup>222</sup> Sections 262, 263 General Civil Code

<sup>223</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 594

<sup>224</sup> Sections 266, 267 General Civil Code

<sup>225</sup> S.PERNER, M. SPITZER and G. KODEK, *Bürgerliches Recht*, 6th edition, Manz, Wien 2019, p. 135

<sup>226</sup> Sections 1002 et seq. General Civil Code

<sup>227</sup> Sections 1005 General Civil Code

The enduring power of attorney must be executed and registered in the Central Austrian Representation Register at a time when the person in need of protection still has full decision-making capacity.<sup>228</sup>

If a person of full age cannot manage his or her affairs due to mental illness or a comparable impairment of decision-making capacity but is still capable of understanding the basic meaning and consequences of a power of attorney and of determining his or her will and acting accordingly, he or she may select an elective adult representative.

The existence of an enduring power of attorney for a specific matter supersedes an elective adult representation for this matter.<sup>229</sup>

**35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?**

The enduring power of attorney may be granted for individual matters or for types of matters,<sup>230</sup> thus it may also apply to matters of personal law, property law or medical treatment.<sup>231</sup>

The elective adult representation covers individual matters or types of matters agreed upon by the person in need of protection and the adult representative and includes representation of the agreed matters in court if not expressly excluded.<sup>232</sup> The purpose of the patient decree is to exclude specific medical treatments.

*Start of the measure*

*Legal grounds and procedure*

**36. Who has the capacity to grant a voluntary measure?**

The person seeking protection must himself or herself grant an enduring power of attorney or conclude an agreement for an elective adult representation or declare a patient decree.

A person who wishes to grant a voluntary measure must have at least limited decision-making capacity to act for this declaration of intent.

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<sup>228</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 260, marg. No. 5

<sup>229</sup> Section 240 (2) General Civil Code

<sup>230</sup> Section 261 General Civil Code

<sup>231</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 261, marg. No. 3

<sup>232</sup> Section 265 (4) General Civil Code

**37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.**

Procedurally, as long as he or she still has decision-making capacity, the person in need of protection issues the enduring power of attorney in writing before a notary, lawyer or adult protection association, that is to be registered in the Central Austrian Representation Register. The enduring power of attorney becomes operative only upon the precautionary event when the person in need of protection loses his or her decision-making capacity in the matter in question and the occurrence of the precautionary event is registered in the Central Austrian Representation Register.<sup>233</sup>

The written agreement on an elective adult representation must also be drawn up before a notary, lawyer or adult protection association and registered in the Central Austrian Representation Register to become effective.<sup>234</sup>

A patient decree (also in writing) may be drawn up before a notary, lawyer, patient representation or adult protection association.<sup>235</sup>

**38. Describe when and how voluntary measures enter into force. Please consider:**

- a. the circumstances under which voluntary measures enter into force;**
- b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. who is entitled to initiate the measure entering into force?**
- d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?**

**a. Circumstances**

An enduring power of attorney registered in the Central Austrian Representation Register shall become effective only if the person in need of protection loses his or her decision-making capacity in a matter cited in the power of attorney and the occurrence of this loss of decision-making capacity is registered in the Central Austrian Representation Register. An enduring power of attorney is subject to the condition precedent that it shall only become effective upon the so-called "precautionary event".

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<sup>233</sup> Sections 262, 263 General Civil Code

<sup>234</sup> Sections 266, 267 General Civil Code

<sup>235</sup> Section 6 (1) Patient Decree Act



An adult representative decree becomes effective if the person no longer has the decision-making capacity to act in certain matters and there is no enduring power of attorney.

An elective adult representative becomes effective if the decision-making capacity for certain matters is no longer present, but the person is still able to appoint a close relative as representative and neither an enduring power of attorney nor an adult representative decree has been established.

A patient decree becomes effective if the person is no longer able to give consent at the time when medical treatment is to be given.

## **b. Formalities**

The registration of the coming into effect of the enduring power of attorney in the Central Austrian Representation Register has constitutive effect.<sup>236</sup>

An adult representative decree must be drawn up before a notary, lawyer, patient representation or adult protection association and must be registered in the Central Austrian Representation Register. However, it does not have to be registered immediately after establishment, but only becomes effective after registration.<sup>237</sup>

An elective adult representation is also to be entered in the Central Austrian Representation Register.

A patient decree does not need to be registered in the Central Austrian Representation Register but must be drawn up before a notary, lawyer, patient representation or adult protection association.

## **c. Initiation**

Pursuant to the first sentence of section 140h (5) of the Code on Notaries, the person of full age or the person who wishes to be registered under a power of attorney must certify the existence of the prerequisites for the enduring power of attorney and the occurrence of the contingency. In connection with the coming into effect of the enduring power of attorney, according to the second sentence of section 140h (5) of the Code on Notaries, an appropriate medical certificate must be submitted stating that the person of full age is so limited in his or her decision-making capacity due to a mental illness or a comparable impairment that he or she is unable to take care of the matters covered by the scope of the representation. If the notary or the lawyer or the employee of the adult protection association has justifiable doubts about the occurrence of the loss of decision-making capacity, he or she must refuse to register the occurrence of the precautionary event and must

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<sup>236</sup> M. ROTH, *Außerstreiverfahrensrecht*, 7<sup>th</sup> edition, Sramek, Wien 2023, p. 209; Supreme Court, Judgement of 24.09.2019, 5 Ob 145/19p

<sup>237</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 108

immediately inform the guardianship court if there are justifiable indications that the welfare of the adult person is endangered.<sup>238</sup>

#### **d. Registration**

The elective adult representation becomes effective upon registration in the Central Austrian Representation Register. Here, too, the notary, the lawyer or the employee of the adult protection association must refuse the registration in case of justifiable doubts about the existence of the prerequisites of the chosen adult representation and immediately inform the guardianship court in case of justifiable indications that the welfare of the adult person is endangered.<sup>239</sup>

This also applies to the registration of an adult representative decree or an elective adult representation.

