Going Private: "Vorsorgevollmacht" as an Alternative to Legal Guardianship for Adults[1]

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I. Introduction

In an aging society whose citizens may expect to live 80 years or even longer, it is more likely than ever that an adult may become incapable of managing his own affairs due to old age or health problems. Traditionally, a guardianship court, or another public authority, will then issue an interdiction order rendering the adult legally incapable and appoint a legal guardian to act on his behalf. This approach has been severely criticised for, inter alia, violating the rights of the ward, disregarding his existing abilities, and being too expensive to be applied to a large number of people. Consequently, governments and legislators have been looking for alternatives to the traditional system. This search lies at the very heart of the debate on how to reform legal guardianship.

Private law instruments appear especially attractive because they respect the autonomy of the individual, avoid state intervention and must be funded by the citizens themselves. In this paper, I will thus explore the German enduring power of attorney ("Vorsorgevollmacht") and its merits as an alternative to legal guardianship in private law.

II. Fundamental structure of the German enduring power of attorney

1. Philosophy

Germany fundamentally reformed the law on the legal protection of adults at the beginning of the 1990s. The former guardianship system was completely abolished and replaced by a new system of "gesetzliche Betreuung". There is no incapacitation by court order anymore and, instead of a legal guardian who has control over all aspects of the life and the affairs of the ward, a court-appointed (legal) representative ("gesetzlicher Betreuer") merely takes care of the specific matters assigned to him by the court in each individual case.

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Even so, a person's right to privacy and their autonomy is restricted both by the court's involvement and its appointment of a (legal) representative. Consequently, many people wish to take matters into their own hands to avoid an intervention by the court. The principal legal instrument for achieving this is the enduring power of attorney ("Vorsorgevollmacht").

Generally speaking, the grantor of an enduring power of attorney pursues numerous aims. He appoints a trusted (legal) representative to ensure that an unknown person does not manage his affairs. He also seeks to prevent the special court for proceedings for "Betreuung" ("Betreuungsgericht") and other public authorities from interfering with his affairs. To achieve this, the attorney ought to be capable of managing all of the grantor's affairs and should possess the same range of powers as a court-appointed (legal) representative. Another advantage of such an arrangement is that the (legal) representative follows the directives and wishes of the grantor while fulfilling his functions.

In a comparative perspective, we can distinguish two main types of enduring powers of attorneys. One type is derived from legal guardianship. It enables an adult to nominate the person who should manage his affairs but the court or authorities retain ultimate control, e.g. via compulsory registration and court consent before it becomes operational. In other words, this is a more or less privatised form of a court-appointed (legal) representative. The German enduring power of attorney ("Vorsorgevollmacht") does not fall within this category.

The second type, of which the German enduring power of attorney is a good example, is rooted in ordinary agency and powers of attorney in private law. The "Vorsorgevollmacht" has been acknowledged since the introduction of the German Civil Code ("Bürgerliches Gesetzbuch – BGB") in 1900, so for over a hundred years. Originally, it was used for property and financial matters, but it has since been extended to personal matters.

2. Legal framework

a.) Principle of autonomy

The ability of an adult to grant another person a power of attorney ("Vollmacht") forms part of his or her autonomy, which is, inter alia, protected by the German constitution as well as under international human rights law. In other words, under German law an adult has the right not only to make his own decisions, but also to delegate this power to a third party. This includes the right to grant a lasting power of attorney ("Vorsorgevollmacht").

Since the enduring power of attorney is based on the autonomy of the adult, it has priority over the appointment of a (legal) representative by the "Betreuungsgericht". This priority is explicitly acknowledged by the German Civil Code (§ 1896 BGB) and complies with both the fundamental right of self-determination, as protected by the German constitution, and the relevant recommendations of the Council of Europe.

b.) Basic agreement and authority to represent

Under German law, the (legal) representative's external powers and his internal rights and obligations vis-à-vis the grantor must be distinguished. The power of attorney ("Vollmacht") endows the (legal) representative with the right to represent the grantor externally towards third parties, but whether or not he is allowed to exercise this authority is determined by the basic agreement between the grantor and the (legal) representative.

