

## **Supported Decision-Making Replaces Adult Guardianship in Austria**

***An innovative guardianship reform puts Austria at the forefront of efforts to provide equal recognition before the law for persons with intellectual disabilities***

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**André Bzdera \***

**(Senior advisor, Curateur public du Québec, Montréal, Canada)**

Austria has recently modernized its guardianship system in order to bring it into line with article 12 of the UN Convention on the Rights of Disabled Persons and the principle of equal recognition before the law. The reform also responds to the UN Disability Committee's 2013 report on Austria, which stated that its guardianship system was "old-fashioned," and more generally to the Committee's General Comment No. 1 of the following year which calls for the replacement of traditional adult guardianship systems by supported decision-making measures.

The Austrian reform centers all protective measures on the will and preferences of persons with intellectually disabilities. In doing so, this country of 8 million inhabitants is now at the forefront of efforts to better protect the fundamental rights of such persons in Europe. The reform, which came into force in July 2018, also provides for comprehensive safeguards to prevent abuse.

The government suggests that the reform will require about 17 million euros of additional funding per year which will be gradually offset by savings generated from streamlined judicial procedures (fewer evaluations) and an overall reduction in the number of court-ordered protective measures. However, these projections may prove to be overly optimistic as an earlier impact study prepared by the Ministry of Justice suggested few if any savings from the reform proposals.

### **Why is the Austrian reform important?**

Two aspects of the reform may be of particular interest to those jurisdictions wishing to replace their adult guardianship system and with supported decision-making measures, as called for by the UN Convention on the Rights of Disabled Persons.

First, the traditional "best interests" rule for decisions-making involving adults with intellectually disabilities is put aside. Henceforth, decisions must respect their will and preferences, whether such decisions are made by disabled adults with the help of a trusted supporter or whether they are made on their behalf, either by a personal representative named by the adult or by a court appointed representative. Only when such adults put their welfare in "serious and significant danger" may their will and preferences be overridden.

Secondly, the Austrian reform includes a new type of "representation agreement" that vastly improves on the model first developed in the Canadian province of British Columbia in the mid-1990s. This model provides a way to empower adults who do not

have the necessary contractual capacity to prepare a regular or enduring power of attorney because of an intellectual disability, but can nevertheless make their wishes known. Such persons in British Columbia may designate a trusted relative or friend to assist and represent them in their financial, legal and personal affairs – to the exclusion, however, of important financial affairs involving real estate and investments.

The new Austrian law improves on this idea by ensuring that such representatives are held accountable for their actions by requiring that representation agreements be registered and that annual reports be filed with the local authority responsible for supervising adult protective measures. Such agreements may cover any subject matter and may also be of an enduring nature. They also can be used by persons with mental health issues (Ulysses contract).

## **Background**

The Austrian reform came into effect five years after the experts of the UN Disabilities Committee concluded that Austria's adult guardianship legislation was "old-fashioned and out-of-step with the provisions of article 12 of the Convention." The Committee's experts also recommended that Austria "replace substituted decision-making with supported decision-making for persons with disabilities." The federal Ministry of Justice promptly launched wide-ranging consultations with stakeholders on the reform of the adult guardianship system.

At the time, many stakeholders were already looking into more palatable protective measures to replace adult guardianship, known as *Sachwalterschaft*.

Their interest rapidly zeroed in on British Columbia's experience with representation agreements. Canadian proponents of such agreements were repeatedly invited to give conferences in Vienna on this subject between 2011 and 2014. They notably included Michael Bach, of the Canadian Association for Community Living (CACL), and Christine Gordon, of Vancouver's Personal Planning Resource Centre and Registry (Nidus). Michael Bach's presentations were of particular interest to the Austrians since Bach had been involved in the drafting the original 1992 reform proposals that inspired British Columbian legislators and had worked on the issue ever since.

By mid-2016, the Austrian government unveiled its legislative proposals and a hundred associations and individuals made submissions to the parliamentary committee studying the bill. A few months later, in April 2017, the bill was adopted by a unanimous vote of the Austrian Parliament and came into effect in July 2018.

The new Austrian law provides for four distinct measures, or "pillars."

### **1) Enduring power of attorney (*Vorsorgevollmacht*)**

Introduced in 2007, the Austrian power of attorney covers only property and financial matters and requires neither a medical certificate nor the approval of a public authority or tribunal. Its scope can be adjusted to suit the needs of the principal. The principal is not deprived of his or her civil rights. The power of attorney can also be enduring and remain in effect when the principal loses his or her mental capacity.

The power of attorney is normally prepared with the help of a notary or lawyer or, for relatively simple matters, with the help of an employee of an adult representation

agency. Austria has four such agencies (*Erwachsenenschutzverein*) that operate much like a public guardian in many common law jurisdictions. The power of attorney is added to the Central Austrian Representation Register, administered by the Austrian Chamber of Notaries.

