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THE NEW ADULT PROTECTION LAW



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**A new law with a completely new approach:
‘Nothing ABOUT us WITHOUT us’**

The Second Protection of Adults Act (*2. Erwachsenenenschutz-Gesetz – 2. ErwschG*), which has already been adopted by the Austrian parliament and will extensively modernise the guardianship system for adults with incapacity, will enter into force on 1 July 2018. The new law is **centred on autonomy, self-determination and decision-making guidance** of those concerned.

These principles were the basis from the very beginning of the entire legislative process. The existing provisions in the law were revised over a two-year period with the close involvement of **individuals concerned** themselves, as well as a full range of interested groups (the courts, lawyers and notaries, organisations representing people with disabilities, senior citizens’ representatives, representatives of residential homes, guardians’ associations, the Austrian Ombudsman Board (*Volksanwaltschaft*), employer and employee associations etc.), including people affected by guardianships, by way of regular discussions, working parties and discussion groups. The working parties were facilitated by a specially trained moderator who depicted key discussion points in sketch form and then explained the sketches. Care was also taken to ensure that the language used in these discussions was as plain and simple as possible. This joint working process was accompanied by a pilot project referred to as “Support for Self-determination” (*Unterstützung zur Selbstbestimmung*), carried out from March 2014 to December 2015 at 18 courts. The objective of the project was to work with guardians’ associations to identify alternatives to guardianship in an extended pre-appointment ‘clearing’ process. The results, which also significantly shaped the reforms, were documented in an accompanying research paper by the Austrian Institute for the Sociology of Law and Criminology (*Institut für Rechts- und Kriminalsoziologie*).

BACKGROUND: The adult guardianship system is proven, but outdated.

PROVEN SUCCESSES AND PROBLEMS WITH THE CURRENT LAW

The law on guardianship of adults with incapacity has been proven to work well in practice in Austria in the majority of cases. It can provide support, assistance and protection against exploitation, and in many ways has done so successfully. Over recent years, however, a number of serious problems have arisen. For example, guardianship was originally intended to be used only as a last resort. In practice, this has not always been the case. And rather than being appointed for a specific matter only (to sign a contract, for example) or a set of related matters (e.g. to represent the individual when dealing with the authorities or in relation to the management of a rental property or securities portfolio), guardians are often appointed to look after all of a ward's affairs. Alternatives such as the enduring power of attorney (*Vorsorgevollmacht*) or the power of representation exercised by family members (*Vertretungsbefugnis durch Angehörige*) have been underused or not used to their full potential.

➔ **There has been a huge increase in the number of guardians appointed for incapacitated adult persons:**

In 2003, around 30,000 adults were under guardianship in Austria – by 2016 this figure had almost doubled. It has become evident that in many cases appointment of a guardian is requested at a very early stage, without any discussion with the person concerned.

➔ **Not enough suitable guardians:**

A frequent criticism is that there are too few suitable guardians. In urban areas in particular, individuals without capacity often do not have relatives able or willing to act on their behalf. In many cases, lawyers or notaries are appointed as guardians even if there are no legal affairs to manage.

➔ **Unfamiliar or unattractive alternatives:**

In many cases, people know little or nothing about existing alternatives to guardianship. These comprise regional assistance facilities, but also alternative systems for representing an adult without capacity (enduring power of attorney or power of representation exercised by family members).

➔ **Implementation of international rules:**

Austria ratified the UN Convention on the Rights of Persons with Disabilities in 2008. Article 12 of the Convention requires the State Parties to take all necessary measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

KEY PRINCIPLES OF THE NEW ADULT PROTECTION LAW

The declared aim of the new law is to maintain and recognise the autonomy of every individual for as long as possible, and to support those individuals in the management of their affairs rather than making decisions over their heads.

To this end, the following principles have been enshrined in the new statute:

➔ Transparency and a wider range of representation models to choose from: solutions tailored to the individual needs

A choice of four pillars, each with different levels of powers attached, providing an optimum solution for every situation. All schemes, of whatever type, must be recorded in a central register.

➔ Representation schemes apply only to the extent necessary and for as long as necessary:

A right to object to the form of representation chosen and a limited term of applicability mean that it will be possible to examine whether representation is necessary and to select the scheme most suitable for the individual's situation.

➔ Self-determination even after representation is in place:

Legal capacity will no longer be restricted in general – provided that the individual concerned is able to decide for themselves on a particular matter, they will still be able to act validly on their own behalf. A statutory duty to establish the individual's intentions aims at ensuring that their wishes and comments are taken into account.

➔ **Limited power of the courts:**

For the first three pillars, the court will in future only be involved if there are particularly sensitive decisions to be made. These include decisions concerning matters such a permanent change of residence, disagreements between the individual concerned and their representative regarding medical treatment, or asset management issues.