If somebody wishes to grant an enduring power of attorney, he must enter into a basic agreement with the chosen representative ("Vorsorgeverhältnis"), which forms the basis for his representation. This agreement authorises and obliges the (legal) representative to manage the grantor's affairs. It states when the power of attorney should or must be used, provides guidelines for the representative's actions, and regulates his powers and rights. Under German law, this agreement either constitutes a non-remunerated mandate or a remunerated agency agreement. Furthermore, the (legal) representative needs to be authorised to represent the grantor externally via the power of attorney ("Vollmacht"), which is legally separate from the basic agreement.

If a valid basic agreement exists, it endures even if the grantor becomes legally incapable, for this is the very purpose of the "Vorsorgevollmacht" (§ 672 BGB). The power of attorney also remains in force (§ 168 BGB).

The law does not define or limit the situations that might be covered by a basic agreement or by the corresponding power of attorney. It is entirely up to the parties to define the circumstances under which the (legal) representative should manage the affairs of the grantor and the powers of the representative. They might draw up specific provisions, or they could, as regularly is the case in family situations, state the relevant situations in very general terms, e.g. "If I am no longer able to manage my own affairs and need help…".

Additionally, there is no statutory requirement as to the use of the power of attorney. It need not be publicly registered, nor is there a validation procedure before it can be used. It is legally possible to insert the purpose of the power of attorney or the conditions under which it should be exercised into the document in which it is contained. This does, however, give rise to severe practical problems. Namely, if the (legal) representative wishes to make use of a conditional power of attorney, he must first prove that the conditions are met, e.g. that the grantor is in fact incapable. This is often either practically impossible or at least time-consuming. Thus the power of attorney becomes ineffective and the court must appoint a (legal) representative. For these practical reasons, it is generally recommended that grantors create unconditional powers of attorney. Conditions under which the (legal) representative is allowed or obliged to make use of his power of attorney should instead be stated in the basic agreement. Thus, they will bind the (legal) representative internally without limiting his external power to represent the grantor.

c.) The German Legal Services Act

The management of a person's financial and personal affairs regularly includes legal services. Without going into detail, it can be said that due to the German Legal Services Act ("Rechtsdienstleistungsgesetz"), one has to be a registered "Rechtsanwalt" (solicitor, or attorney in the U.S.) to render legal services professionally. This effectively bars members of other professions from becoming (legal) representatives under an enduring power of attorney. One may even doubt if there is a big market for this at all, since, to my knowledge, very few German "Rechtsanwälte" offer these services.

The Legal Services Act stipulates that anybody who renders legal services must have a legal qualification, even if these services are offered for free, unless the advice comes from a family member or a friend. In effect, this means that only family members or friends can become (legal) representatives under an enduring power of attorney.

In other words, the German enduring power of attorney is mainly designed with family members or others persons close to the grantor in mind. Only under very limited circumstances can professionals offer legal services, i.e. only qualified "Rechtsanwälte".

d.) Optional Registration

In Germany, registration is optional. Rather than safeguarding the validity of the enduring power of attorney, purpose of the public registry is to inform the special court ("Betreuungsgericht") of the existence of an enduring power of attorney. Since 2005, there has been a Central Register for Advance Instruments at the German Federal Chamber of Public Notaries on a statutory basis (§§ 78a to 78c Bundesnotarordnung). Due to the purpose of the Central Register, only "Betreuungsgerichte" have access to it. Other public authorities and members of the public cannot access it, as there is no legal basis for this.