The patient decree comes into force when it is executed after the patient is fully medically informed<sup>240</sup> and is valid for a maximum of 8 years with the possibility of renewal or for an unlimited period in the event of a loss of decision-making capacity.<sup>241</sup>

#### *Appointment of representatives/support persons*

- 39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:**
- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
  - b. what are the safeguards as to conflicts of interests?**
  - c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

#### **a. Requirements**

Natural persons who have a close private relationship with the person in need of protection e.g. close relatives other close persons have priority but notaries, lawyers and adult protection associations may also be selected for an enduring power of attorney. However, this does not apply to an elective adult representation, as there must be a certain relationship of trust (close relationship), which does not exist in the relationship with a professional legal representative or an organisation.<sup>242</sup>

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<sup>238</sup> Section 263 (2) General Civil Code

<sup>239</sup> Section 267 (2) General Civil Code

<sup>240</sup> Sections 5, 6 Patient Decree Act

<sup>241</sup> Section 7 Patient Decree Act

<sup>242</sup> R. FRITZ in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 666

According to section 243 (1) of the General Civil Code a person may not be appointed as an attorney or adult representative if he or she

- is himself or herself entitled to protection within the meaning of section 21 (1) of the General Civil Code,
- cannot be expected to exercise the representation in a manner conducive to the welfare of the adult, for example because of a criminal conviction, or
- is in a relationship of dependence or in a comparably close relationship to an institution in which the adult person is staying or by which he or she is being cared for.

A person may only assume as many powers of attorney and adult representations as he or she is able to properly manage, taking into account the associated duties, especially those regarding personal contact. In total, a person - with the exception of an adult protection association - may not assume more than 15 powers of attorney and adult representations. A notary or candidate notary or a lawyer or candidate lawyer may exceed this number if he or she is registered as active in the list of lawyers or notaries especially qualified to assume enduring powers of attorney and court-appointed adult representation.<sup>243</sup>

#### **b. Conflicts of interests**

Conflicts of interest may limit the suitability of the representative if there is reason to believe, based on concrete circumstances, that the interests of the person in need of protection are likely to be harmed. A merely abstract possibility (based on the close relationship alone) is not sufficient for this purpose.<sup>244</sup>

An adult representative shall immediately disclose to the court any circumstances that make him or her unsuitable. If such circumstances arise after appointment, he or she shall likewise disclose them without delay.<sup>245</sup>

A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative ("collision"). In the second case, the legal representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them ("collision curator").<sup>246</sup>

#### **c. Several persons/one single measure**

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<sup>243</sup> Section 243 (2) General Civil Code

<sup>244</sup> R. FRITZ in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 667

<sup>245</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 243 marg. no. 11 (status 1.8.2019, rdb.at)

<sup>246</sup> Section 277 (2) General Civil Code

Several adult representatives may only be appointed for one person, each with a different scope of action, and be entered in the Central Austrian Representation Register.<sup>247</sup>

The patient decree does not provide for representation within its framework, however, representation such as an enduring power of attorney, which must in any case be confined to the content of the patient decree, may be added.

### *During the measure*

### *Legal effects of the measure*

#### **40. To what extent are the voluntary measure and the wishes expressed within it legally binding?**

The enduring power of attorney itself as well as the commencement of the representation require registration in the Central Austrian Representation Register at which point it becomes effective.<sup>248</sup> The adult representative is bound to act in accordance with the wishes of the person in need of protection<sup>249</sup> and only within his or her scope of authority.<sup>250</sup>

Similarly, an elective adult representation becomes effective as of registration in the Central Austrian Representation Register.<sup>251</sup>

An amendment, transfer or termination of these measures also becomes effective upon registration in the Central Austrian Representation Register.<sup>252</sup>

The registration in the Central Austrian Representation Register has constitutive effect and therefore is legally binding.

A patient decree becomes effective upon its execution.<sup>253</sup>

While patient decrees are generally binding, according to the Section 11 of the Patient Decree Code, unlimited wishes and instructions can be added to a patient decree. However, instructions or wishes that are unlawful or repugnant to societal mores, such as requests for assisted suicide, are not binding. Some instructions are not binding due to impossibility of fulfilment. Finally, instructions to which the grantor is not entitled are not binding.<sup>254</sup>

#### **41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?**

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<sup>247</sup> Section 243 (3) General Civil Code

<sup>248</sup> Section 245 (1) General Civil Code

<sup>249</sup> Section 241 (1) General Civil Code

<sup>250</sup> Section 261 (1) General Civil Code

<sup>251</sup> Section 245 (2) General Civil Code

<sup>252</sup> Section 246 General Civil Code

<sup>253</sup> Section 6 (1) Patient Decree Act

<sup>254</sup> U. PESENDORFER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 432

A represented persons capacity to act is not restricted by an enduring power of attorney or adult representation.<sup>255</sup>

In the absence of decision-making capacity, persons in need of such protection participate in legal transactions through their voluntarily chosen representation. However, if a person lacking decision-making capacity concludes a legal transaction in daily life that does not exceed his or her living conditions, the transaction becomes legally effective retroactively upon fulfilment of the obligations incumbent upon him or her.<sup>256</sup>

Court approval is required in the case of a disagreement between the representative and the person in need of protection concerning matters such as medical treatment and research or permanent change of residence.<sup>257</sup> Court approval must also be obtained by the elective adult representative for property transactions outside the ordinary course of business<sup>258</sup> and for payments exceeding € 10,000.<sup>259</sup>

Transactions outside the ordinary course of business include: the sale or encumbrance of real estate; the establishment or acquisition, including under inheritance law, of an enterprise including its conversion, sale or dissolution; the conversion including under inheritance law of a company or partnership; the waiver of a right of inheritance; the unconditional acceptance or decline of an inheritance; the acceptance of gifts subject to encumbrances or the rejection of a gift offer; the investment of money with the exception of the types regulated in section 216 and 217 of the General Civil Code and the filing of a lawsuit and all procedural dispositions that concern the subject matter of the proceedings. However, according to section 167 (3) of the General Civil Code the receipt of declarations of intent and documents for service are not included.<sup>260</sup>

### *Powers and duties of the representative/support person*

#### **42. Describe the powers and duties of the representative/support person:**

##### **a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**

- **property and financial matters;**
- **personal and family matters;**
- **care and medical matters?**

With the acceptance of an adult representation, the representative acquires rights as well as duties.<sup>261</sup> These duties are derived either from the enduring

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<sup>255</sup> Section 242 (1) General Civil Code

<sup>256</sup> Section 242 (3) General Civil Code

<sup>257</sup> Sections 253 - 257 General Civil Code

<sup>258</sup> Section 258 (4) General Civil Code

<sup>259</sup> Section 258 (3) General Civil Code

<sup>260</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 258, marg. No. 20

<sup>261</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 635

power of attorney, the statutes regulating general power of attorneys contracts of assignments<sup>262</sup> or the special provisions for adult representation.<sup>263</sup> The adult representative has the power to act in the name of the adult in need of protection within his scope of authority. This can include: property and financial matters; personal and family matters and care and medical matters.

