Nordisk seminar om framtidsfullmakter

Oslo 3. mai 2007

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Innhold

Forord

Justisdepartementet ønsket velkommen til et seminar om framtidsfullmakter 3. mai 2007 i Oslo. Justisdepartementet arrangerte konferansen med støtte fra Nordisk Ministerråd.

Det er lang tradisjon i de nordiske land for samarbeid på privatrettens område. Også i forbindelse med utredningen av nye regler om framtidsfullmakter har det vært et nordisk samarbeid. Vi er glad for å ha kunnet utdype dette nordiske samarbeidet gjennom seminaret om framtidsfullmakter, og ved å formidle informasjon basert på seminaret.

I løpet av seminaret ble framtidsfullmaktene belyst fra mange sider. Framtidsfullmakter, eller "interessebevakningsfullmakter" som de kalles i Finland, "vedvarende fullmakter" i Danmark, er et nytt rettsinstitutt i Norden. Justisdepartementet inviterte derfor også foredragsholdere fra land utenfor Norden der framtidsfullmakter er i bruk allerede. Kanskje kan erfaringene fra disse landene komme til nytte også i Norden. Siden det i dag foreligger forslag til lovbestemmelser om framtidsfullmakter i flere nordiske land, ønsket vi dessuten å gå nærmere inn på disse forslagene.

Det var vårt siktemål at seminaret også skulle kunne fungere som et lovgivningspolitisk verksted. I denne sammenhengen spilte deltakerne en viktig rolle. Deltakerne var invitert på bakgrunn av sin særskilte kompetanse. Seminaret gav grunnlag for en felles forståelse av at spørsmålene knyttet til ikraftsetting og behovet for registrering av framtidsfullmaktene må vurderes nærmere. Ved seminarets avslutning valgte representanter for det svenske Justisministeriet derfor å invitere til et felles nordisk møte for å drøfte disse problemstillingene videre.

Vi har grunn til å tro at konferansen bidro til å opprettholde og kanskje også styrke den nordiske tradisjonen for samarbeid og erfaringsutveksling på vergemålsområdet.

Det er med glede vi nå kan viderebringe bidrag fra seminaret.

Med hilsen

Justisdepartementet

Fremtidsfullmagter; definisjon og fremvekst

Af adj. professor, dr. jur. Svend Danielsen, Københavns Universitet

Jeg gratulerer de norske initiativtagere og takker Nordisk Ministerråd for støtte til dette nordiske seminar. Jeg er glad for, at vi en hel dag får mulighed for at drøfte *fremtidsfuldmagter* på nordisk plan og i en bredere kreds. Jeg går ud fra, at meningen er, at jeg skal sætte debatten lidt i perspektiv.

Det er naturligt først at *fastlægge begrebet*. I et norsk og svensk lovudkast er definitionen:

”En fremtidsfuldmagt er en fuldmagt til en eller flere personer om at repræsentere fuldmagtsgiveren, efter at fuldmagtsgiveren på grund af sindslidende, herunder demens, eller alvorlig svækket helbred hovedsagelig ikke er i stand til at varetage sine interesser inden for de områder, som omfattes af fuldmagten.”

Lidt *dansk retshistorie*. Under drøftelserne i det danske værgemålsudvalg i begyndelsen af 1990-erne var vi opmærksomme på brugen af sådanne fuldmagter. I dag kan jeg ikke forklare, hvordan tanken opstod. Vi skrev, at fuldmagter kunne være et alternativ til værgemål. Vi sluttede modsætningsvis fra den fællesnordiske aftalelovs § 22, hvorefter fuldmagter ifølge den danske tekst først falder bort, hvis der iværksættes værgemål med handleevnefratagelse. I dansk teori og praksis antages, at fuldmagter derfor ikke falder bort, fordi udstederen senere mister evnen til at handle fornuftmæssigt. Der oprettes i dag danske fuldmagter med netop dette perspektiv. I de uddelte materiale er der en formular. Hvor udbredt brugen er, vides ikke.

Det danske udvalg skrev om fuldmagterne uden af have kendskab til *internationale strømninger*. Senere er jeg blevet klar over, at de kendes i England og Skotland samt i alle de amerikanske, australske og canadiske enkeltstater. Senere er de indført i Tyskland og Japan. Det skal vi snart høre mere om.

I det *norske* værgemålsudvalgs *mandat* fra 2001 kom et afsnit med under overskriften ”vedvarende fuldmagter” I *svenske komiteedirektiver* fra 2002 omtaltes fuldmagter af generel karakter som et muligt alternativ til godmans- og förvaltarinstituttet. Der har været et forbilledligt *nordisk samarbejde* – efter min vurdering bedste på det familieretlige område i mine mange år i branchen. Forudsætningerne var også til stede i usædvanlig grad. Der blev arbejdet samtidig i Norge og Sverige med reformen og fremtidsfuldmagter stod på programmet i begge lande. Formændene – Bo Broomé og Peter Lødrup, som begge er til stede – var interesseret i drøftelser. Jeg har fulgt de nordiske forhandlinger som ekspert i det svenske reformarbejde. Resultatet er blevet næsten enslydende udkast til regler om fremtidsfuldmagter. Den finske repræsentant i drøftelserne Markku Helin tog hjem og iværksatte et udvalgsarbejde om fuldmagterne, der har

resulteret i et lovforslag om interessebevakningsfullmagter, som er fremsat i Rigsdagen.

Jeg mener, at fremtidsfuldmagter i mange tilfælde er et glimrende *alternativ* til det myndighedsoprettede og –kontrollerede værgemål. Ældre og syge får mulighed for selvbestemmelse. De bør have adgang til i private rammer selv at tilrettelægge, hvad der skal ske, hvis eller når de ikke længere kan varetage deres anliggender og at bestemme, hvem der skal repræsentere dem, hvis det bliver aktuelt. Det vil være betryggende at vide, at de får en fuldmægtig, de har tillid til. Fuldmægtigen kan træde i funktion straks, uden at afvente en offentlig myndigheds beslutning om udpegning af en legal repræsentant - en værge eller en god man. Jeg nævne ordet privatisering, idet man kan spørge, om et værgemål, måske med beskikkelse af en offentlig antaget professionel værge, og med udbyggede kontrolforanstaltningerne, er nødvendigt i alle tilfælde.