Originally, the Central Register was meant to record all advance instruments (enduring powers of attorneys and advance directives for health care and for court-appointed representatives). It was meant to guarantee that all existing advance instruments would come to the attention of the "Betreuungsgericht", if proceedings to appoint a (legal) representative were commenced with respect to the grantor. But, because of the controversies surrounding euthanasia and advance directives in health care, now only powers of attorney and advance directives for court-appointed (legal) representatives can be registered. Advance directives in health care can only be registered if they are part of a package containing one of the "recognised" instruments.

Apart from registration, each (legal) representative is under an obligation to inform the "Betreuungsgericht" in writing about the enduring power of attorney, and the court may request a copy thereof (§ 1901c BGB).

3. Scope of the enduring power of attorney ("Vorsorgevollmacht")

The (legal) representative may assist and counsel the grantor, while the grantor is still able to represent himself. He can also act on behalf of the grantor, if he acts under a valid enduring power of attorney and if the matter at hand is not excluded from its scope. Under German law, a power of attorney can be granted for all matters unless the law states otherwise.

a.) Property and financial matters

In property and financial matters, powers of attorney concerning the financial affairs of the grantor have been in use since the 19th century. Due to their general character, they are termed "Generalvollmacht" (general powers of attorney). These general powers of attorney typically

cover a wide range of cases, e.g. temporary incapacity and incapacity due to accident, disease or age related problems. As I pointed out earlier, German law, in contrast to other jurisdictions, has held these powers of attorney valid since 1900, even despite the subsequent legal incapacity of the grantor. Therefore, every general power of attorney may have become an enduring power of attorney. Thus, an enduring power of attorney in financial matters, in principle, is not a novelty for German law. What is new, however, is its widespread use today to plan ahead for bad health and old age.

b.) Court Proceedings

Whether a (legal) representative under an enduring power of attorney can bring a lawsuit on behalf of the grantor has long been debated. In 2005, an amendment to the German Code of Civil Procedure (§ 51 ZPO) was enacted to end this controversy. Now, a (legal) representative acting under an enduring power of attorney is able to act in court proceedings if he has been authorised expressly and in writing as a (legal) representative for court proceedings by the grantor.

c.) Health Care and Deprivation of Liberty

In contrast to financial matters where an enduring power of attorney has been in use for a long time, an enduring power of attorney for personal matters is a creation of the 1990s. For a long time, it was highly disputed if an enduring power of attorney can cover personal matters, and also the conditions of its use. Most of these issues have since been solved by legislation.

In 1999, the position was somewhat clarified as it was stated that the enduring power of attorney can also cover medical treatment (§ 1904 BGB). Ten years later, in 2009, the legislator explicitly acknowledged the long established practice that the enduring power of attorney in health care decisions allows the (legal) representative to consent to or to withhold life-sustaining medical treatment (§ 1901a BGB).

Moreover, since 1999 the BGB has provided that a (legal) representative may be granted the power, under certain circumstances and with the permission of the special court ("Betreuungsgericht"), to place the grantor in a closed ward and consent to measures depriving him of his liberty (§ 1906 BGB).

And very recently, in February 2013, an amendment to § 1906 BGB opens up the possibility to grant the power to consent to compulsory treatment under the enduring power of attorney, again under conditions and with the permission of the "Betreuungsgericht".

However, all these powers in personal matters must be granted explicitly and in writing, including the personal signature of the grantor. A "Generalvollmacht" (general power of attorney) "for all affairs" or "all personal matters" will therefore not be sufficient, even if it is done in writing and signed by the grantor. The enduring power of attorney must specifically include medical treatment, compulsory treatment, or deprivation of liberty in its scope. Moreover, if a (legal) representative wants to exercise these powers in personal matters, he is subject to the same controls as a court-appointed (legal) representative ("gesetzlicher Betreuer"). I will come back to this later.

4. Duties and Obligations of the (legal) representative under an enduring power of attorney

The duties and obligations of the (legal) representative under an enduring power of attorney are laid down in the basic agreement, which is, in most cases, a non-remunerated mandate. In the absence of a special agreement, the general rules on mandates will apply.