Acts of representation by an adult representative in property matters require court approval in order to be legally effective unless the property matter is part of ordinary business operations.<sup>264</sup>

Acts of representation by an adult representative in financial matters require the notification of the adult in need of protection and must provide reasonable time to respond to the request. The representative shall act in accordance with the wishes of the person in need of protection unless his welfare otherwise requires.<sup>265</sup>

In matters of personal law, the representative may act only if his or her scope of authority includes these matters, the represented person is not capable of making decisions, representation is not excluded by law and it is necessary to safeguard the welfare of the represented person.

Representation is excluded by law from drafting a testamentary disposition<sup>266</sup>, a patient decree<sup>267</sup>, an enduring power of attorney<sup>268</sup>, a declaration of acknowledgment of paternity<sup>269</sup> and adoption<sup>270</sup> or betrothal of marriage.<sup>271</sup>

In other personal law matters, the represented person may refuse representation. Representation in this case i.e. against the will of the represented person is possible only if his or her welfare would otherwise be significantly endangered. In important personal law matters, the adult representative must also obtain court approval.<sup>272</sup>

An adult representative is not required to take care of the represented person himself or herself, but he or she must organise such care.<sup>273</sup> Care includes assistance with dressing and undressing, personal hygiene, preparing and taking meals, taking medication and achieving sufficient mobility.<sup>274</sup>

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<sup>262</sup> Section 1002 et. seq. General Civil Code

<sup>263</sup> Sections 239 – 259 General Civil Code

<sup>264</sup> Section 258 (4) General Civil Code

<sup>265</sup> Section 241 (2) General Civil Code

<sup>266</sup> Section 564 General Civil Code

<sup>267</sup> Section 3 Patient Decree Act

<sup>268</sup> Section 262 (1) General Civil Code

<sup>269</sup> Section 141 (3) General Civil Code

<sup>270</sup> Section 191 (1) General Civil Code

<sup>271</sup> Section 17 Austrian Marriage Act (*Ehegesetz - EheG*), German Imperial Law Gazette (*deutsches Reichsgesetzblatt, dRGBI*) I S No. 807/1938, in the version of Federal Law Gazette I No. 59/2017

<sup>272</sup> Section 250 General Civil Code

<sup>273</sup> Section 251 General Civil Code

<sup>274</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 29

Medical treatment of a person lacking decision-making capacity requires the consent of the representative except in an emergency, involving danger to life or health or severe pain. The representative must give due consideration to the will of the represented person. In case of disagreement between the person in need of protection and the representative, judicial authorisation must be obtained;<sup>275</sup> if a valid and binding patient decree exists, the treatment must be withheld in any case.<sup>276</sup>

Medical treatment is defined to be treatment carried out by a member of a legally recognised health profession such as doctors and members of the health and nursing professions.

It does not include health professions who are not regulated by a separate professional law, for example members of health-related trades such as opticians, hearing aid acousticians, dental technicians, etc.<sup>277</sup>

A decision to change the place of residence of the person in need of protection shall be made by the representative as the welfare of the represented person requires. Court approval is required in case of a permanent change.<sup>278</sup>

**b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

The agreement of elective adult representation may, with the exception of representation before the court, provide that the adult representative may perform legally effective acts of representation only when in agreement with the represented person. Likewise, the agreement, with the exception of representation in court, may provide that the represented person himself or herself can make legally effective declarations only with the authorisation of the adult representative.<sup>279</sup>

The adult representative shall act in accordance with wishes and ideas of the person in need of protection as far as possible without endangering his or her well-being.<sup>280</sup>

**c. is there a duty of the representative/support person to inform and consult the adult?**

An attorney or adult representative shall timely notify the represented person of contemplated decisions concerning his or her person or property and shall give him or her reasonable time to comment on them.

The statement of the represented person shall be given due consideration unless this would significantly endanger his or her well-being.<sup>281</sup>

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<sup>275</sup> Section 254 (1) General Civil Code

<sup>276</sup> Section 253 General Civil Code

<sup>277</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 30

<sup>278</sup> Section 257 General Civil Code

<sup>279</sup> Section 265 (2) General Civil Code

<sup>280</sup> Section 241 (1) General Civil Code

<sup>281</sup> Section 241 (2) General Civil Code

**d. is there a right to receive remuneration (how and by whom is it provided)?**

The represented person shall reimburse the elected adult representative for the cash expenses incurred by the representation together with the actual expenses and liability insurance costs insofar as they are not born directly by third parties pursuant to statute. In cases where it is unreasonable to require the representative to produce proof of individual expenditures he or she may be reimbursed with an appropriate lump-sum amount.<sup>282</sup>

Expenses incurred by the adult representative shall be reimbursed<sup>283</sup> but remuneration shall occur only if agreed to in the power of attorney.<sup>284</sup>

**43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**

**a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**

Simultaneous representation by several adult representatives in the same matter is excluded,<sup>285</sup> but multiple enduring powers of attorney including "joint representation" i.e. with several representatives may be concluded.<sup>286</sup>

**b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

The grantor of an enduring power of attorney may grant a power of attorney in certain matters to several persons jointly. In this case, the consent of all representatives must be present for an effective act of representation.<sup>287</sup>

Several representatives may also be appointed in the same matter, who may also act individually (without the consent of the others). However, this only applies to the enduring power of attorney, not to the adult representation.<sup>288</sup>