På den anden side er fremtidsfuldmagter ikke løsningen på alle problemer. De har kun deres berettigelse i *velfungerende,* samarbejdsvillige *familier*. De er ikke nogen reelt alternativ i konfliktfyldte og mistroiske familier. Der skal findes en fuldmægtig, som nyder den fornødne tillid. En engelsk ekspert har udtrykt det sådan: "I de forkerte hænder, i de forkerte familier og med den forkerte rådgivning er fuldmagterne som en Pandoras æske". Dermed er målgruppen for en lovgivning måske lidt utraditionelt den velfungerende familie og bonus pater aktører.

Jeg vil gerne nævne nogle af dem *emner*, jeg tror, kommer i centrum i dag:

Skal vi have fuldmagter om andet end økonomi – om *personlige anliggender*, f.eks. om helbredsspørgsmål og på de sociale områder? I den svenske udvalgsbetænkning er der også udkast til love om stedfortrædere for voksne med bristende beslutningsformåen inden for sundhedsområdet og inden for den sociale velfærd.

Skal der være krav til *indholdet*? Det må kræves, at det udtrykkeligt fremgår af ordlyden, at fuldmagten skal have virkning, efter at opretteren har mistet evnen til at handle fornuftmæssigt, så udstederen skriver under herpå. Et særligt spørgsmål er, om fuldmægtigen skal have adgang til at disponere til fordel for nærstående, hvilket må kræve en udtrykkelig tilkendegivelse. Det kan være om adgang til at give gaver samt til at tillægge sig selv et honorar.

Skal der være *formkrav* ved *oprettelsen*? I de norske og svenske udkast har man lagt sig op ad formkravene til testamenter, og det er jo vidnetestamenter. Det mener jeg er fornuftigt. I Danmark, mener mange notarer ikke, at der er i dag er hjemmel til at attesterer, at fuldmagtsgiveren er i stand til at handle fornuftmæssigt, sådan som de gør det ved testamenter.

Et helt centralt spørgsmål er, om der skal være *formkrav*, når fuldmagten skal *træde* i *kraft.* Her er der to forskellige holdninger. Den ene er, at området skal være privatiseret, og at det er op til fuldmægtigen, f.eks. ved en lægeattest, over for omverdenen at dokumentere, at betingelserne for ikraftsættelse er indtrådt. Den anden er, at det offentlige skal medvirke ved konstateringen, og det er den finske løsning.

Spørgsmålet er, om der skal være *offentlige kontrolforanstaltninger*, dvs. om nogle af de krav om regnskabsrevision, forhåndsgodkendelse af visse dispositioner og formueforbrug, der gælder ved værgemål, skal overføres. Sker det i større omfang, og skal det offentlige kontrollere iværksættelsen, bliver fuldmagterne i højere grad en tilkendegivelse af ønsker til, hvem der skal repræsentere vedkommende.

Skal myndighederne på grundlag af henvendelser fra udenforstående med retlig interesse kunne kræve, at fuldmægtigen *indsender regnskab* og *redegør* for sine *dispositioner*, f.eks. på det personlige område?

Hvilke *muligheder* skal der være for *indgriben*? I de nordiske lande har man valgt iværksættelse af værgemål, hvorefter fuldmagten ophører eller kan tilbagekaldes af værgen. Det bør overvejes, om der skal indføres et særligt kriterium for iværksættelse af værgemål - misbrug af fuldmagten og måske tillige om alvorlige samarbejdsproblemer.

Det bliver spændende for en dansk at høre, hvor langt man er kommet i Finland, Norge og Sverige med en reform på området. Det ser ud til, at mere generelle overvejelser på grundlag af de norske og svenske betænkninger trækker ud. De er jo mere end to år gamle. Derfor kunne de være interessant at høre, om der er overvejelser om et særskilt lovgivningsinitiativ om fuldmagterne.

Må jeg til sidst komme med et *fromt dansk ønske*. Jeg håber, at drøftelserne i dag fører til et dansk politisk initiativ, f.eks. i form af en arbejdsgruppe eller et seminar, så det nordiske samarbejde udstrækkes til dette område. Vi har måske endnu mere grund til at regulere end i de andre lande, fordi sådanne fuldmagter allerede oprettes hos os. Notarmedvirken bør reguleres. Det vil være hensigtsmæssigt at fastlægge fuldmagternes rækkevidde. Lovgivning er måske nødvendig for at få fuldmagterne anerkendt af banker og andre tredjemænd. Der er behov for visse muligheder for offentlig indgriben og for at fastlægge kriterier for beslutninger om værgemål for at bringe fuldmagten til ophør. En lovgivning vil gøre ordningen mere kendt. Der er et godt grundlag og megen inspiration at hente i de andre landes lovudkast.

Presentasjon og vurdering av de skotske reglene om framtidsfullmakter

(Presentation and evaluation of continuing and welfare Powers of Attorney in Scots law)

background paper
by
Adrian D. Ward MBE LL.B

1 Terminology and Abbreviations

Power of Attorney (Power) (POA):	fullmakt
Continuing Power of Attorney (CPA):	a POA dealing with property and financial matters
Welfare Powers of Attorney (WPA):	a POA dealing with personal welfare matters
Combined Power of Attorney (Combined Power):	a POA which is both a CPA and a WPA
Incapacity Act (the Act):	Adults with Incapacity (Scotland) Act 2000 (asp 4)
2007 Act:	Adult Support and Protection (Scotland) Act 2007 (Part 2 of which contains various amendments to the Incapacity Act)
The Adult:	A person over 16 to whom a provision of the Incapacity Act applies, or may apply
Grantor:	The person granting a POA
Attorney:	The person acting under a POA (not to be confused with the U.S. use of "attorney" for lawyer)
ECHR:	European Convention on Human Rights

2 Introduction

In Scotland Powers of Attorney are used in various ways. They are used for many commercial purposes. Some are very limited, such as authorising signature of specified categories of documents, and others may be for broader purposes, which

may extend as far as the entire conduct of the business of a sole trader. In a non-commercial context, people may also grant Powers of Attorney in various circumstances, for various purposes, and for various durations. People going abroad may grant Powers of Attorney for the conduct of some or all of their affairs. A common example is when someone has to go abroad in the midst of negotiating a house purchase or sale, and grants a Power of Attorney for limited and specific purposes likely to arise during their absence, and limited to the short duration of absence. People may have many other reasons, including convenience and infirmity, for granting Powers of Attorney.

