Enduring Power of Attorney in Health Care as an Act of Trust
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1) Problem statement

- Ageing society → increasing number of potentially incapable patients (e.g. due to dementia, see fig. 2)
- Right of self-determination → in Germany: public legal protection und support in the form of “Betreuung”
- Problem: o State intervention in privacy
  o Possibly significant decisions of the court-appointed (legal) representative (“Betreuer”), e.g. concerning grave medical situations or end-of-life decisions
- Avoidance of “Betreuung” (sec. 1896 para. 2 BGB) by (enduring) power of attorney in health care (EPAHC; German: Gesundheitsvollmacht)
- Questionable from an empirical point of view: Representative acting under EPAHC is better suited to determine patient’s will.4
- Different approach: EPAHC is based on the patient’s trust towards his representative.5

→ Thesis and consequences have not yet been examined from a legal perspective.

2) Starting point

Patient must consent to medical measure.

Problem: Patient is incapable to consent

- Anticipated consent (advance directive in health care)
- Legal representative

- EPAHC = external relationship: Legal authority of the representative to act on behalf of the patient
- Internal relationship between the parties: When and how representative should exercise his authority

- EPAHC and advance directive on “Betreuung”

Representative appointed by granting EPAHC

- E.g. concerning grave medical situations or end-of-life situations
- Does representative have a certain scope of independent decision-making?
- Possible discrepancies between patient’s wishes and the representative’s assumptions → consequences?
- What may the physician rely on when interacting with the representative in treatment situation?

3) Objective

- Legal analysis of legal relationship
- Concept of the EPAHC as an act of trust?
- Exact tasks of the representative? How to determine and implement patient’s will (advance directive in health care)?
- Importance of trust concerning
  o advance directives in health care?
  o decisions on medical treatments?
- Does representative have a certain scope of independent decision-making?
- Possible discrepancies between patient’s wishes and the representative’s assumptions → consequences?
- What may the physician rely on when interacting with the representative in treatment situation?

4) Methods

- Analysis of legislative materials, case law, legal literature.
- Comparison of “Betreuung” and EPAHC: What are the commonalities, what are the differences? What is the reason for the differences?
- Legislative motivation → comparison with legal situation in Sweden, where no instrument like the EPAHC exists.
- Analysis of empirical studies.

5) (Preliminary) findings

- Function of EPAHC: Avoidance of “Betreuung”
- Differences to “Betreuung” → not tasks/duties + commitment to patient’s will
- Advance directive on “Betreuung” → functionally close to EPAHC
- Questionable from an empirical point of view: Representative acting under EPAHC is better suited to determine patient’s will
- Difference: supervision and control mechanisms

Representative under EPAHC

- No supervision by court, no requirements of court approval
- Exception: sec. 1904 BGB, Dissent between physician and representative acting under EPAHC on patient’s will in grave medical situations

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→ Waiver of court control by granting an EPAHC → compensation through trust

Patient assigns task of determining and implementing his will to his representative acting under EPAHC.

- Does advance directive meet requirements of sec. 1901a para. 1 BGB?
- Interpretation of patient’s expressions and directives.
- Assignment of decision, whether patient’s directive represents patient’s will (scope of independent decision-making).
- If result of interpretation → change of will:

→ Authorisation to deviate from advance directives

6) Summary and relevancy to practice

- Enduring power of attorney in health care allows:
  o to assign decisions to a certain person of trust
  o to reduce state intervention in privacy
  o scope of independent decision-making of the representative when determining patient’s will
- Possible follow up questions for practise:
  o Better education of population about advantages/disadvantages of EPAHC and advance directive on “Betreuung”?
  o Are importance of trust and scopes of decision-making sufficiently respected by physicians and courts?

References

5) Weber, E. P. (1996): Anticipated consent (advance directive in comparison with legal to reduce state intervention in privacy consequences have not yet been examined from a legal perspective.

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