These general rules on mandates are, however, construed according to the purpose of the enduring power of attorney. Its main purpose is for the (legal) representative under an enduring power of attorney to stand in the place of a court-appointed (legal) representative ("gesetzlicher Betreuer"), rendering his appointment unnecessary. In order to attain this goal, the (legal) representative under an enduring power of attorney must fulfil exactly the same functions as a court-appointed (legal) representative. Consequently, the duties and obligations of the (legal) representative acting under an enduring power of attorney are modelled on the duties of a court-appointed (legal) representative. Thus, the primary duties of the (legal) representative under an enduring power of attorney are to assist and represent the grantor on the one hand, and to protect him from inflicting harm onto himself or his property on the other.

The (legal) representative under an enduring power of attorney may counsel and advise the grantor to prevent him from inflicting harm to himself. The obligation to protect the grantor arises from the basic agreement. Even if the basic agreement does not state this expressly, it can be so interpreted because otherwise the existence of the power of attorney would not exclude the appointment of a (legal) representative.

Generally speaking, the instructions of the grantor bind the (legal) representative under an enduring power of attorney. However, if an instruction might prove harmful to the grantor, the grantor may allow the (legal) representative to deviate from his instructions, if this would be in his best interest. According to § 665 BGB, the latter is presumed to have been agreed between the parties unless stated otherwise in the basic agreement. Therefore, the (legal) representative under an enduring power of attorney does not act in breach of his duties under the basic agreement if he asks the grantor to clarify his wishes or ignores an instruction of the grantor to prevent harm.

However, the enduring power of attorney can only provide limited protection against self-inflicted harm because the grantor has the right to withdraw the power of attorney and / or to terminate the basic agreement at any time. A waiver of these rights is invalid because nobody may waive his autonomy. If the grantor revokes the enduring power of attorney, the (legal) representative loses his powers. Since he can no longer act for and on behalf of the grantor, he can merely inform the court of the situation. The court may then appoint a (legal) representative in order to protect the former grantor.

5. Control and Remedies

Due to the purpose of the enduring power of attorney, the powers of the (legal) representative acting under it are independent from the status and the actual capacity of the grantor. This can become very dangerous for the grantor. If the grantor becomes incapable, nobody may control the (legal) representative under an enduring power of attorney or exercise the safeguards in place under the basic agreement. Therefore, in most European countries, powers of attorney traditionally cease to have effect upon the incapacity of the grantor. Over the last decades, many countries, mainly of the Common Law tradition, introduced enduring powers of attorney by way of special legislation. Most of these statutes contain sophisticated mechanisms which control the validity of the instrument and the (legal) representative and his actions.

German law has followed a different path. Since 1900, according to the German Civil Code, the power of attorney remains valid if the basic agreement, together with the power of attorney, is intended to cover the case of incapacity. Like every other power of attorney, the "Vorsorgevollmacht" (enduring power of attorney) need neither be registered nor approved by a public authority in order to be operational.

Unlike a court-appointed (legal) representative, the (legal) representative under an enduring power of attorney is not subject to the control of the special court ("Betreuungsgericht"). He is neither accountable to the court nor does he need its approval for specific transactions or decisions. Instead, the (legal) representative under an enduring power of attorney is subject to the control of the grantor. The law on agency and powers of attorney provides the necessary checks and balances. The grantor can give instructions, the (legal) representative is accountable to him and must inform the grantor of everything that may be of importance for him, and the grantor may revoke the power of attorney and / or to terminate the basic agreement. If the (legal) representative under an enduring power of attorney is in breach of these obligations, he may be liable under civil law as well as under criminal law.