Increasingly people are granting continuing, welfare and combined Powers of Attorney – POA's granted with the specific intention that they be operated following the grantor's loss of capacity. These are some statistics:

Powers of Attorney registered in Scotland

	Financial	**Welfare**	**Both**	**Total for year**
2001/2002	3,947	197	1,448	5,592
2002/2003	6,382	468	3,508	10,358
2003/2004	7,554	1,096	5,794	14,444
2004/2005	8,044	1,356	8,713	18,113
2005/2006	8,062	1,908	12,927	22,897

For centuries POA's were well established as a form of agency. They are described in 17th century texts[1]. But it was generally considered that, under the general law of agency, the POA ceased to have effect upon the incapacity of the attorney or the grantor. However, people began to grant POA's containing express declarations that they should continue in effect notwithstanding the grantor's loss of capacity. They also adopted other rather clumsy strategies such as putting their assets in trust, so that trustees could manage them.

With effect from 1st January 1991 the position was reversed. Section 71 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provided as follows:

(1) Any rule of law by which a factory and commission or power of attorney ceases to have effect in the event of the mental incapacity of the grantor shall not apply to a factory and commission or power of attorney granted on or after the date on which this section comes into force.

(2) In subsection (1) above, "mental incapacity" means, in relation to a person, that he is incapable of managing his property and affairs by reason of mental disorder within the meaning of section 1 of the Mental Health (Scotland) Act 1984.

[1] e.g. Stair's *The Institutions of the Law of Scotland*, Book I, Title 12 (1693).

This created an unsatisfactorily simplistic régime under which all POA's continued in force following loss of capacity, unless they specifically stated otherwise. The régime lacked safeguards, but lasted for a decade. I shall evaluate it at the seminar.

On 2nd April 2001 an entirely new régime of CPA's and WPA's under our Incapacity Act came into force. The background and context of the Incapacity Act as a whole are important to an understanding of our POA régime, and are described in sections 3, 4 and 5 of this paper (all of them edited extracts from papers which I wrote following passage of the Act, so please note that use of the present tense refers to 2000). Again, I shall give my evaluation at the seminar.

Because of the revolutionary nature, for us, of the Incapacity Act, it was from the beginning subject to careful monitoring and further consultation, resulting in improvements (including amendments to the POA régime) in the 2007 Act, passed by the Scottish Parliament on 15th February 2007. So the timing of this seminar means that I can present to you at the seminar not only personal experience during my professional career in practice as a solicitor of three quite different POA régimes, but also the results of our experience and evaluation of our current, modern régime.

3 Background to the Incapacity Act

[This is an edited extract from the papers for a series of seminars which I gave to solicitors around Scotland immediately following the passage of the Incapacity Act in 2000]

Let us begin with some simple points and concepts to set the scene.

Apart from child law, the law is based on a presumption of capacity, and is generally expressed and formulated as it applies to adults with full capacity. The presumption can be set aside by evidence of incapacity. Our concern at this seminar is with how that body of law which presumes capacity is adapted and modified, and makes special provision, when applied to adults whose capacity is in some degree impaired.

Mental disabilities which may cause impairment of capacity are notable for their prevalence and their diversity. In Scotland[2] every year some 6,000 people sustain head injuries, around 1,500 of them with lasting consequences, and some 10,250 people suffer a stroke. At any one time, about one in six of the adult population in Scotland has some form of mental health problem, and each year in Scotland there are about 30,000 psychiatric hospital admissions. Around 2% of the population have a learning disability, and it is estimated that over 20,000 people in Scotland have a severe learning disability. In Scotland right now there are some 61,000 people diagnosed with dementia, most of them in the moderate to severe range. It is projected that by the year 2011 there will be 73,000 people in Scotland with some form of dementia. Not all of the foregoing will necessarily have a legally

[2] Total resident population of Scotland at last census (2001) was 5,062,011.

significant impairment of capacity, but it is estimated that at any one time some 100,000 adults in Scotland do have significant impairment of legal capacity, and that issues of adult incapacity are likely to affect every family sooner or later.

These impairments vary hugely in cause, nature and degree. Some are temporary, some lifelong, some variable or progressive. People with the same diagnosis may vary considerably in degrees of capacity. For example, some people who have Down's Syndrome are severely or even profoundly handicapped, while at the other end of the scale I have clients with Down's Syndrome who have jobs, have bought their own houses with a mortgage, and themselves have insight into the areas of intellectual functioning where they experience difficulties which they attribute to their syndrome. Even with broadly similar degrees of incapacity, people are likely to be diverse in their strengths and weaknesses in different skills, such as long-term memory, short-term memory, arithmetical competence, various areas of conceptual and cognitive functioning, communication abilities, and so on.

Hitherto, the way in which our law has responded to the prevalence, diversity and reality of intellectual impairment has been fundamentally unsatisfactory. That has not been a problem unique to Scots law. The problem has merely persisted longer, and been more severe, here because of many decades of legislative neglect by [the British Parliament in] Westminster. World-wide, over the last two or three decades legal systems throughout the world have been making the shift from provision which can be categorised as "old law" to modern systems which are remarkably similar in their underlying principles and many of their techniques, and which can be described as "new law".

"Old law" proceeded upon a simplistic black and white view of incapacity. People were seen as sane or insane, fully capable or completely incapable, educable or ineducable, and so on. Responses to incapacity followed a simplistic pattern of putting people in a category based on diagnosis, and then following a procedure which resulted in a standardised outcome. An example in Scots law is curatory [abolished by the Incapacity Act], where a curator takes over all financial management and the ward is deprived of all management capacity, even - in law – in respect of simple transactions and acts of management of which several people under curatory are in fact capable. Generally, our "old law" produced a rising tide of criticism and complaint which generated the pressure for the reforms which have now been enacted.

"New law" seeks to balance the tension between autonomy and protection by providing an individual package of provision accurately matched to capabilities and needs. Underlying principles address this issue of balance. On the one hand, we live in a society rightly committed to respect for autonomy of the individual, to empowerment, and to non-discrimination. On the other hand, a caring society should protect vulnerable people. It should protect them from exploitation and abuse, both physical and financial, and from suffering avoidable disadvantage by

reason of their vulnerability. But to protect is to restrict. To apply special rules of law is to discriminate. To declare invalid a purported act or transaction is to disempower. We should apply such measures only if the need and justification clearly outweighs the disadvantages. Where we can, we enable and assist and empower so as to push back as far as possible those grey areas where issues of incapacity may arise.

For each individual with a mental disability, the ideal is a legal environment which is as normal as capabilities, needs and circumstances permit. There should be no special provision, no intervention, no differentiation, unless it is shown to be necessary. By necessary we mean that the desired outcome cannot be achieved by some less formal means, and that there will be positive advantage in applying it. The intervention or differentiation should be as much as is needed to achieve that advantage, but no more. Where however some special provision is needed, it should be provided; it should contain necessary safeguards and protections; and it should impose no unnecessary or inappropriate limitations, disqualifications or other disadvantages. Procedures should be no more complex or difficult than is necessary. They should be workable, accessible and fair. This is what "new law" seeks to provide, and what our "new law" seeks to provide.