**44. Describe the interaction with other measures. Please consider:**

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<sup>282</sup> Section 249 (2) General Civil Code

<sup>283</sup> Section 1014 General Civil Code

<sup>284</sup> Section 1013 General Civil Code

<sup>285</sup> Section 243 (3) General Civil Code

<sup>286</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 30

<sup>287</sup> Section 1011 General Civil Code

<sup>288</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 633



- a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**

Several measures may not take effect at the same time in the same matter or type of matter. If an enduring power of attorney exists no adult representation may take place.<sup>289</sup>

In cases of an elective adult representation additional measures, e.g. state-ordered measures and statutory measures are possible as long as the representatives have different matters. The matter assigned to one adult representative blocks assignment to other adult representatives. Therefore, joint representation is not permitted.<sup>290</sup>

- b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

All representation relationships must be entered in the Central Austrian Representation Register. This register can be inspected by certain authorities (social insurance institutions, social welfare institutions) or information can be obtained from the guardianship court.<sup>291</sup>

**45. Describe the safeguards against:**

- a. unauthorised acts of the adult and of the representative/support person;**
- b. ill-conceived acts of the adult and of the representative/support person;**
- c. conflicts of interests**

**Please consider the position of the adult, contractual parties and third parties.**

- a. Unauthorized acts**

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<sup>289</sup> Section 240 (2) General Civil Code

<sup>290</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 243 marg. No. 21

<sup>291</sup> S. BACHER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 822

The legal consequences in the event of an inadmissible act of representation by the representative are governed by general civil law provisions: such acts of representation are absolutely void and trigger any obligations to pay damages.<sup>292</sup> The court shall order the termination of the enduring power of attorney or the elective adult representative. The court shall appoint, if necessary, a court-appointed adult representative if the representative fails to act or acts in breach of duty or if the welfare of the represented person otherwise requires it.<sup>293</sup> The adult representative is liable for damages caused by his or her unlawful conduct. It is the duty of the adult representative to obtain court approval when required.<sup>294</sup>

Legal transactions of incapacitated adults are without effect unless done with an authorised representative or adult representative for the legal transaction in question. In cases done without an authorized representative or adult representative the legal transaction becomes effective upon the approval of the representative and, if necessary, of the court. Until such approval is granted the other party is bound by his or her contractual declaration but he or she may set a reasonable deadline for the representative to grant approval.<sup>295</sup>

#### **b. Ill-conceived acts**

If ill-conceived acts lead to damage, the person acting shall be liable for any damage. This applies to both the representative and the represented person.<sup>296</sup> However, fault is a prerequisite in every case. An attorney or adult representative is liable to the represented person for any damages caused by his or her fault. The court may mitigate or waive the obligation to pay compensation unless it would be unreasonably harsh on the representative, taking into account all circumstances, especially the degree of fault or his or her closeness to the represented person.<sup>297</sup>

#### **c. Conflicts of interests**

An adult representative shall immediately disclose to the court any circumstances that make him or her unsuitable. If such circumstances arise after appointment, he or she shall likewise disclose them without delay.<sup>298</sup>

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<sup>292</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 613

<sup>293</sup> Section 246 (3) General Civil Code

<sup>294</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 190

<sup>295</sup> Section 865 General Civil Code

<sup>296</sup> Section 1014 General Civil Code

<sup>297</sup> Section 249 (1) General Civil Code

<sup>298</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 243 marg. No.11

A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative (“collision”). In the second case, the representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them (“collision curator”).

In principle, self-dealing is inadmissible and legally ineffective. This also applies to double representation in the case of a conflict of interests.<sup>299</sup>

**46. Describe the system of supervision, if any, of voluntary measures. Specify the legal sources. Please specify:**

**a. is supervision conducted:**

- **by competent authorities;**
- **by person(s) appointed by the voluntary measure.**

Section 259 of the General Civil Code regulates judicial supervision of adult representation.

The locally competent district court conducts its supervision by requiring court approval in certain matters. The matters included are: medical treatment in cases in which the adult representative approves of a treatment while the adult in need of protection does not agree to the treatment<sup>300</sup>; in cases in which the representative wants to move the residence of the adult in need of protection to a foreign country<sup>301</sup>; in cases in which sterilisation is required<sup>302</sup>; and in cases in which the representative seeks medical research to be performed on the adult in need of protection. In all other cases court approval is not required. The court is limited in its supervision to cases regarding abuse of power of the adult representative. However, the court can always appoint an adult representative in cases of conflict of interest or when examining the proper execution of the duties of the adult representative.<sup>303</sup>

An adult representative shall report annually to the court on the nature and frequency of his or her personal contacts with the represented person, his or her place of residence, his or her mental and physical condition and the matters attended to for him or her in the past year and those to be attended to in the coming year.

An adult representative who is entrusted with the administration of the assets or the income of the represented person shall, upon assuming management of the

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<sup>299</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p.633

<sup>300</sup> Section 254 (1) General Civil Code

<sup>301</sup> Section 257 (3) and (4) General Civil Code

<sup>302</sup> Section 255 (2) General Civil Code

<sup>303</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 634

assets and after a thorough investigation of the state of the assets, declare the assets in detail to the court and subsequently render an account. To avoid endangering the welfare of the represented person, the court shall supervise his or her activities and shall issue the orders necessary for this purpose.

An attorney or adult representative is required to hold the power of attorney document as well as the medical certificates required under section 140h of the Code on Notaries until the termination of his or her representation and shall submit them to the court upon request.

Monitoring by other institutions or persons is not intended.

**b. in each case, what is the nature of the supervision and how is it carried out?**

The nature of the supervision of the adult representative can be defined as a duty to report to the court.

Supervision by a court of competent authority includes review of matters subject of approval and a duty to intervene when appropriate. Generally, to comply with requirements of supervision, the adult representative shall report to the court.

