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Häufig gestellte Fragen zur Vorsorgevollmacht in englischer Sprache!

Ein Informationsservice ihrer Kanzlei Schröder

1. Does your legal system provide for lasting powers of attorney for persons who wish to nominate someone close to them as their guardian in case of loss of legal capacity owing to an accident or illness?

Antwort auf die Frage:

German law expressly recognises lasting powers of attorney (Section 1896 (2), sentence 2 of the German Civil Code).

a) What is covered by the lasting power of attorney (administration of assets, custody rights, etc.)?

The lasting power of attorney can cover all property and personal affairs to the extent that representation of the person concerned is admissible.

The measures relating to property affairs can, amongst others, be the following:

- dealings with the courts, public authorities and other public powers
- disposing of assets, such as real estate and bank accounts
- the exercise of shareholder rights
- entering into commitments.

The measures relating to personal affairs can be the following:

- making health-related declarations (e.g. giving agreement for an operation)
- exercising the right to information against medical practitioners
- making decisions concerning detention measures (e.g. fixing bars to the bed or belts on the bed or chair)
- deciding on a stay and or placement in a health care institution
- determining the prerequisites for the legal representative's consent to coercive medical measures.

b) Who may be appointed as legal representatives?

The civil law provides in principle no constraints on who may be appointed as a legal representative. The empowerment of certain persons, however, may require the appointment of an additional guardian (see below lit. ee).

c) Must all representatives be approved, for example by a court?

The court only checks the legal representative's capacity if there are signs suggesting that the legal representative's perception of the interests of the ward would pose a real risk for the ward's well-being.

d) May authorised representatives delegate authority to third parties?

A legal representative may give a deputy-protection when authorised to do so by the content of the main power of attorney. Owing to the fact that a lasting power of attorney involves particularly high levels of trust, deputy-protection is often expressly ruled out in practice.

e) Under what conditions may lasting powers of attorney replace official guardianship?

The lasting power of attorney replaces official guardianship if and to the extent that its content and scope are sufficient to ensure the necessary measures which, otherwise, would be made by the guardian.

Only if the legal representative, based on matters of law or fact, cannot act on behalf of the person represented as well as a guardian, the court will appoint a guardian despite the existing lasting power of attorney.

Furthermore, the appointment of a guardian is required, if the legal representative is a person who is in a situation of dependence or in another close connection to an institution, a home or another establishment to which the person of full age has been committed or in which he lives (Section 1896 (2) in conjunction with Section 1897 (3) of the German Civil Code).

f) Do powers of attorney have any legal effects before the loss of capacity occurs? Do they have effects after death?

In practice, lasting powers of attorney generally produce effects directly that are in no way linked to the loss of capacity occurring. If this were the case, there would be considerable problems in practice, as the legal representative would always have to prove that the prerequisite was (still) fulfilled. The principal can provide individually in the power of attorney that it should also produce effects following death.

g) In what form must the power of attorney be drawn up?

The lasting power of attorney is not required to be in any particular form, but it should be in written form. If the legal representative is required to dispose of immovable property, the lasting power of attorney must be in notarised form.

h) Must/can lasting powers of attorney be recorded in a register?

The lasting power of attorney is not required to be in any particular form, but it should be in written form. If the legal representative is required to dispose of immovable property, the lasting power of attorney must be in notarised form.

2. Does your legal system provide for an advance decision on medical treatment for persons who, as a result of an accident or illness, are no longer able to express their wishes with regard to undergoing or refusing medical treatment?

Antwort auf die Frage:

Yes, German law expressly provides for the possibility to draw up such an advance decision on medical treatment (Section 1901a of the German Civil Code).

a) What is covered by the advance decision?

The measures are limited by criminal law. The following measures are covered by the advance decision:

Assisted death (relieving pain without the risk of reducing the length of life);

In a targeted way, easing pain likely to reduce the length of life (indirect euthanasia);

Allowing to die, withholding treatment that would keep the patient alive (artificial respiration, blood transfusion, artificial nutrition) even if the fatal process itself has not yet begun.

b) Must the advance decision be officially approved, if appropriate?

An advance decision can be subject to judicial review if there are any doubts about its validity, content or scope.

c) Is the advance decision binding on medical staff and the patient's representatives?

The wishes stated in the advance decision are in principle binding. In the actual circumstances, the guardian/representative must check whether these wishes correspond to the current life circumstances and medical treatment. If this is the case, he/she must respect them, as must the doctors providing treatment.

d) In what form must the advance decision be drawn up?

Advance decisions must be drawn up in writing (Section 1901a (1), sentence 1).

e) Must/can advance decisions be recorded in a register?

Even advance decisions can be recorded in the central register of lasting powers of attorney and living wills. Like for lasting powers of attorney, recording them is recommended. However, recording them does not have a constitutive effect.

f) Do regulations exist to resolve any conflict between an advance decision and a wish for organs to be donated expressed by the patient in another form (such as an organ donor card)?

There are no such rules in Germany. If organ donation is admitted, it is necessary to check that the patient's wishes regarding medical treatment are not contrary to this. If the reverse is true, it is necessary to determine which measures or medical treatment are essential. If there are contradictions nevertheless, the representative or a guardian must act according to presumed wishes.

3. Does your legal system provide for the right to request that a trusted person be named as guardian in case of future incapacity?

Antwort auf die Frage:

Such powers of attorney issued for cases of future incapacity (Betreuungsverfügungen) are possible in German law (Section 1901c of the German Civil Code).

a) Is the request for a trusted guardian binding on the court/authority?