The principles of "new law", as fully developed in modern legal systems, have at their centre an individualised package of provision which is the culmination of initial procedures and the definitive starting-point for implementation. The key elements are initial gateway definitions to access the procedure; a flexible range of possible outcomes; principles to guide the choice of outcome; and a process of assessment to produce the individualised package of provision.

Implementation is guided by a set of principles, generally similar to those which guided choice of provision; is subject to requirements of accountability and supervision; and if necessary is subject to the application of remedies. Where circumstances, capabilities or needs have changed materially, there is a requirement to go back to the beginning and re-assess.

I would like you to hold this overall pattern in mind when we come shortly to the provisions of the Act.

Let us be clear, however, as to what our new Act covers and what it does not. Legal issues arising from mental disabilities include the following broad categories:

- whether purported acts or transactions are voidable through facility and circumvention, or the exercise of undue influence
- whether purported acts or transactions are void through lack of capacity

- whether there should be exemption from, or mitigation of, the civil and/or criminal consequences of wrongful conduct
- what anticipatory measures may be taken in relation to possible future loss of capacity
- what responsive measures may be taken in consequence of impairment of capacity which already exists
- what measures may be taken by third parties to provide for existing or future incapacity.

Except for some empowering provisions in relation to authorised decisions and transactions by people under guardianship, the new Act does not alter the law on validity or invalidity of purported acts and transactions in relation to capacity or incapacity. It is important to recognise that the definitions of "incapable" and "incapacity" in the Act are for the purpose of the provisions of the Act. The Act's definitions do not alter the legal criteria for testing the validity of purported acts and transactions.

The Act is not concerned at all with issues of civil or criminal responsibility, and facility and circumvention, or undue influence, do not feature except for precautions against undue influence when Powers of Attorney are granted. The Act does not directly affect the law on third party measures, such as trusts established by third parties in anticipation of, or in response to, incapacity of beneficiaries. It could however be relevant to refer to the Act's general principles in situations where the actings of trustees are challenged, or in questions as to whether it would be appropriate to resort to remedies under the Act to safeguard the interests of a beneficiary with incapacity.

The Act is concerned principally (and indeed, with a few peripheral exceptions such as those mentioned, exclusively) with anticipatory and responsive measures in relation to decisions about personal welfare matters and management of property and financial affairs. While the Act for the first time gives us a coherent and integrated code in respect of these matters, it is not comprehensive. Some existing techniques in our law are to be abolished, some amended, and some left substantially untouched; and some new techniques are to be created.

Before giving you an overview of what will change and what will not, I would like to look at these two areas of personal decision-making and financial management. The Act does not define what personal welfare matters are and it does not define what financial and property matters are. While the difference may be obvious, it is wise at this stage to ensure that it is clearly understood.

Personal decision-making covers the whole range of non-economic decisions including decisions about personal health and welfare; residence; personal relationships; work, education and training; social and other activities; diet, dress and other routine daily matters; and so on.

Management concerns making decisions and exercising rights regarding property, money and so forth, including financial management generally and all acts of administration of money and property; entering contracts of any kind, from simple purchases to more complex transactions; and all other acts or transactions affecting finances, property or similar rights.

Hitherto, our law has largely dealt separately with these two areas. While the new Act takes a more integrated approach, the distinction is still preserved and is still significant. Some techniques apply only to one area; there are procedural differences for integrated techniques; and there are different supervisory roles – except for some registration and consultation provisions, the Public Guardian is concerned with property and financial matters, and the functions of local authorities are concerned principally with personal welfare matters. The Mental Welfare Commission will bridge the two areas – the Commission will be principally concerned with welfare matters, but will have in addition an investigatory function when property may be at risk. Attorneys may have welfare powers or financial powers or both, but there is differentiation; and the same applies to appointees under intervention orders, and to guardians.

Now let us take these two main areas of personal welfare matters and management, and within each the two general categories of anticipatory measures and responsive measures, and look at what is abolished, amended, created and unaltered under the new Act.

Personal welfare matters

Anticipatory measures

Amended: welfare powers of attorney.
Unaltered: advance directives.

Responsive measures

Abolished: tutors-at-law; tutors-dative; Mental Health Act guardians.
Created: intervention orders; guardianship orders; authority to treat; authority for medical research.
Unaltered: parens patriae; medical treatment on grounds of necessity; Mental Health Act and Criminal Procedure Act provisions (except as regards guardianship); removal to hospital under National Assistance Act 1948 s.147 (as amended).

Management

Anticipatory measures

Amended: continuing powers of attorney; joint bank accounts.
Unaltered: trusts (including trusts for administration); gifts.

Responsive measures

Abolished: tutors-at-law; tutors-dative; curatory; hospital management.

Created: guardianship, intervention orders; authority to intromit; management of residents' finances.

Unaltered: a wide range of provisions for management of particular types of asset, including social security benefits under the Social Security (Claims and Benefits) Regulations 1987, vaccine damage payments, sheriff court management, criminal injuries compensation and various miscellaneous statutory methods;
a range of informal techniques including *negotiorum gestio*, informal voluntary arrangements and bare trusts.

There is an important two-way relationship between the Act and those measures and techniques which lie outwith the Act's own code of provision. Firstly, and as we shall see, the second of the overriding general principles in section 1 of the Act requires us to apply "the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention". That is not limited to the options under the Act. Obviously, we cannot apply the least restrictive option unless, in an individual case, we consider and evaluate – in relation to the circumstances of that case – all potential options. This has always been good practice, and now becomes a requirement. So if needs can be adequately and properly met by a social security appointee, or a nominated recipient under the Savings Certificates Regulations or National Savings Bank Regulations, and so on, or by a combination of such techniques, then we must not use a technique more invasive of the adult's freedom.

In the other direction, because section 1 of the Act gives statutory authority to accepted standards of good practice, it sets a standard against which performance under arrangements outwith the Act's scheme can be measured. Failure to attain those standards would be likely to justify sanctions and remedies appropriate to the technique in question, or the application of interventions under the Act either to supersede existing arrangements or to safeguard the adult's interests under them. I believe that this effect extends not only to the whole range of anticipatory and responsive measures, but also to third party measures, such as trusts. The trust is a technique of major importance whenever a third party is providing funds or assets to benefit someone with existing or anticipated impairment of capacity, whether *inter vivos* or *mortis causa* or both. Properly structured, a trust can not only provide appropriate arrangements for management, but can provide protection from the dangers of means-testing and the effects of the beneficiary's own intestacy. In my view, if in future trustees under such a trust act in serious contravention of the Act's section 1 principles, that would be a *prima facie* case for sanctions under trust law and/or intervention under the Act to safeguard the beneficiary with impaired capacity.