Why does German law follow this approach? Is it blind to the fact that nobody controls the (legal) representative under an enduring power of attorney if the grantor becomes incapable? Of course not. The basic idea is that the court should only intervene if necessary. And when we seek to determine "necessity" we should keep two things in mind:

Firstly, the abilities of the grantor very often vary over time. At one moment he may be active and alert, the next confused. Even if he needs somebody to manage his affairs, he may still be able to exercise control over his (legal) representative under an enduring power of attorney. Secondly, in Germany an enduring power of attorney is very often used within a family, where other, more informal forms of control are often in place.

If, however, external controls become necessary, the court will intervene. It will not, however, simply replace the (legal) representative under an enduring power of attorney with a court-appointed (legal) representative, since in most cases it is not necessary to replace the (legal) representative under an enduring power of attorney but to control him. The court therefore appoints a (legal) representative who is given the special task of controlling the (legal) representative under an enduring power of attorney and exercising the rights of the grantor under the basic agreement (§ 1896 subsection 3 BGB). This representative is called monitoring court-appointed (legal) representative ("Überwachungsbetreuer"). Like any other (legal) representative, a monitoring court-appointed (legal) representative may only be

appointed if this is necessary. The court assesses necessity on the merits of the individual case. A real danger of the (legal) representative under an enduring power of attorney not fulfilling his duties and obligations under the basic agreement must be established. It is not necessary to prove abuse. Abuse is just an extreme example for a (legal) representative under an enduring power of attorney who fails to do what he is obliged to do under the basic agreement. It is the outcome for the grantor and not the (wrong) intentions of the (legal) representative under an enduring power of attorney that is of importance here.

So far, I have been describing the general regime of control. However, there are certain areas where the (legal) representative under an enduring power of attorney is subject not only to the control of the grantor but also to the direct control of the special court ("Betreuungsgericht"). For important health care decisions where there is a dispute over the patient's will (§ 1904 BGB), and especially for compulsory treatment (§ 1906 BGB), the (legal) representative under an enduring power of attorney needs to obtain the approval of the court. This is also necessary if he wants to place the grantor in a closed ward or otherwise deprive him of his liberty (§ 1906 BGB). These situations have two factors in common. First, they seriously endanger the grantor's human rights and his person. Second, in these situations the grantor is unable to give valid consent to the measures taken, which means that he can no longer control the (legal) representative under an enduring power of attorney. These special provisions are ultimately based on the same principles that underpin the general regime of control, namely that the court should – and must – intervene if necessary.

III. Differences and similarities between the court-appointed (legal) representative ("Gesetzlicher Betreuer") and (legal) representative under an enduring power of attorney

Clearly there seem to be many more differences than similarities between a court-appointed (legal) representative ("gesetzlicher Betreuer") and an (legal) representative under an enduring power of attorney. The (legal) representative under an enduring power is selected and appointed by the grantor himself. The court neither has a part in this nor does it interfere. By contrast, the appointment of a (legal) representative by the court bases on a thorough assessment of the legal conditions and of the necessity of such an intervention.

The same seems to hold true with respect to the regulations on the activities of the (legal) representative under an enduring power of attorney or court-appointed (legal) representative respectively. The tasks, obligations and duties of the (legal) representative under an enduring power of attorney are laid down in the basic agreement, i.e. in a contract, whereas those of the court-appointed (legal) representative are regulated by statute and court orders.

But, if we take a closer look, these differences are not as fundamental as they appear at first sight. If somebody names a person as his (legal) representative, the court must appoint this person unless he or she is not qualified (§ 1897 BGB). The outcome is similar to granting him an enduring power of attorney: the suggested person becomes the (legal) representative, but it is the court that appoints him. And there are controls in place with respect to the appointment of the (legal) representative and his activities.