If the welfare of a represented person is endangered, the court, *ex officio*, shall at any time issue orders necessary to safeguard his or her welfare.<sup>304</sup>

**c. the existence of measures that fall outside the scope of official supervision.**

Matters not named in section a) of this question (46) are not subject to official supervision.<sup>305</sup>

If an enduring power of attorney exists, there is no regular judicial or extrajudicial review of the representative's actions. However, anyone can appeal to the court if there is a fear of abuse of the enduring power of attorney.<sup>306</sup>

*End of the measure*

**47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.**

The enduring power of attorney or the elective adult representation ends pursuant to section 246 (1) of the General Civil Code

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<sup>304</sup> Section 259 (4) General Civil Code

<sup>305</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 634

<sup>306</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 597

- with the death of the represented person or his or her representative,
- by court decision,
- by the entry of the revocation or termination of a power of attorney or the cessation of the case of the incapacity in the Central Austrian Representation Register,
- by the entry of the revocation or termination of an elected adult representation in the Central Austrian Representation Register.

To revoke or object to the adult representation, it is sufficient if the represented person indicates that he or she no longer wishes to be represented. He or she cannot waive this option. The recording of the revocation or objection must be made at the request of the represented person or his or her representative. A binding patient decree according to section 4 of the Patient Decree Act ends with the expiry of time after 8 years unless renewed.<sup>307</sup> The patient may revoke the patient decree at any time.<sup>308</sup>

Until the revocation or the termination of a power of attorney is registered in the Central Austrian Representation Register, the adult representative remains in effect. Therefore, the adult representative can still act in the name of the adult in need of protection. However, as soon as he or she is informed that the grantor wishes to no longer be represented by him or her, the adult representative may not act in the name of the adult in need of protection and he or she has a duty to register the termination in the Central Austrian Representation Register.<sup>309</sup>

## ***Reflection***

### **48. Provide statistical data if available.**

As of 1 January 2020, 150.607 enduring powers of attorney and 2.456 elected adult representatives were registered in the Central Austrian Representation Register.<sup>310</sup>

### **49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measure been evaluated, if so what are the outcomes?**

The type of representation referred to as "co-decision" in section 265 (2) of the General Civil Code is intended as a form of expression of self-determination in adult protection law that sometimes causes problems in everyday legal practice. For example, in legal transactions a third party dealing with the represented person may be unclear, because he lacks knowledge of the contents of the representation,

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<sup>307</sup> Section 7 Patient Decree Act

<sup>308</sup> Section 10 (2) Patient Decree Act

<sup>309</sup> M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 629

<sup>310</sup> I. KOZA, 2. Erwachsenenschutz-Gesetz in Zahlen, *iFamZ* 2020, p. 23

whether the requirements of the representation for the consent of the representative have been complied with. An agreement with a person in need of protection may be rendered invalid by that person or his representative. The party dealing with the person in need of representation must wait for consent by that person's representative unless he sets a deadline.<sup>311</sup>

## **SECTION V – EX LEGE REPRESENTATION**

### *Overview*

#### **50. Does your system have specific provisions for *ex lege* representation of vulnerable adults?**

Statutory representation of adults in need of protection is provided for in sections 268 to 270 of the General Civil Code.

#### **51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?**

A person of full age may be represented in certain matters by one or more next of kin, if he or she

- due to mental illness or a comparable impairment of his or her decision-making capacity cannot attend to these matters without risk of harm to himself or herself,
- has no representative for these matters
- is no longer able or willing to choose such a representative, and
- has not objected to statutory adult representation in advance and his or her objection has been registered in the Central Austrian Representation Register.<sup>312</sup>

Statutory adult representation is therefore considered only if elected adult representation is not possible.<sup>313</sup>

While alcohol and drug consumption because it is a temporary impairment is not categorized as a “comparable impairment,” substance abuse can lead to chronic damage ,e.g. organic brain damage or alcohol or drug infused psychosis that fall under the term of a comparable impairment and can lead to loss of decision-making and therefore to a court appointed adult representation.

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<sup>311</sup> M. SCHWEIGHOFER, Die gewählte Erwachsenenvertretung, *ÖZPR* 2019/48, p.86

<sup>312</sup> Section 268 (1) General Civil Code

<sup>313</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 268, marg. No. 2

A physical impairment is grounds for a measure only when it is accompanied by a mental illness or a comparable impairment regarding decision-making capacity.<sup>314</sup>

**52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?**

The requirements for the registration of adult representation must be certified in accordance with the sixth main chapter of the first part of the General Civil Code. A medical certificate must be submitted stating that the person to be represented is unable to manage the matters covered by the representative's scope of authority due to his/her limited decision-making capacity that is caused by a mental illness or a comparable impairment.<sup>315</sup>

The representative is required to hold this medical certificate which shall be submitted to the court upon request.<sup>316</sup>

If the notary, lawyer or employee of the adult protection association has reasonable doubts as to the existence of the requirements for statutory adult representation, he or she shall refuse the registration and, if there are reasonable indications that the welfare of the adult is endangered, he or she shall immediately inform the guardianship court.<sup>317</sup>

**53. Is it necessary to register, give publicity or to give any other kind of notice of the *ex-lege* representation?**

The statutory adult representation is to be entered in the Central Austrian Representation Register by a notary, a lawyer or an adult protection association.<sup>318</sup>

***Representatives/support persons***

**54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.**

Next of kin may be registered as statutory adult representatives. Pursuant to section 268 (2) of the General Civil Code next of kin of the person in need of protection who is of full age are:

Parents and grandparents, children of full age and grandchildren, siblings, nieces and nephews of the person in need of protection who is of full age, his or her spouse or registered partner and his or her cohabiting partner if the latter has lived with him or her in the same household for at least three years, as well as the person

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<sup>314</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenen-schutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 34

<sup>315</sup> Section 140h Code on Notaries

<sup>316</sup> Section 259 (3) General Civil Code

<sup>317</sup> Section 270 (2) General Civil Code

<sup>318</sup> Section 270 (1) General Civil Code

designated by the person of full age in need of protection in an adult representative decree.