➔ **A focus on the individual, not on the impairment resulting from illness:**

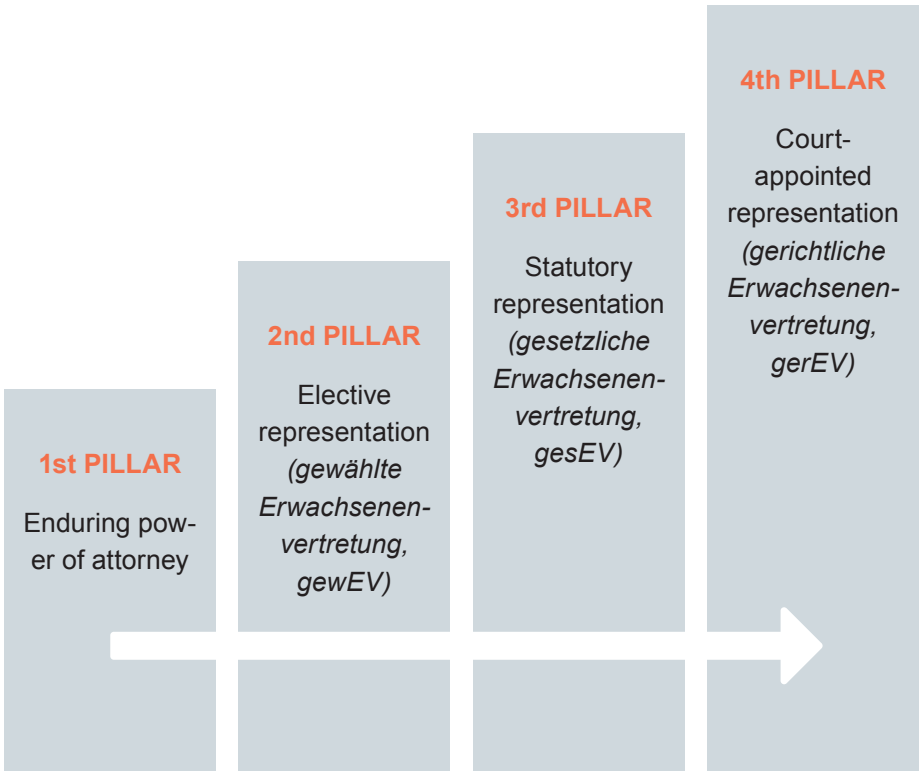
A medical diagnosis is not necessarily accompanied by impaired decision-making capacity. A person's ability to handle their own affairs will now no longer be assessed on the basis of medical criteria, but by means of a 'clearing' process initiated by an 'adult protection association' (referred to as 'psychosocial model'). This will give a full picture of each individual's circumstances.

➔ **Modern terminology:**

With the overhaul of the system comes a change to modern terminology: Guardians are now referred to as 'relevant person's representative' (*Erwachsenenvertreter*). This is aligned with the terminology used internationally, which refers to the protection of vulnerable adults as 'adult protection'. The term 'disabled person' will no longer be used. A 'mental disability' is now described as an impairment to a person's decision-making capacity comparable to a mental illness.

THE FOUR PILLARS OF REPRESENTATION

In future there will be four types of scheme for representing adults requiring assistance, each offering different powers to ensure greater self-determination by the individual concerned.



WHAT WILL CHANGE? THE DIFFERENCES AT A GLANCE:

The new legislation will retain the advantages of the previous guardianship system while eliminating its weaknesses.

CURRENT SYSTEM

NEW LAW

Enduring
power of
attorney

1st PILLAR

**Enduring
power of
attorney**

- ⊖ can be set up with or without the involvement of an adult protection association
- ⊖ very limited supervision by the courts
- ⊖ indefinite

2nd PILLAR

**Elective
representation**

NEW FORM OF REPRESENTATION

- ⊖ a representative is chosen when needed (friends, family, other person with close links to the individual concerned)
- ⊖ in cases of limited legal capacity
- ⊖ indefinite

Representation
by a close
relative

3rd PILLAR

**Statutory
representation**

- ⊖ more powers than the power of representation hitherto exercised by family members
- ⊖ open to a wider group of people, including e.g. siblings, nephews, nieces
- ⊖ right of objection by the individual concerned
- ⊖ limited duration: 3 years

Guardianship

4th PILLAR

**Court-
appointed
representation**

- ⊖ specific scope: does not apply to all of an individual's affairs
- ⊖ limited duration: 3 years
- ⊖ legal capacity is in principle retained

1st

The **enduring power of attorney** under the current law has proved very useful, and so will be retained. The law does not limit the scope of the powers that an attorney can exercise, but a power of attorney of this kind cannot take effect until the donor, i. e. the individual concerned, is no longer able to make their own decisions and the power of attorney has been entered in the Central Austrian Representation Register (*Österreichisches Zentrales Vertretungsregister, ÖZVV*). Supervision by the courts is essentially limited to approving decisions when the attorney and the donor are in disagreement regarding medical treatment. Enduring powers of attorney remain in force indefinitely.

2nd

Elective representation is a new scheme, intended to fill a gap in the current system. It differs from the enduring power of attorney in that a person can choose a representative even if they no longer have full legal capacity. However, they must be able to understand the consequences of appointing a representative, at least in broad terms, and act accordingly. This scheme requires entry in the ÖZVV register and is subject to supervision by the courts. As the adoption of this scheme results is based on a decision taken by the individual represented – even if their decision-making capacity is already impaired to some extent – it is valid indefinitely too.