The gap between a (legal) representative under an enduring power of attorney and a court-appointed (legal) representative decreases further upon a closer examination of their activities. I have already pointed out that under German law the general obligation for both types of (legal) representatives is the same, namely to assist and support on the one hand, and to protect from harm on the other. This explains firstly why a (legal) representative under an enduring power of attorney may deviate from his instructions if this is in the best interest of the grantor. While this, according to the general rules of contract law, would mean a breach of contract, it is perfectly legal, and even obligatory, under the special provisions on mandates (§ 665 BGB). And this explains secondly why, despite the court-appointed (legal) representative being a statutory regime, the fundamental principle governing the activities of the (legal) representative is respect for the autonomy of the ward: the court-appointed (legal) representative has to respect the wishes of the ward unless they run contrary to his best interest (§ 1901 BGB).

To sum it up very briefly, the differences between a court-appointed (legal) representative and a (legal) representative under an enduring power of attorney have narrowed considerably for two reasons. One is the fundamental reform of German law to respect the principles of autonomy and necessity, which has lead the court-appointed (legal) representative to assist and help the adult in his own decisions rather than to be his guardian. The other is that the task to protect an adult from self-inflicted harm is not only the task of a court-appointed (legal) representative but may also, upon agreement, become the task of a (legal) representative under an enduring power of attorney appointed by this adult himself.

IV. Reasons for the introduction and use of an enduring power of attorney ("Vorsorgevollmacht")

The grantor of an enduring power of attorney pursues a number of different aims, all of which are based on the fundamental idea of preserving his autonomy by appointing a trusted person to act in the same manner that he would act himself. The grantor seeks to appoint the (legal) representative under an enduring power of attorney both to ensure that his affairs are not taken care of by an unknown person that he does not trust and to prevent the court and other public authorities from interfering with his affairs. Finally, he wants to ensure that his (legal) representative under an enduring power of attorney follows his directives and wishes when managing his affairs.

The German government and German legislators have promoted the use of an enduring power of attorney as an alternative to a court-appointed (legal) representative ("gesetzlicher Betreuer") for a long time. From their perspective, the enduring power of attorney has two main advantages. Firstly, it is based on the autonomy of the grantor, and so the promotion of the enduring power of attorney is synonymous with promoting autonomy over state intervention via a court. Secondly, as it is a completely private instrument, it costs far less public money and court resources. Except in the rare case that court intervention proves necessary, the enduring power of attorney does not cost a single Euro of public money. From a political perspective, the financial benefit of the enduring power of attorney may even constitute its most important advantage.

IV. Function and Popularity in Society

In 2015, there were over 2.8 million enduring powers of attorney registered in Germany compared to more than 1.3 million court-appointed (legal) representatives in 2014 (these being the latest figures available).[2]

Keeping in mind that registration is purely optional, it is safe to say that there are many more enduring powers of attorney out there than are listed in the Central Register. They may reside with persons appointed as (legal) representatives under an enduring power of attorney, i.e. with family and friends, packed away in desk drawers like wills, and they might have been drawn up when moving into a retirement home and filed in the office of the home.

[2] http://www.bundesanzeiger-verlag.de/bt-prax/downloads.html#c24670 (in German, last visit: 11.01.2016).

In my view, very good reasons exist to conclude that in Germany the enduring power of attorney is very popular and highly prevalent.

V. The future of the German "Vorsorgevollmacht"

As you have seen, German law is very liberal towards the appointment of family and friends as (legal) representatives under an enduring power of attorney. Conversely, it highly restricts the possibility of industry professionals to be appointed as (legal) representatives under an enduring power of attorney. All in all, it is very popular and prevalent in practice. Over 2,8 million registered instruments and perhaps the same number of unregistered ones prove this.

The enduring power of attorney is also very popular with the German government and legislator, as it helps to avoid court-appointed (legal) representatives and saves public resources. The interest in cutting down public expenses fuels the debate on how we can further promote the use of an enduring power of attorney.

A 2011 report made by an expert group set up by the Federal Ministry of Justice provides a good example. Whereas it suggests a significant law reform with respect to court-appointed (legal) representatives, it does not so with respect to enduring powers of attorneys: here the focus is entirely on its promotion.