Their help is also required if the principal wishes to cancel an ongoing power of attorney but, in order to do so, the principal must be able to express his will to that effect. Regular contractual capacity is not required for termination, although it is required to set up a power of attorney. Thus, a principal who terminates a power of attorney may not be able to prepare a new power of attorney.

## **2) Elective representation (*gewählte Erwachsenenvertretung*)**

Elective representation is a new measure inspired by BC's representation agreement. Adults who do not have the legal capacity to prepare a power of attorney may choose one or more trusted individuals to support and represent them. Section 264 of the Austrian Civil code illustrates the new approach:

§ 264. Insofar as a person of full age cannot take care of his or her own affairs due to mental illness or a comparable impairment of their decision-making ability, has no representative and can no longer prepare a power of attorney, but is still able of understanding the meaning and consequences of a power of attorney in broad terms, express his or her will and act accordingly, that person may choose one or more friends or family members as adult representatives to take care of his or her affairs. (Our translation)

A written agreement must be prepared before a notary, a lawyer or an employee of an adult representation agency and be registered with the Central Austrian Representation Registry. The agencies charge relatively modest fees for this service: 60 euros for the representation agreement itself and an additional 25 euros if the employee makes a house call. The principal is not deprived of his or her civil rights and can thus terminate the agreement at any time. To this end, the principal must be able to indicate that the agreement should no longer apply.

The agreement is enduring and thus continues if and when the principal loses his or her mental capacity because of a degenerative disease, brain-injury or stroke. The courts supervise the agreement much as they would a regular court-ordered protective measure (annual reports).

A representation agreement can take on several distinct forms (section 265 of the civil code, as amended):

- Informational support. The agreement can be narrowly focused on giving the representative access to the principal's personal information held by clinics, schools, tax and welfare offices, banks and other third parties so that the representative can help the principal to make an informed decision.
- Co-decision-making. The agreement can stipulate that the representative cannot legally act without the principal's consent. This form of representation agreement appears to have been inspired by the example of the Canadian provinces of Saskatchewan and Alberta, although co-decision-making in Canada does not cover financial affairs.

- Representative's veto. The agreement can also stipulate that the principal can only make legally valid acts with the approval of the representative. Such an agreement could potentially be used by persons with recurrent mental health issues or problems relating to addiction. The representative would, however, only have a suspensive veto since the adult could terminate the agreement with the help of a notary, lawyer or employee of an adult representation agency. These administrative steps would, however, take at least a few days, a delay that might be conducive to reflection.

### **3) Statutory representation (*gesetzliche Erwachsenenvertretung*)**

This measure was first introduced in 2007 under the awkward title of “Agent's authority granted to next of kin” (*Vertretungsbefugnis nächster Angehöriger*). A close relative (spouse, parent, child of full age and, since the 2018 reform, a grandparent, a grandchild of full age, sibling, niece or nephew) of a person no longer able to take care of his or her affairs may legally intervene to assist and represent this person. The measure can only be used for day-to-day financial matters.

The relative must meet with a notary and provide two key documents: a medical certificate indicating that the adult is not capable of looking after his or her affairs and a second document attesting to their family tie. The notary must then inform the adult and register the measure in the Central Austrian Representation Registry. In the event that the initiative is opposed by the adult or by other close relatives, the notary must refer the matter to the courts.

Statutory representation measures are valid for a maximum of three years and can be renewed. The adult is not deprived of his or her civil rights. In order to better prevent financial abuse, the reform provides for judicial supervision of statutory representatives.

As with the previous “Agent's authority granted to next of kin”, adults who do not have good relations with one or several relatives may have notice of their opposition added to the Central Austrian Representation Registry. Such notices are legally binding on all concerned. Named relatives cannot become their statutory representative.

### **4) Court-appointed representation (*gerichtliche Erwachsenenvertretung*)**

This protective measure essentially replaces guardianship (*Sachwalterschaft*). It is a measure of last resort when the three other measures are not applicable: the adult does not have a power of attorney (first pillar), is not able to choose a representative (second pillar) and has no close relative capable or willing to intervene (third pillar).

When appointing a representative, the court will prioritize the adults own choice or, if the adult has given no indication as to his or her preference, a close relative or friend. If the adult is socially isolated, an adult representation agency will be chosen or, when required by the specifics of the case, a legal practitioner. The court supervises all such representatives. Court-appointed representation can only apply to specific domains, contrary to the previous guardianship measures which were often plenary. The measure is valid for up to three years and can be renewed when required. The adult is not deprived of his or her civil rights. The court may however give the representative the right to veto specific types of decisions made by the adult in order to protect his or her fundamental interests.

## **The adult's will and preferences**

With the Austrian reform, supported decision-making replaces substituted decision-making, and the change is most apparent with regards to statutory and court-appointed representation. The golden rule is henceforth that decision-making must respect the wishes, the will and the preferences of the person being represented.