Of course, such a power of attorney does not make it possible to avoid court intervention, but it can influence the guardianship decided by the court. It is thus possible to appoint the person (and/or wishes with a view to a life under guardianship). The court is linked to these wishes as a matter of principle. The court can only designate another person when the person mentioned in the proposal proves to be unfit to act. The court determines the extent of the guardian's powers.

b) Who may be appointed as guardian? May more than one person be named as legal guardian?

There also, all natural persons who have the necessary capacity are considered. Moreover, it is possible to appoint more than one guardian (Section 1900 of the German Civil Code). They must be capable of dealing with the cases to be handled. It is also possible to propose more than one representative (Section 1899 of the German Civil Code).

c) May more than one person be named responsible for the administration of assets and handling custody rights?

Yes, this is perfectly possible.

d) In what form must the request be drawn up?

The power of attorney does not need to be in any particular form. For reasons of documentation and evidence, it should at least be in written form.

e) Must/can such requests be recorded in a register?

Powers of attorney can also be recorded in the central register of lasting powers of attorney and living wills. There also, recording them is recommended, like for lasting powers of attorney and advance decisions, but recording them does not have a constitutive effect.

4. Which authority has international, territorial and material jurisdiction to appoint legal guardians?

Antwort auf die Frage:

From a German point of view, the judicial or administrative authorities of the contracting State of the habitual resident of the adult have international jurisdiction, in accordance with Article 5 of the Hague Convention on the International Protection of Adults. Territorial jurisdiction is objective and is a matter for the family court (court of first instance) situated in the place of residence of the person concerned.

5. Is it usual practice to appoint several guardians, to deal with different matters (custody rights, administration of assets, etc.)?

Antwort auf die Frage:

In most cases, only one guardian is appointed to deal with all the different areas of life.

6. To what formal and material restrictions are legal guardians subject? Specifically, must they be officially approved? Must they have authorisation from a court or authority to carry out certain legal acts?

Antwort auf die Frage:

The guardian must look after the affairs of the ward in a way that is in the ward's best interests. It is also in the ward's interests to be able to organise life according to his/her aptitude, own wishes and projects. The assistant must conform to the wishes of the ward as long as this does not go against the ward's interests and where it is possible to satisfy them. The guardian must report to the court once a year on the personal circumstances of the ward (Section 1840 of the German Civil Code). The court can request information at any time on all the affairs subject to guardianship. In addition to the report on the personal circumstances of the ward, an account must be given of the management of the assets if the guardian also handles this. This involves presenting all account transactions with corresponding supporting documents. In this case, an inventory of assets must also be drawn up when the guardianship is organised (Section 1802 of the German Civil Code).

A certain number of particularly important decisions require the approval of the family court. Such approval is necessary as a matter of principle prior to the legal transaction envisaged (Section 1829 of the German Civil Code). Examples of such decisions submitted for approval are:

- Approval in the case of medical treatment if this treatment brings a risk of death or serious harm to the person's health (Section 1904 of the German Civil Code);
- Putting the ward in accommodation that is associated with deprivation of liberty (Section 1906 of the German Civil Code);
- Abandonment of rented home (Section 1907 of the German Civil Code);
- The acquisition, alienation or other provisions relating to immovable property with the exception of mortgages and land charges (Section 1821 of the German Civil Code);
- The disposition of the ward's share in an inheritance (Section 1822 (1) of the German Civil Code)
- The waiver of a succession, etc. (Section 1822 (2) of the German Civil Code)
- Contracts creating a service or employment relationship (Section 1822 (7) of the German Civil Code)
- Taking out a loan (Section 1822 (8) of the German Civil Code)
- Debts to a third person (e.g. for the assumption of a guarantee) (Section 1822 (10) of the German Civil Code).

7. Under the conflict-of-law rules in force, what substantive law is applicable to:

a) lasting powers of attorney?

b) advance decisions to refuse treatment?

c) requests made with regard to the guardian and/or circumstances of a guardianship?

Antwort auf die Frage:

a) lasting powers of attorney

The law applicable is that of the habitual residence of the principal when he/she grants the lasting power of attorney (Article 15 of the Hague Convention on the International Protection of Adults). Furthermore, it is possible to choose the applicable law. The States whose law can be designated are as follows:

- a State of which the adult has nationality;
- a State of the adult's previous habitual residence
- a State in which the adult's assets are located, as far as these assets are concerned.

b) advance decisions to refuse treatment

The Hague Convention on the Internal Protection of Adults is not applicable to advance decisions to refuse treatment (on their own). Therefore the German conflict-of-law rules apply. It seems plausible to assume that the relevant connecting factor is the place of treatment, especially since this will usually be the law governing the treatment contract as well.

c) powers of attorney to avoid the appointment of a guardian by a magistrate

The establishment, modification and termination of the powers of attorney to avoid the appointment of a guardian by a magistrate are governed by the law of the nationality of the ward (Art. 24 (1), sentence 1 of the Introductory Act to the German Civil Code) as long as – against the opposite view – the Hague Convention on the International Protection of Adults, according to which the habitual residence of the ward is relevant, is not applicable.

Has your Member stated signed and ratified the Hague Convention of 13 January 2000 on the International Protection of Adults?

Yes.

Under what conditions are foreign

a) lasting powers of attorney

b) advance decisions to refuse treatment

c) powers of attorney to avoid the appointment of a guardian by a magistrate recognised in your Member State?

Lasting powers of attorney, advance decisions and powers of attorney to avoid the appointment of a guardian by a magistrate are recognised in Germany (a country in which they are used) according to the relevant conflict-of-law rules.