3rd

Statutory representation in the revised law is equivalent to the former power of representation exercised by family members. Unlike previously, however, this scheme no longer takes effect by operation of law, but must be entered in the ÖZVV register first. Statutory representation gives relatives more extensive powers than previously, and so – unlike under former legislation – is also subject to supervision by the courts. It must be renewed after a maximum period of three years.

4th

Court-appointed representation replaces the current guardianship system. However, the powers that a representative may exercise must be more clearly restricted to particular matters than is currently required. The new law does not permit a court-appointed representative to manage all of a person's affairs. The representation scheme ceases to apply after the specific matter it relates to has been dealt with, or after three years, whichever is sooner. Just like now, allocation of a court-appointed representative is intended as a last resort, which is why the alternatives to this scheme have been developed and expanded.

FURTHER ASPECTS OF THE NEW ADULT PROTECTION LAW

➔ Legal capacity and requirement for approval

None of these schemes will result in the automatic loss of legal capacity. However, if necessary to avert a serious and significant risk to the individual concerned, the court will, in cases where a court-appointed representative is in place, be able to order that certain legal acts undertaken by the person represented will not take effect until they have been approved by that representative (**requirement for approval - *Genehmigungsvorbehalt***). Aside from this, the only consideration in relation to adults is whether or not they are able to demonstrate the necessary capacity in their legal transactions.

➔ Personal and family matters

The new law will **strengthen** the **autonomy** of adults with incapacity in these areas too. It follows the general principle that adults should make their own decisions on matters of this kind – including those relating to medical treatment or a change of home, for example. A representative may intervene here only if the person concerned is not capable of making a decision. Certain decisions cannot be decided by a representative at all. Making a will or an advance healthcare directive (*Patientenverfügung*), setting up an enduring power of attorney, getting married, adopting a child or acknowledging paternity: these are all examples of matters that cannot be decided by anyone other than the person directly concerned.

➔ **Expansion of the adult protection associations and mandatory clearing**

A fundamental element of the reform is the expansion of the **publicly funded adult protection associations** (formerly ‘Guardians’ Associations’). Their advisory functions will be extended. In future, they will also be able to help set up straightforward enduring powers of attorney and provide representatives. The associations can also register court-appointed representation schemes. In addition, the process known as ‘**clearing**’, which is carried out by a local association during court proceedings for appointment of a representative, will be **mandatory** in future. This means that the court must refer cases to the association. The association will then collect information and submit it to the court for deciding whether or not a court-appointed representative is needed. Positive experiences with this process, which was introduced in 2006, were confirmed by the ‘Support for Self-determination’ pilot project. This and other measures will gradually make the adult protection associations a central hub for legal support and representation.

➔ **Representation by legal professionals (lawyers, notaries)**

As a rule, lawyers and notaries will in future be able to **act as representative for a maximum of 15 individuals. Members of these professions** will also have to act as **court-appointed representative for up to five individuals** – but, contrary to the previous system, only if there are legal matters to be attended to. They can represent up to 15 individuals without any further requirements.

But if they wish to take on more cases than this, they must apply for registration in the ‘List of specifically qualified lawyers and notaries’. This list is administered and controlled by the relevant professional associations.

➔ **Payment of court-appointed representatives**

The previous rules on payment have been revised to better meet practical needs, and in some cases reworded for clarity. These rules are intended to ensure that individuals acting as representatives for adults with incapacity are appropriately compensated. They should also provide an incentive for qualified individuals to act as representatives. At the same time, however, precautions have been put in place to prevent excessive fees and resultant ‘enrichment’ of representatives from the adult they represent.

➔ **Responsibility for care – medical treatment**

As previously, the new law does not assign exclusive responsibility for the living situation of persons with a mental illness or comparable impairment to providers of social care or assistance for persons with disabilities. However, the representatives of those individuals are not required to take full responsibility for their care either. Yet if the individual does not already receive comprehensive care, their representative must act to seek the medical and social care they need.

The rules relating to **medical treatment** of people with a mental illness or comparable impairment have been revised. As long as a person is capable of making a decision, only they themselves can give consent. If they are not capable of making a decision,

the first step will be to call on a ‘circle of support’ (family members or other trusted persons close to the individual) to enable them decide what they want. This will ensure that, in this sensitive area, people receive as much support as possible to enable them to decide about treatment for themselves. If the individual is still not able to reach a decision, they can – except if they are in immediate danger – only be treated with the consent of their representative. In every case, the individual themselves must be given information about the proposed treatment and asked for their opinion by the physician treating them. If the patient and their representative disagree, the matter must be decided by the court.

Procedural requirements

The procedural rules relating to the appointment of a guardian have been carried over from the current law and developed further. This applies in particular to the ‘clearing’ process mentioned above, which will be mandatory in future. In addition, **close relatives** of the individual concerned will be **involved** in proceedings for appointment of a representative.