4 The Incapacity Act – an overview

[This is also an edited extract from the papers referred to in the note at the beginning of section 3 of this paper]

Let us now look at the overall layout of the Act. Part 1 commences with the general principles, followed by the definitions of "adults", "incapable" and "incapacity". It contains general provisions about proceedings, appeals and powers of the court; about the Public Guardian (formerly the Accountant of Court), the Mental Welfare Commission and local authorities; and about investigations, codes of practice and appeals against decisions as to incapacity.

Parts 2 – 6 contain the range of anticipatory and responsive measures which are reformed and created by the Act. The layout is as follows:

Part 2	-	continuing powers of attorney;
	-	welfare powers of attorney.
Part 3	-	authority to intromit;
	-	joint accounts.
Part 4	-	management of residents' finances.
Part 5	-	new authority to treat;
	-	authority for medical research.
Part 6	-	intervention orders;
	-	guardianship.

Part 7 is headed "Miscellaneous" but contains some important substantive provisions as well as the usual tail-end matters.

There are six Schedules. Schedule 1 is concerned solely with defining who are the managers of different categories of establishment for the new scheme of management of residents' finances under Part 4. Schedule 2 sets out the main management provisions applicable to guardians with property and financial powers – Schedule 2 should be read in close conjunction with Part 6: there is not always any obvious logic about the allocation of provisions to Part 6 or to Schedule 2. Schedule 3 deals with matters of jurisdiction and private international law; Schedule 4 contains the transitional provisions in respect of existing curators, tutors, guardians and attorneys; and Schedules 5 and 6 deal respectively with statutory amendments and statutory repeals.

5 The general principles, and definitions of "adult" and "incapacity", in section 1 of the Incapacity Act

[This is an edited version of part of another seminar paper, written in 2001]

There are five general principles. The first four apply to all "interventions" under the Act. The fifth, as well as the first four, apply *inter alia* to attorneys.

Section 1(1)

The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.

The principles apply to any intervention, but "intervention" is not defined in the Act. It is clear that the term means not only procedures under the Act, but the acts and decisions of attorneys, guardians and others, including decisions not to do something as well as decisions to do something.

Section 1(2)
There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

This is the first principle. "Benefit" is not defined but it is clear from the terms of the Act that it has a wide meaning, including overcoming the limitations created by incapacity so as to permit something which the adult could reasonably be expected to have chosen to do if capable – such as making a gift, about which the Act has specific provisions.

Under the first principle, intervention is never justified by the existence of incapacity alone, however severe. There must be both incapacity and need; the intervention must meet that need; and even then there must be no intervention if the need can reasonably be met in some other way, not involving intervention. Steps to avoid legal intervention could include treatment to restore capacity (except where a decision is urgent and there is no time), provision of assistance and services, help with communication, and so on.

Section 1(3)
Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

This second principle is the principle of minimum necessary intervention. It applies at three levels. Firstly, it applies to the choice of measure to be used – for example, section 58(1)(a) effectively defines guardianship as the most restrictive of the options under the Act. However, the reference to "freedom" raises an important point also relevant to the first principle. The exercise *de facto* of powers such as guardianship powers without legal authority, without any procedure to determine whether and to what extent such powers are needed and upon whom they should properly be conferred, and without the attendant régime of suitability and accountability, is by far the greatest restriction of the adult's freedom, and will often be wrongful (and perhaps a contravention of ECHR Article 6). Also at the level of the choice of measure to be applied, the combined effect of the first and

second principles is that all available options, and not merely those under the Act, require to be considered. Moreover, the least restrictive option does not necessarily mean the simplest procedure.

The second level at which this principle operates is in the choice of powers to be conferred, where the chosen procedure offers such flexibility. This applies, for example, to the choice of powers under a guardianship order, and likewise to the extent of powers granted under an intervention order. However, the principle is also relevant to questions of whether, and if so to what extent, authority to intromit should be granted, or the new authority to treat should be applied.

The third level at which this principle applies is that the individual acts and decisions – the individual "interventions", including decisions to refrain from acting – must also comply with this principle. This requirement applies to attorneys, guardians, appointees under intervention orders, people authorised to intromit with funds, people accessing joint accounts, managers of residents' finances, anyone acting by virtue of the new authority to give medical treatment; and also to the sheriff exercising his various jurisdictions under the Act, the Public Guardian discharging his responsibilities under the Act, and so on.

Section 1(4)
In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of:
(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature of otherwise) appropriate to the adult;
(b) the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practicable to do so;
(c) the views of:
(i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
(ii) any person whom the sheriff has directed to be consulted,
in so far as it is reasonable and practicable to do so; and

(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.

Section 1(4)(a) contains the third principle and demands a fundamental change in attitudes – never again should we encounter the scandal of curators who have never even met their wards. Note that the qualification "insofar as it is reasonable and practicable to do so", which appears in each of the other paragraphs, does not appear in paragraph (a). The duty to take account of the adult's wishes and feelings, if ascertainable, is absolute. The reference to "any means of communication …" etc. merely adds emphasis. The absolute terms of paragraph

(a) mean that if advanced modern neuro-psychological techniques would allow wishes and feelings to be accessed, then those techniques must be applied, even if to anyone unskilled in such matters the adult might appear to be in something very close to a vegetative state.

Section 1(4)(b) – (d) contains the fourth principle – taking account, where reasonable and practicable, of the views of others.

Section 1(5)
Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.

This fifth principle is another provision requiring a fundamental shift in attitudes. Instead of appointments imposing artificial incapacity which may exceed actual incapacity, there is instead now an obligation to encourage the exercise and development of skills. In the case of guardianship, this should be read in conjunction with section 64(1)(e), under which guardians may be empowered to authorise the adult to carry out transactions, and section 67(1), which limits the extent to which the guardianship order results in legal incapacity.

