

Briefing November 2017

Advance Care Directive and Living Will – Health and Wealth Planning Tools

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

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 people 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 a person suffers from incapacity of judgment. Anyone may notify the APA, if they consider a person to be incapacitated.

However, since the adult protection law is based on the principles of autonomy and the subsidiarity of state measures, anyone may set forth binding instructions in advance by issuing (1) an advance care directive (ACD) and/or (2) a living will.

Advance Care Directive

Any person with legal capacity can issue an Advance Care Directive 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 finan-

cial affairs and relating representation in legal matters. Personal care generally relates to matters of everyday living, such as administrative matters, dealing with mail and taking decisions about the principal's residential situation. A representative designated with the representation in financial affairs must submit the principal's tax returns, manage his/her assets, as the case may be, and take care of financial matters in general.

An ACD enables a person 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 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 hand-written (from beginning to end), dated and signed, or executed by way of public deed (notarization in front of a Swiss Notary Public). 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 to meet his/her duties and whether (4) further adult protection measures are required. Subsequently, the appointed person can accept or reject such mandate.

Upon request, the civil register 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*, but without mentioning its content. It ensures that an ACD can be found in a timely manner in case 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 principals' place of residence are competent to declare the ACD effective and to take the necessary measures. Swiss courts may recognize 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 power of attorney only remains valid in case the principal is merely temporarily incapacitated, e.g. if he/she is temporarily hospitalized. A power of attorney will in practice not be accepted if the principal suffers from lasting incapacity.

Statutory Right of Representation by Spouse

The adult protection law also strengthens family solidarity. It sets forth that if a person did not issue 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 person and perform all legal acts relating to general maintenance expenses. However, for extraordinary legal acts, such as the sale of real estate, the consent of the APA must be obtained.

Guardianship

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

Living Will

A living will enables anyone of sound mind to make binding provisions regarding medical measures in the event he/she is not capable to express his/her wishes anymore. The principal may determine which medical treatment he/she agrees to and which he/she refuses. The principal may also appoint natural persons as representative who shall be entitled to discuss all medical measures with the attending physician and decide whether and which medical measures shall be taken, if the principal is no longer able to express him-/herself. However, the principal may also give precise instructions or some guidance to his representative as to how he/she shall decide in such situation.

Formal Requirements

A living will must be issued in writing, dated and signed. It does not have to be handwritten or notarized.

Safe-keeping of the Living Will

As there is no official public register for living wills in Switzerland, it is reasonable 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. However, the principal can add an electronic note on his/her health insurance card about the existence and place of deposit of a living will.

Conclusion

The adult protection law strengthens the right to self-determination and provides for an ACD and a living will. Thereby, 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. As the principal must be capable of judgment to issue an ACD and/or a living will, it is important to do so early enough and not only once it becomes apparent that the principal is already suffering from a degenerative disease.

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