Relatives have equal priority to act as representative. Practical problems such as the need to investigate might arise if individual groups of persons are given priority over others, however, a statutorily fixed hierarchy method of choosing a representative might not correspond to the actual living situation of the family. Yet, as noted in the review procedure, the lack of a statutory ranking system can lead to family disputes. The purpose of this regulation is to fashion statutory adult representation as a model for functioning family associations that constitute the great majority of cases. In principle, a family itself is to agree on who is to act as the statutory adult representative and the representative's areas of responsibility. If the family cannot agree, or if disputes arise despite a "hierarchy" of relatives, a court appointed representative is required.<sup>319</sup>

**55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

The powers of representation may cover the following areas:

- a. Representation in administrative proceedings and administrative court proceedings,
- b. Representation in judicial proceedings,
- c. Management of income, assets and liabilities,
- d. Conclusion of legal transactions to cover the need for care and assistance,
- e. Decisions on medical treatment and conclusion of related contracts,
- f. Change of residence and conclusion of home contracts,
- g. Representation in matters of personal law not mentioned in lit. e) and f), and
- h. Conclusion of legal transactions not mentioned in lit. d) to f).

The scope of the matters regulated in lit. c) to h) always includes representation in court and the power to dispose of current income and the assets of the represented person to the extent that this is necessary for the performance of legal transactions.<sup>320</sup>

The powers of representation extend to business activities or shares owned in a company but do not extend to corporate actions.<sup>321</sup>

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<sup>319</sup> Explanatory notes to the Governmental Proposal 1461 of the addenda to the stenographic protocol of the national council, XV. legislation period, p. 41

<sup>320</sup> Section 269 General Civil Code

<sup>321</sup> M. SCHAUER, *Erwachsenenschutz und Unternehmensrecht*, in A. DEIXLER-HÜBNER and M. SCHAUER (eds), *Erwachsenenschutzrecht*, Manz, Wien 2018, p. 85 et seq.



**56. What are the legal effects of the representative's acts?**

**Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?**

The person in need of protection participates in the matters covered by the representation through his or her representative to the extent that it is unavoidable for the protection of his or her rights and interests.<sup>322</sup>

In an adult representative decree pursuant to section 244 of the General Civil Code, an adult who is still capable of making decisions may also identify persons who may not act as adult representatives in case of need.<sup>323</sup> The represented person may object to statutory adult representation at any time. The registration of the objection in the Central Austrian Representation Register terminates the statutory adult representation.

**57. Describe how this *ex lege* representation interacts with other measures? Think of subsidiarity**

Statutory adult representation is only possible if there is no enduring power of attorney for a given purpose and no elected adult representation exists. If there is statutory adult representation, there may not be a court-appointed adult representation for the same matter.<sup>324</sup>

***Safeguards and supervision***

**58. Are there any safeguards or supervision regarding *ex lege* representation?**

Statutory adult representation is also subject to judicial review.<sup>325</sup> The adult representative must annually report to the court on the represented person and the acts of representation as well as a statement of assets and accounts. The court may issue orders in this regard.

***End of the ex-lege representation***

**59. Provide a general description of the end of each instance of *ex-lege* representation.**

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<sup>322</sup> Section 240 (1) General Civil Code

<sup>323</sup> Section 244 (1) General Civil Code

<sup>324</sup> Section 271 No. 4 General Civil Code

<sup>325</sup> Section 259 General Civil Code

The statutory adult representation ends

- with the death of the represented person or his or her representative,
- by court decision, or
- by the registration of the objection of the represented person or his or her representative in the Central Austrian Representation Register, or
- with the expiry of three years unless it is re-registered beforehand.<sup>326</sup>

### ***Reflection***

#### **60. Provide statistical data if available.**

On 1 January 2020, 11.507 statutory adult representations were registered in the Central Austrian Representation Register.<sup>327</sup>

#### **61. What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?**

Adult representation shall be appointed by a court for support of an adult in need of protection only if an enduring power of attorney or elected representation or statutory representation cannot be established. If a relative declares his or her willingness to manage the affairs as a statutory adult representative of an existing court-appointed adult representation and if he or she is found to be suitable, the court-appointed adult representation shall be terminated and the relative shall be registered as a statutory adult representative. However, the termination of the court-appointed adult representation must not be untimely.<sup>328</sup>

The court thus refers to the statutory necessity to first terminate the existing (court appointed) adult representation before another (statutory) adult representation can be registered - even if the new representation is the same person. However, this requires a vacancy in which the person concerned has no representation at all. In order to avoid problems here, the court therefore emphasises that such a change of representation may not take place at an untimely moment, i.e. when acts of representation that cannot be postponed are pending.

### ***Specific cases of ex lege representation***

#### ***Ex lege representation resulting from marital law and/or matrimonial property law***

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<sup>326</sup> Section 246 (1) General Civil Code

<sup>327</sup> I. KOZA, 2. Erwachsenenschutz-Gesetz in Zahlen, *iFamZ* 2020, p. 23

<sup>328</sup> Supreme Court, Judgement of 26.5.2021, 8 Ob 49/21w

**62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then (also) legally bind the other spouse?**

Austrian matrimonial law provides for separate ownership of property. According to this system, the spouse remains the owner of the assets he or she brought into the marriage or acquired during the marriage. In principle, each spouse is liable only for his or her own debts.

In the event of the dissolution of the marriage (e.g. through divorce) the (commonly held) marital assets and the marital savings are divided.<sup>329</sup>

These regulations can be modified by concluding a marriage contract.

The marriage contract can be concluded at any time and must be in writing but agreements concerning marital savings or the marital home require a notarial deed.<sup>330</sup>

Spouses can agree to be liable for joint credit debts in which case the court can determine that the liable spouse is the principal debtor and the other party the guarantor.

Section 96 of the General Civil Code provides for the so-called "key power" ("*Schlüsselgewalt*"):

A spouse who has no income and who conducts legal transactions of daily life on behalf of the household that do not exceed a level corresponding to the ordinary living conditions of the spouses acts as legal representative for his or her spouse. This does not apply if the other spouse has made it clear to the third party that he or she does not wish to be represented by his or her spouse. If the third party cannot reasonably conclude that the spouse is acting only as a representative in the name of the other spouse then both spouses are jointly and individually liable.