Section 1(6) defines "adult" and "incapacity" – the elements which comprise the Act's title. It is in the following terms:

> *1(6) For the purposes of this Act, and unless the context otherwise requires–*
> *"adult" means a person who has attained the age of 16 years;*
> *"incapable" means incapable of–*
> *(a) acting; or*
> *(b) making decisions; or*
> *(c) communicating decisions; or*
> *(d) understanding decisions; or*
> *(e) retaining the memory of decisions,*
> *as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and "incapacity" shall be construed accordingly.*

An adult is someone who has attained the age of 16. I again stress that the definition of "incapacity" is for the purposes of this Act (only). For example, element (e) may not always be relevant in determining validity. Element (e) also raises an obvious point of interpretation: if it means total and permanent recollection of every minor decision, then I imagine that we are all incapable, and I

have suggested that this element should be interpreted as being retention of memory to a degree, and for a duration, appropriate to the matter in question. This is where (as mentioned earlier) I would suggest a divergence between the Act's definition and the criteria for validity.

Note also the important element of particularity in "as mentioned in any provision of this Act". The Act does not create any general category of people who are incapable. Incapacity is specific to a particular matter and to the particular provisions of the Act referring to that matter.

We can now identify four levels at which the Act engages with an individual's incapacities and abilities. The definition in section 1(6) is particularised as I have described, but is nevertheless the broad gateway definition designed to ensure that no-one who might reasonably and properly benefit from the Act's provisions will be excluded from them. However, having entered the gateway, the first and second principles apply the stringent requirements, before we go any further, that before any intervention under the Act takes place it must be shown that the intervention will achieve benefit, that the benefit cannot reasonably be achieved without the intervention, and that the least restrictive option has been selected. Thirdly, if we have entered the gateway and satisfied the first and second principles, any of the appointees mentioned in the fifth principle must nevertheless encourage the exercise and development of skills, and this principle is linked to provisions which can give validity to resulting acts and transactions. Fourthly, where there is incapacity, then however severe that incapacity may be there is the absolute obligation under the fourth principle to ascertain present and past wishes and feelings of the adult.

6 Continuing and Welfare Powers of Attorney under the Incapacity Act

Under the Incapacity Act Powers of Attorney may cover property and financial matters (continuing powers), personal welfare matters (welfare powers), or both (combined powers). They may appoint sole attorneys, joint attorneys, different attorneys for different purposes, and/or substitute attorneys. Continuing powers may, if the grantor so chooses, be exercised before as well as after loss of capacity. Welfare powers may only be exercised after loss of relevant capacity, or at times when the attorney reasonably believes that the grantor has lost relevant capacity. Subject to these constraints, the grantor may specify a "trigger mechanism", either for exercise of the powers or for registration of the document with the Public Guardian. No powers may be exercised before registration. Even where the document states that continuing powers are to be exerciseable immediately, before any loss of capacity, the document must still be registered before they can be exercised.

The legal requirements for the document itself are relatively simple. The Power of Attorney must be in writing, subscribed by the grantor, and clearly state the

grantor's intention that the powers be continuing or welfare powers (or both). The particular powers granted are set out in the document. Often the list is lengthy. Examples of specific powers from one of my office styles are reproduced in the Appendix to this paper. Welfare attorneys cannot be empowered to supersede Mental Health Act provisions on detention and treatment, nor to authorise certain prescribed forms of treatment.

The principal controls are requirements for certification and for registration.

Every continuing and welfare Power of Attorney must incorporate a prescribed certificate, and combined Powers must incorporate both forms of certificate. Solicitors and other prescribed persons may sign the certificate. The certificate must confirm that the certifier interviewed the grantor immediately before the grantor subscribed the document, is satisfied that the grantor understood the nature and extent of the document, and that the certifier has no reason to believe that the grantor was under undue influence, or that any other factor invalidates the grant of the Power. The certifier must state that capacity is certified either from the certifier's own knowledge, or following consultation with persons who are named in the certificate.

The Power of Attorney may be registered with the Public Guardian at any time before the attorney begins to act. The document may contain a "trigger" that it may only be registered after loss of capacity.

To register the Power of Attorney, the attorney completes and signs a registration application form. The particulars include information about the powers granted, the grantor, the attorney, any joint attorneys and any substitute attorneys, and the relationship or other connection of the attorney(s) to the grantor, and some other information. The attorney and any joint attorneys sign the application to confirm their acceptance of appointment. The Power of Attorney with incorporated certificate(s), application form and payment of the registration fee (currently £35) are sent to the Office of the Public Guardian. The Public Guardian enters prescribed particulars in the register, sends a copy of the document with a certificate of registration to the sender, and copies to the grantor and up to two other persons specified by the grantor. Welfare Powers are also copied to the local authority and to the Mental Welfare Commission. An explanatory leaflet is sent with the copies to the attorney and other individuals.

Attorneys are not subject to any automatic official supervision. They must comply with the general principles of the Incapacity Act. They must keep records of the exercise of their powers. In accordance with the Act there is a code of practice for attorneys, the Public Guardian must (if asked) provide information and advice to continuing attorneys, and both the local authority and the Mental Welfare Commission must (if asked) provide information and advice to welfare attorneys.

The Public Guardian (in relation to continuing powers) and the local authority (in relation to welfare powers) have the function of receiving and investigating any complaints about attorneys. They also have the functions of investigating any circumstances where (respectively) an adult's affairs or welfare appear to be at risk.

The sheriff court has jurisdiction to put attorneys under the supervision of the Public Guardian, or terminate any powers, or revoke the appointment. The court cannot confer additional powers. The sheriff may be asked to give directions to anyone acting under the Act, including attorneys, as to the exercise of their functions.

After a Power of Attorney has been registered, the attorney must notify to the Public Guardian any change in address of the grantor or attorney, the death of the grantor and any other event which results in the termination of the Power of Attorney. If the attorney dies, the attorney's personal representatives must notify the Public Guardian. Powers of Attorney in favour of a spouse terminate on separation, divorce or declarator of nullity. Continuing Powers terminate upon the bankruptcy of the grantor or attorney, but welfare powers do not. The Public Guardian keeps the register updated with any relevant changes, with obligations to notify some changes.

An attorney must give 28 days' notice to the Public Guardian of intention to resign, except that the resignation takes place immediately if the Public Guardian receives evidence that a joint attorney is willing to continue to act, or a substitute attorney is willing to commence acting. The Public Guardian must notify the resignation of a welfare attorney to the local authority and to the Mental Welfare Commission.

A continuing attorney must repay funds used in breach of fiduciary duty or outwith the powers conferred. An attorney who ill-treats or wilfully neglects the grantor is guilty of an offence. Attorneys do not incur liability where they act (or do not act) reasonably, in good faith and in accordance with the Act's general principles.

On 2nd April 2001 existing attorneys came under some of the provisions of the Act, including the requirement to comply with the general principles, the powers of the sheriff court, and the investigative and supervisory functions of the Public Guardian, the Mental Welfare Commission and local authorities. In relation to adults who are in Scotland, attorneys acting under foreign Powers of Attorney are subject to similar parts of the Scottish régime.