The quality of representation is therefore to be evaluated according to new criteria. For example, if the representative makes a decision that does not respect the will of the adult with intellectual disabilities, this would be sufficient grounds for a complaint and possible corrective actions, just as any form of mistreatment or abuse would be.

Austrian law also does not make a clear distinction between assistance and representation, as both elements are needed to effectively assist persons with varying degrees of intellectual disabilities. The key element of this new protective scheme is therefore the degree, to which the will of the adult is respected, and not the fact that the adult makes the decision independently or whether the decision is made by the representative. Even when a representative gives effect to the previously expressed will of an adult currently unable to express his or her wishes, the representative is participating in a form of supported decision-making.

## **Limits on the legal capacity of represented adults**

Substitute decision-making is not however entirely eliminated in the new Austrian adult protection law. A statutory or court-appointed representative can overturn an act made by the adult that puts his or her fundamental interests in jeopardy. When such a representative is called upon to make a decision, the representative may put aside the adult's wishes for the same reasons. The civil code stipulates that such a course of action is possible only in situations where there is a "grave and significant danger" (*ernstliche und erhebliche Gefahr*) to the adult. Furthermore, for important acts, such as the sale of real estate, the final decision always remains with the court.

A recent article by Judge Felicitas Parapatits and Professor Stefan Perner underscores that this restriction, called an "authorization requirement" (*Genehmigungsvorbehalt*), remains a measure of last resort. This legislative provision is modeled on a similar concept in German civil law, the "reservation of consent" (*Einwilligungsvorbehalt*).

For these authors, the authorization requirement is a response to the new obligation under international law, namely article 12 of the UN Convention on the Rights of Persons with Disabilities, since only a grave and significant danger to the adult with intellectual disabilities can justify limiting the adult's legal capacity.

These authors also remark that this principle has been in use for well over 20 years in Germany and that only 5 to 10 percent of protected adults are today deprived of their legal capacity in order to adequately protect their fundamental interests. The other 90 to 95 percent of protected adults in Germany retain their legal capacity and their representatives must respect their will.

If we were to apply this ratio to Austria, where there were 60,000 guardianships when the reform came into effect, we could expect that only 3,000 to 6,000 of these adults will still be deprived of some of their civil rights (5 to 10 percent of the total). For all other adults with statutory or court-appointed representation, the protective measure could be

likened to a form of supported decision-making, since the adult's will and preferences remain the cornerstone of any decision that concerns them.

## **Conclusions**

The Austrian representation agreement marks a milestone for intellectually disabled adults. For first time since 2000, when BC introduced its representation agreement, a jurisdiction has introduced a similar contractual measure specifically designed for adults who do not have the capacity needed to prepare a regular or enduring power of attorney. Other jurisdictions have previously made attempts to follow British Columbia's trail-blazing path, including US State of Texas in 2015, but their initiatives have been aimed at adults who still have contractual capacity, even if they demonstrate some difficulties in communicating with others persons.

The Austrian reform also corrects the two main flaws of the British Columbian model identified by Canadian observers, namely the absence of a central registry and accountability to an independent authority.

The Austrian legislator has provided for a central registry and effective judicial supervision of all such agreements, as well as making it clear that representation agreements can be adapted to the specific needs of adults with intellectual disabilities. Government impact statements suggest that this contractual measure will be frequently used in Austria. The representation agreement, combined with the ease of use of statutory representation, is expected to reduce the need for court-appointed representation.

Taken together, the four representation measures offer a wide range of solutions for adults with intellectually disabilities in Austria while, at the same time, giving priority to the intervention of their family and friends, especially when older adults gradually lose their mental capacity. Even when an adult is able to prepare neither a power of attorney nor a representation agreement, when such an adult has an active circle of support, statutory representation offers a practical solution in the short to medium time frame. Statutory representation can also be used as a long term measure if the adult's financial situation is relatively uncomplicated.

For adults with sizable assets and for adults who are socially isolated, on the other hand, court-appointed representation offers a solution of last resort without any significant deprivation of rights, since all decisions concerning the adult, in the absence of grave and significant danger, must respect the adult's past or current will and preferences.

In the presence of such dangers, which are often associated with severe mental health issues, drug-use and gambling, the court can exceptionally authorize limits on the adult's freedom. But even here, such limits should highlight the adult's past will and preferences and point the representative in the direction of decisions that maintain the adult's living conditions and take into account the adult's family responsibilities, all of which are expressions of the adult's past will and preferences. This balancing act will not be easy to accomplish, but it is very far removed from traditional plenary guardianship based on the best interests rule!

The UN Disabilities Committee will soon have an opportunity to examine these new developments in Austrian civil law when it reviews Austria's second national report, perhaps as early as the end of 2019.

\* The views and opinions expressed are the author's and do "not necessarily represent those of the Curateur public du Québec or the Government of Québec.

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