

Briefing April 2020

Advance Care Directive and Living Will in times of Covid-19

The current Covid-19 pandemic forces many people to think about what would happen if they lose their capacity of judgment or if they end up in a hospital in imminent need of emergency surgery or intensive care, such as intubation.

Swiss adult protection law is based on the right of self-determination and provides for two instruments in this regard: an advance care directive (so-called *Vorsorgeauftrag*) and a living will (so-called *Patientenverfügung*). In short, these instruments enable individuals to draw up binding instructions relating to how they wish to be treated in the event of loss of capacity of judgment and how representation by their designated representatives should be carried out.

Current surveys indicate that only around 50% of Swiss residents over the age of 65 have set up a living will. Naturally, among younger residents, this number is even lower, ranging between 25% of people aged between 40 and 64 years and only 5% of people aged between 18 and 39 years. While the instruments of an advance care directive and a living will could prove crucial in the current Covid-19 pandemic, some important details must be kept in mind when considering using them.

Adult Protection Authority

The child and adult protection law sets forth that each canton in Switzerland has its own adult protection authority (APA). The APA guarantees the protection and support of individuals who lack capacity of judgment

and who are, thus, no longer in a position to look after themselves. The APA will implement the necessary measures if it becomes aware that an individual suffers from incapacity of judgment. Anyone may notify the APA if they consider a person to be incapacitated.

However, as the adult protection law is based on the principles of autonomy and the subsidiarity of state measures, each individual has the option of setting forth binding instructions in advance by issuing: (1) a living will (Living Will) and/or (2) an advance care directive (ACD).

Living Will

A Living Will enables any individual who is of sound mind to make binding provisions regarding medical measures in the event that he/she is no longer capable of expressing his/her wishes. The principal may then determine which medical treatment he/she agrees to or refuses. The principal may also appoint natural persons as representatives who are thereby entitled to discuss all medical measures with the attending physician and to decide if and which medical measures shall be taken in the event that the principal is no longer able to express himself/herself. However, the principal may also give precise instructions or guidance to his/her representative regarding how he/she is to decide in such a situation.

While a Living Will increases the probability that a certain medical treatment will correspond to the wishes of the principal – who at that point in time is

no longer able to communicate – substantially, it can also bring an immense relief for close family members who may otherwise find themselves forced to make a very difficult decision without being sure as to what the person concerned would have wanted in such a situation.

Notably, in the case of a specific medical diagnosis or treatment, a Living Will should be discussed with a competent medical practitioner. However, even for individuals in a perfect state of health, it makes sense to think about setting up a Living Will and to speak with close relatives about their wishes in case of a medical emergency, as such emergencies can always occur unexpectedly.

In light of the current Covid-19 pandemic, we generally advise clients to focus on three main questions: (1) do I want to be reanimated in case of an emergency?, (2) do I want to be put into intensive care (especially intubation) over a longer period of time? and (3) who should be my representative in case questions arise about my actual or presumptive Living Will?

Formal Requirements

A Living Will must be issued in writing, dated and signed. However, it does not have to be handwritten nor notarised.

Safe keeping of the Living Will

As there is no official public register for Living Wills in Switzerland, it is advisable to give copies of the Living Will to one's general practitioner and to close relatives or to one's representative, as the case may be. Ideally, an electronic copy of the Living Will can be sent to those involved (preferably via e-mail). In any case, the principal can add an electronic note on his/her health insurance card with information on the existence and place of deposit of his/her Living Will.

Advance Care Directive

Any individual with legal capacity may issue an ACD and appoint a natural person or a legal entity to represent him/her in case he/she becomes incapacitated. It is also possible to appoint several representatives to represent the principal with regard to different matters, e.g. personal care and/or financial affairs as well as those relating to representation in legal matters. Personal care generally relates to matters of everyday living, such as administrative tasks, dealing with mail and taking decisions about the principal's residential situation. A representative designated with representation in financial affairs must submit the principal's tax returns, manage his/her assets, if applicable, and take care of financial matters in general.

An ACD enables an individual to draw up tailor-made instructions with regard to his/her representation in case he/she becomes incapacitated. In particular, it is useful to protect the principal's assets, e.g. if he/she owns a family business, has made substantial investments or in case the financial situation is complicated. It also provides the opportunity to coordinate lifetime wealth planning with estate planning in the best possible way.

Formal Requirements

An ACD must either be handwritten (from beginning to end), dated and signed, or executed by way of a public deed (notarisation in front of a Swiss civil public notary). The principal may revoke the ACD at any time as long as he/she is still capable of judgment.

Procedure for Enactment

The APA is competent to put the ACD into effect once the principal becomes incapacitated. The APA verifies whether: (1) the ACD has been validly executed, (2) the requirements for its effectiveness are met, (3) the appointed representative is capable of meeting his/her duties and whether (4) further adult protection measures are required. Subsequently, the appointed person can accept or reject such a mandate.

Upon request, the civil registry office will register the fact that an ACD has been issued and the place where it is located in the Swiss Central Civil Register *Infostar*, albeit without mentioning its content. It ensures that an ACD can be found in a timely manner in the event that the principal becomes incapacitated.

Conflict of Law Rules

The Swiss Private International Law Act (PILA) and the Hague Convention on the International Protection of Adults of 13 January 2000 (HCIPA) determine the international jurisdiction, the applicable law and the recognition of foreign instruments equivalent to the ACD and/or the Living Will. Generally, the authorities at the principal's place of residence are competent to declare the ACD effective and to take the necessary measures. Swiss courts may recognise foreign equivalent instruments under certain circumstances.

Swiss Power of Attorney

Unlike an ACD, a power of attorney is effective from the date it is granted and expires when the principal becomes incapacitated, unless otherwise agreed. However, even if otherwise agreed, such a power of attorney only remains valid in cases where the principal is merely temporarily incapacitated, e.g. if he/she is temporarily hospitalised. In practice, a power of attorney will not be accepted if the principal suffers from lasting incapacity.

Statutory Right of Representation by Spouse

The adult protection law also emphasises family solidarity. It sets forth that if a person has not issued an ACD, his/her spouse or registered partner is entitled to act to a certain extent on behalf of the incapacitated person. The spouse/registered partner may open and process mail on behalf of the incapacitated individual and perform all legal acts relating to general maintenance expenses. However, for extraordinary legal acts, such as the sale of real estate, the APA's consent must be obtained.

Guardianship

The APA appoints a guardian as a protective measure if the individual is incapacitated, if there is no ACD in place and if representation by their spouse/registered partner is not possible. The APA monitors the guardian and reviews and approves his/her reports and accounts.

Conclusion

The current Covid-19 pandemic has led many people to consider their options should they lose their capacity of judgment or in case they need to be hospitalised for a long time including intensive care. With an ACD and a Living Will, Swiss adult protection law allows for adequate instruments which concerned individuals can make use of. With these instruments, anyone can set up tailor-made provisions in advance to protect his/her personal, legal and financial interests in the event that he/she becomes incapable of judgment. As the principal must be capable of judgment to issue an ACD and/or a Living Will, it is essential to do so early on – and not only once it becomes apparent that the principal is already suffering from a degenerative disease. The same applies when considering a Living Will. In this regard, it is important to reflect seriously on the question of which medical measures should be undertaken and to include one's close relatives when making such decisions.

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