The "key power" shall apply to such business as is customarily entailed in the orderly and proper management of the household.<sup>331</sup>

It cannot be assumed that the legislature intended to override the general rules on representation for the relationship between spouses by the provision of Section 96 General Civil Code. The validity of the power of representation, which can be granted expressly or impliedly, that is asserted by a spouse in a legal transaction must be assessed according to general principles and section 1029 of the General Civil Code. The power of representation is inherent in the administration of the household.<sup>332</sup>

**63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.**

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<sup>329</sup> Sections 81 et seq. Marriage Act

<sup>330</sup> Section 97 Marriage Act

<sup>331</sup> Supreme Court, Judgement of 14.04.1983, 7 Ob 565/83

<sup>332</sup> Supreme Court, Judgement of 15.09.1982, 1 Ob 652/82

There is no community property in Austrian marriage law. Community property and its legal consequences must be explicitly agreed upon in a marriage contract. In the case of mental impairment of a spouse, the relevant provisions of adult protection including decision-making capacity and representation apply.

*ex lege representation resulting from negotiorum gestio and other private law provisions*

**64. Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If yes, does this instrument have any practical significance in cases involving vulnerable adults?**

The *negotiorum gestio* is regulated in sections 1035 et seq. of the General Civil Code and deals with the officious management of the affairs of other persons. Self-authorisation exists if the activity takes place without an explicit or implicit contract and also without legal, judicial or official basis.

As a matter of general principle, someone who undertakes to manage another person's affairs should seek the consent of the person concerned.

In an emergency, i.e. if the consent of the affected person cannot be obtained, the expenses incurred by the person undertaking to manage his or her affairs must be reimbursed by the affected person, even if no beneficial result has been achieved.<sup>333</sup>

If the consent of the affected person could be obtained but was not obtained, the expenses of the person undertaking to manage his or her affairs are to be reimbursed by the affected person only if the activity has led to a clear and substantial benefit for the affected person. If such a benefit is not created, the person concerned is not obligated to compensate for such efforts but may demand that the person undertaking to manage his or her affairs restore the changes made; if this is not possible, he or she must compensate with damages.<sup>334</sup>

If actions are carried out against the will of the person concerned, or if an authorized representative is obstructed, the person undertaking to manage affairs is not entitled to compensation but must compensate the person affected with damages including loss of profit.<sup>335</sup>

**SECTION VI – OTHER PRIVATE LAW PROVISIONS**

**65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?**

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<sup>333</sup> Section 1036 General Civil Code

<sup>334</sup> Sections 1037, 1038 General Civil Code

<sup>335</sup> Section 1040 General Civil Code

Representation by proxy is an important instrument under private law in the area of legal transactions. Because legal relationships can be autonomously structured in the area of legal transactions, a person can act personally or use a proxy for this purpose. However, certain highly personal legal acts cannot be carried out by proxy (e.g. marriage, testamentary disposition); they are legal transactions that are "hostile to representation".<sup>336</sup>

There are two types of representation: power of attorney granted in a legal transaction<sup>337</sup> ("*Vollmacht*") and a representation provided for by law.<sup>338</sup>

A power of attorney empowers the authorised person to perform legal acts on behalf of the represented person. The representation is not bound to any particular form, however, certain requirements as to form may be laid down by law. The authorised person must have at least limited legal capacity.<sup>339</sup> Powers of attorney range from a power to conclude a specific legal transaction to a power to conclude specific types of legal transactions and a "general power of attorney" for all types of legal transactions suitable for representation.

Legal representation exists for minors and persons who, for reasons other than being a minor, are not able to manage all or some of their own affairs properly ("*Schutzberechtigte Personen*").<sup>340</sup>

A legal representative of a person is defined as

- whoever is legally entrusted with the representation of a minor child within the framework of custody or otherwise provided by statute in individual cases;
- a power of attorney, upon the enduring power of attorney becoming effective;
- an elective and a statutory adult representative upon registration in the Central Austrian Representation Register, a court-appointed adult representative and
- a curator.<sup>341</sup>

## **66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?**

The enduring power of attorney is an instrument of precaution to ensure legally effective representation in the event of loss of decision-making capacity. However, this can only be done by the person concerned<sup>342</sup>. Therefore, if the person no longer has the capacity to make decisions when he or she reaches adulthood, an enduring power of attorney cannot be considered, but only (statutory or court appointed) adult representation.

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<sup>336</sup> R. WELSER and A. KLETEËKA, *Bürgerliches Recht I*, 15<sup>th</sup> Edition, Manz, Wien 2018, p. 218

<sup>337</sup> Sections 1002 et seq. General Civil Code

<sup>338</sup> Section 1034 General Civil Code

<sup>339</sup> R. WELSER and A. KLETEËKA, *Bürgerliches Recht I*, 15<sup>th</sup> Edition, Manz, Wien 2018, p. 220

<sup>340</sup> Section 21 General Civil Code

<sup>341</sup> Section 1034 (1) General Civil Code

<sup>342</sup> Section 262 (1) General Civil Code

**SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM  
IN TERMS OF PROTECTION AND EMPOWERMENT**

- 67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. the transition from substituted to supported decision-making;**
  - b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
  - c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
  - d. effect of the measures on the legal capacity of vulnerable adults;**
  - e. the possibility to provide tailor-made solutions;**
  - f. transition from the best interest principle to the will and preferences principle.**
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- a. While the old “Sachwalter” system did not regulate the possibility of supported decision-making the new adult protection laws do. The adult in need of protection is supported in every step of the way to ensure his or her empowerment.
  - b. The adult in need of protection shall remain autonomous for as long as possible. If required, the adult shall be supported in his or her decision-making before an adult representative is appointed. The law provides for an enduring power of attorney, which allows the adult in need of protection to organize his or her affairs before the loss of decision-making capacity. As a last resort the adult shall receive a statutory adult representative or a court appointed adult representative.
  - c. An adult in need of protection shall be supported in his decision-making capacity for as long as possible. However, if the decision-making capacity is so far diminished that autonomous decisions are not possible then the adult representative shall still support the adult in creating the living environment according to his wishes.
  - d. Capacity to act is not lost in all contexts merely by the appointment of an adult representation. Indeed, a general loss of capacity to act by law would contradict the UN Convention on the Rights of Persons with Disabilities.
  - e. The enduring power of attorney is based on the will of the parties. Therefore, a tailor-made solution is not only possible but the objective. The enduring power of attorney gives the adult in need of protection the power to regulate the scope of authority of the individual representatives.