7 Continuing and welfare Powers of Attorney – the 2007 changes

The two most important changes introduced by the 2007 Act are these. Firstly, where continuing Powers of Attorney are to be operable only after loss of relevant

capacity, the document must in future state that the grantor has considered how incapacity is to be determined. All welfare Powers of Attorney must contain a similar statement. Experience shows that grantors have not always addressed that issue clearly.

Secondly, the risks in relation to revocation of a Power of Attorney are similar to those in relation to granting the Power. It is equally important to have safeguards against the grantor acting when lacking capacity, or being pressurised. Accordingly, revocation will in future require to be in writing, with similar certification to the original granting of the Power of Attorney, and likewise registered with the Public Guardian.

Minor changes are that in future there will be a single certificate for combined Powers, rather than two certificates; and a certifier relying upon someone else need now name only one other person. In practice, this will often be a doctor or other suitably qualified person.

There is one issue which was not dealt with in the 2007 Act, but which will hopefully be dealt with by regulations. We need a clear certification procedure when a grantor signs a Power of Attorney abroad. That happens, for example, when a grantor who is abroad at the time has assets or affairs in Scotland.

8 Appendix – examples of specific powers

The following examples of specific powers are reproduced from one of my office styles. They would normally appear in a Schedule to the Power of Attorney document, adapted as necessary to individual requirements.

Part 1

Continuing Powers

1.1 To demand, sue for and recover all debts, claims and sums of money due or that may become due to me or exigible by me on any account or in any way, to give time for payment of any debt or claim and to grant receipts or discharges therefor.

1.2 To open accounts with any banker or banking company or any building society or any other fundholder in the United Kingdom in my name or in my Attorney's name as my Attorney and to operate thereon, or to operate on any such account wherever located already opened in my name or to which I am a party, and for that purpose to lodge or deposit monies and to draw, sign, endorse or negotiate all cheques, coupons, bills of exchange, promissory notes, deposit receipts, interest or dividend warrants, money orders or postal

orders and generally all cash and other documents of whatever description which may require to be signed or endorsed by me.

1.3 To meet my general household and living expenses.

1.4 To apply all or any part of my capital or income towards any scheme or plan which in my Attorney's opinion may provide a sufficient degree of security, protection and care for me during the whole or some part of my life.

1.5 To alter or adapt any residential accommodation in the ownership of any person or body for my more convenient occupation thereof as a home.

1.6 To purchase domestic appliances or procure domestic assistance for me or the person or persons with whom I from time to time reside.

1.7 To purchase, hire or otherwise acquire equipment, appliances, aids or the like for my use or benefit.

1.8 To purchase caravans or motor cars appropriate to my needs and/or those of the person or persons with whom I from time to time reside.

1.9 To purchase or otherwise secure the provision of facilities or services of any kind for my support, care, occupation, training, recreation, enjoyment or otherwise for my benefit, or for the support or assistance of my carers.

1.10 To provide holidays for me or to meet the expenses incurred by any person or persons to enable them to accompany me on holiday or to provide holidays unaccompanied by me for any person who bears the daily burden of caring for me.

1.11 To exercise powers for my benefit notwithstanding that any other person may also benefit from such exercise.

1.12 To sell or concur with others in selling by public auction or by private sale any property, heritable or moveable, real or personal, of any kind or description and wherever situated which may belong to me or in which I may be or become interested and whether the title thereto may be in my name or in the names of myself and others or in the name of any person as nominee or trustee for me, and that at such prices and upon such terms as my Attorney may think proper.

1.13 To purchase or concur with others in purchasing heritable property or real estate in any part of the United Kingdom or to invest in the purchase of government stocks or funds of the United Kingdom, any country of the British Commonwealth or any foreign country or in stocks, securities or funds of any municipal corporation or public trust in the United Kingdom, or

in the stocks, shares, debentures or other securities of public or private companies registered in the United Kingdom or elsewhere or in shares, bonds or other securities of unit or other trusts, provided that the certificates for such investments are registered and not to bearer and that the liability incurred is limited to the amount invested, and generally to act in relation to any such purchases or investments made in virtue of the powers hereby conferred upon my Attorney.

1.14 To accept on my behalf any stocks, shares or securities allotted or provisionally allotted to me, to undertake liability for and make any payments that may be due in respect thereof and to procure the registration thereof in my name or in my Attorney's name as my Attorney, or to renounce or sell any rights to such stocks, shares or securities; and to attend, act and vote for me at all meetings of and with regard to all matters affecting any company, corporation, trust or other undertaking in which I may be or become interested as a holder of stocks, shares, debentures or other securities or as a creditor or otherwise, or at any class meeting of such holders or creditors, and to grant proxies for others to act on my behalf at any of such meetings, and generally to act for me in the premises as fully and freely as I could have done myself, including without prejudice to the foregoing generality power to agree to liquidation, amalgamation, reconstruction or transfer of any such company, corporation, trust or undertaking.

1.15 To grant or accept leases, to excamb land, to improve or reconstruct or concur with others in improving or reconstructing heritable or real property, to accept renunciations of leases, input and output tenants, pay and receive rents, feuduties, ground annuals and ground rents, to redeem or accept redemption of feuduties or ground annuals, to alter or vary rents, and all on such terms and conditions as my Attorney may think proper, and generally to do all acts or things which my Attorney may consider necessary or desirable in relation to the management of heritable or real property in which I may be interested.

1.16 To lend money upon the security of any moveable or personal property or upon the security of any heritable property or real estate in the United Kingdom, on such terms and conditions as my Attorney shall think proper, and to rearrange or vary all loans or securities, whether made by myself or by my Attorney on my behalf, from time to time or to require repayment thereof or enforce the security therefor and generally to do all such acts or things in relation thereto as my Attorney may deem fit.

1.17 To borrow money on my behalf binding me and my executors and representatives jointly and severally for repayment thereof and that on such terms and conditions as my Attorney may think fit, and to grant security therefor over any part of my property, heritable or moveable, real or personal, and to rearrange or vary the terms of any borrowings whether

made by myself or by my Attorney on my behalf, or the securities therefor, including without prejudice to that generality to make repayment thereof or arrange for loans or advances in substitution therefor and generally to do all such acts or things in relation thereto as my Attorney may deem fit.