- f. The adult representative shall act in accordance with wishes and ideas of the person in need of protection as far as possible without endangering his or her well-being.

The general idea of the UN Convention on the Rights of Persons with Disabilities is based on the demand for equality before the law for persons with disabilities (Article 12). This obligates the participating States to amend legal procedures from substitute decision-making to supported decision-making.<sup>343</sup>

In the years consumed in the drafting process of the Second Protection of Adults Act self-representatives were involved from the very beginning, joint working groups were conducted in easy language and moderated by trained professionals and the approach was scientifically oriented.<sup>344</sup>

In drafting the Second Protection of Adults Act, the Austrian legislature sought to address the concerns of the UN Convention on the Rights of Persons with Disabilities as far as possible, however, it was noted in both the legislative history<sup>345</sup> and in the literature<sup>346</sup> that a complete elimination of acts of representation would lead to unacceptable outcomes (for example in the case of self-harm).

The goal of accommodating self-determination is best judged in the individual case. The costs in time and financial expenditure of measures to prevent restriction of the capacity of the person in need of protection to act is high.<sup>347</sup>

**68. Provide an assessment of your system in terms of *protection of vulnerable adults* (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**

- a. **protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;**
- b. **protection during a procedure resulting in the application, alteration or termination of adult support measures;**
- c. **protection during the operation of adult support measures:**
  - **protection of the vulnerable adult against his/her own acts;**
  - **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
  - **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
  - **protection of the privacy of the vulnerable adult.**

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<sup>343</sup> UNCRPD, General Comment No. 1 (2014), p. 5

<sup>344</sup> Second and Third State Report of Austria 2019 on the UN Convention on the Rights of Persons with Disabilities, p. 15

<sup>345</sup> Explanatory notes to the Governmental Proposals 1461 of the addenda to the stenographic protocol of the national council, XXV. legislation period, p. 19

<sup>346</sup> E. GITSCHTHALER and M. SCHWEIGHOFER, *Erwachsenenschutzrecht, 2. Erwachsenenenschutz-Gesetz*, Manz, Wien 2017, p. 64

<sup>347</sup> Report of the Minister of Justice to the National Council of April 2021, III-376 of the addenda to the stenographic protocol of the national council, XXVII. legislation period, p. 4

- a. The adult in need of protection is well protected in cases of limitation of legal capacity by requiring legal representation during the trial, obtaining medical expertise when necessary, hearing the adult in need of protection during the trial and giving him or her the ability to appeal the court's order of appointment.
- b. In applications to revoke, terminate or object to a representation, the application may be made by the person in need of protection himself or by a third party. Additionally, the person in need of protection retains his or her due process rights to be heard and appeal the court's decision.
- c. Since adult protection law generally assumes that the adult in need of protection still has capacity to act, the idea of protection is limited to cases in which the adult in need of protection does not have capacity to act.<sup>348</sup>
  - As long as the adult in need of protection possesses decision-making capacity and no subject of approval has been ordered, the adult in need of protection is not protected from his own ill-conceived acts.
  - An adult representative shall immediately disclose to the court any circumstances that make him or her unsuitable. If such circumstances arise after appointment, he or she shall likewise disclose them without delay.<sup>349</sup> A curator shall be appointed if the interests of a minor or other person entitled to protection under section 21 (1) of the General Civil Code are endangered because of a conflict of interest with his or her legal representative or other person who is also represented by the legal representative ("collision"). In the second case, the legal representative may not represent any of the aforementioned persons and the court must appoint a curator for each of them ("collision curator"). The adult in need of protection is adequately protected from ill-conceived acts of the adult representative as section 249 (1) of the General Civil Code requires that the representative be held liable for damages caused by his or her fault.
  - Vulnerable adults are not explicitly protected against conflicts of interest, abuse or neglect in cases of institutional representation of persons in residential-care institutions. However, the general provisions established in the General Civil Code are applicable.
  - The privacy of the vulnerable adult is generally protected under section 250 (1) of the General Civil Code. However, the adult representative may

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<sup>348</sup> H.P.ZIERL, M. SCHWEIGHOFER and M. Wimberger, *Erwachsenenschutzrecht*, 2<sup>nd</sup> edition, LexisNexis, Wien 2018, marg. No. 571-577

<sup>349</sup> M. SCHAUER in A. KLETEČKA and M. SCHAUER, *ABGB-ON*<sup>1.03</sup> Manz, Wien, section 243 marg.No.11



disclose private matters of the adult in need of protection if required and authorized by his or her scope of authority.<sup>350</sup>

The preservation of the power of self-determination by adults in need of protection has been persevered by certain measures depriving liberty by compulsory admission law or through representation, albeit with different terminology and procedural safeguards. Therefore, protective measures are permitted only to the extent that they are necessary because of danger to the welfare of the person in need of protection. The existing case law<sup>351</sup> makes clear that the authorization required by section 242 (2) of the General Civil Code takes the requirements of the UN Convention on the Rights of Persons with Disabilities seriously and requires that intervention by representatives be set within the narrowest possible limits.

#### *List of Abbreviations*

marg.	marginal ( <i>Randzahl</i> )
ABGB-ON	Online Commentary on the General Civil Code ( <i>Online-Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch</i> )
iFamZ	Interdisciplinary Journal of Family Law ( <i>Interdisziplinäre Zeitschrift für Familienrecht</i> )
i.e.	that is
COVID	Corona Virus Disease
eds.	editors
e.g.	for example
UN	United Nations
et seq.	et sequentia
p.	page
etc.	et cetera
ÖZPR	Austrian Journal for Care Law ( <i>Österreichische Zeitschrift für Pflegerecht</i> )
lit.	litera
No.	number
WHO	World Health Organisation

<sup>350</sup> P. BARTH and M. GANNER in P. BARTH and M. GANNER (eds), *Handbuch des Erwachsenenschutzrechts*, 3<sup>rd</sup> edition, Linde, Wien 2019, p. 217

<sup>351</sup> Supreme Court, Judgement of 29.08.2019, 3 Ob 87/19v