1.18 To grant, execute and deliver or to accept any deeds or documents necessary or appropriate to the exercise of any of the powers hereby conferred upon my Attorney, including without prejudice to that generality dispositions, deeds of conditions relating to land or buildings, deeds of excambion, leases, standard securities, mortgages, assignations, variations, discharges, deeds of restriction or disburdenment, transfers of stocks, shares or other securities, renunciations, acceptances, applications for registration and receipts.

1.19 To make on my behalf all returns required for government or local taxation or rating, to adjust valuations and assessments, to claim all repayments, rebates or allowances to which I may be entitled and to make any relevant appeals, and that as regards all periods past, current or future.

1.20 To claim and receive on my behalf all pensions, benefits, allowances, insurance and other entitlements and proceeds, services, financial contributions, repayments, rebates and the like to which I may at any time be entitled or for which I may at any time be entitled to apply, to complete and submit all forms, give any necessary undertakings, make any relevant appeals, and generally do anything else necessary or appropriate in connection therewith, and that as regards all periods past, current or future.

1.21 To appear and claim for me in the bankruptcy or liquidation of any person or company indebted to me and to concur in any arrangement in connection therewith.

1.22 To examine, prepare and adjust all accounts between me and any other person or persons and to claim or pay any sums which my Attorney may be satisfied are payable to or by me, and to compound, compromise, submit to arbitration and settle claims of any kind due to or payable by me.

1.23 To make any arrangements which my Attorney considers appropriate for the suitable management of my estate, including without prejudice to that generality (a) making arrangements of any kind which will subsist after termination for any reason of this Power of Attorney, and (b) placing any or all of my assets or estate in a trust for administration created by my Attorney on my behalf, under which my Attorney may appoint such trustee or trustees (including or not including himself) as my Attorney may consider appropriate, which trustees may be empowered to assume additional trustees, and otherwise upon such terms as my Attorney may consider appropriate.

1.24 To claim or renounce testamentary or other entitlements (including without prejudice to that generality to claim, discharge or renounce any entitlement to legal rights), execute Deeds of Arrangement in any terms, consent to any variation of any trust in which I have any interest (including any prospective or contingent interest), enter any other arrangements, make gifts, grant deeds of covenant, or make other provision from my estate (including without prejudice to that generality, to create any form of trust, discretionary or non-discretionary, charitable or non-charitable) of any kind and in favour of any beneficiary or beneficiaries if in the judgement of my Attorney, acting reasonably, I myself would have done so if consulted or able to be consulted; declaring that (a) in the case of a trust, the beneficiaries may include myself, but that (b) my Attorney may not exercise any powers in terms of this paragraph so as to benefit himself or herself except in accordance with advice in writing from an appropriate professional instructed to advise with professional responsibility to me alone.

1.25 In accordance with such professional advice as my Attorney may consider it appropriate to seek, to implement such tax-planning or similar arrangements as my Attorney may deem suitable, including without prejudice to that generality to do for such purposes anything authorised in terms of the preceding paragraph 1.24 hereof.

1.26 To grant (or refuse to grant) any consent or renunciation in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

1.27 To make any alimentary payments to my spouse and/or children and/or other dependants for which I may be liable and to continue any such payments customarily made by me without legal liability to do so.

1.28 To conduct, dispose of or otherwise deal with, or to wind up, any business or interest in a business belonging to me.

1.29 To meet the costs of private medical, nursing or other care.

1.30 To agree any common repairs or improvement scheme in relation to any property interest of mine and to meet the expenses thereof.

1.31 To acquire, whether by purchase, lease or otherwise, for my residential use whether alone or jointly with any other person or persons any accommodation without being required to insist upon the payment by any other person, whether or not a joint occupier thereof, of any consideration, but my Attorney shall have a complete discretion as to the terms on which my Attorney permits such residential accommodation to be occupied and the arrangements established to facilitate such occupation (which arrangements may, without prejudice to that generality, include entering leasing or other arrangements with a suitable provider of care or housing).

1.32 To pay the premiums on any policies of assurance belonging to me and to effect any such policies on any lives in which I have an insurable interest.

1.33 To insure any of my property for such amount and against such risks as my Attorney thinks fit.

Part 2

Welfare Powers

2.1 To make decisions generally about my accommodation and care including about where I should live, whether permanently or temporarily, with whom I should live and consort, and what services I should receive.

2.2 To make decisions about my social and cultural activities, including the nature and extent thereof and matters related thereto.

2.3 To make decisions regarding my healthcare, to consent to any healthcare that is in my best interests, to refuse consent to any proposed healthcare that is not in my best interests or does not accord with my known wishes and feelings, to arrange for me to attend for any healthcare (including investigation, assessment and the like) and to arrange access to me for the purpose of any healthcare (including investigation, assessment and the like).

2.4 To decide whether I should (or should be permitted to) take or participate in any educational, vocational or other training and, if so, the nature and extent thereof and matters related thereto.

2.5 To decide whether I should (or should be permitted to) apply for any licence, permit, approval or other consent or authorisation required by law.

2.6 To open, read, attend to and as appropriate reply to any mail or other communications addressed to or received by me or on my behalf, or to make arrangements for such mail to be dealt with.

2.7 To make normal day-to-day decisions on my behalf including as to my diet, dress and personal appearance and to do whatever is necessary to preserve my personal dignity so far as it is reasonable and practicable to do so (regardless of any degree of impairment of my ability still to appreciate such matters).

2.8 To take me on holidays, excursions or the like or authorise someone else to do so.

2.9 To exercise all rights and powers competent to me under statute, and in particular under the Data Protection Act 1998, Access to Personal Files Act 1987, Access to Medical Reports Act 1988, Environment and Safety Information Act 1988 and Access to Health Records Act 1990.

Part 3

Continuing and Welfare Powers

3.1 To raise or defend all actions or judicial or other proceedings in which I am or may be interested so far as my Attorney may consider necessary or expedient and to refer to arbitration any questions or disputes in which I am or may become involved, to appeal against, enforce or implement any judgement, order or award and to appear or instruct appearance on my behalf before any tribunal, commission or other official inquiry.

3.2 To employ bankers, brokers, solicitors, counsel, accountants, managers, factors or agents of any kind for the management of any of my affairs and to pay them appropriate remuneration for their services.

3.3 To require disclosure to my Attorney of any document or information, however confidential, which I could require or (if competent to do so) could have required to be disclosed to me, including without prejudice to that generality (a) my Will, any Codicils thereto and any other documents or writings of a testamentary effect and (b) any medical or other healthcare information; to make decisions regarding disclosure or release of any document or information (whether confidential or not); and to attach conditions to such disclosure or release, or to stipulate or require that any documents or information pertaining to me or my affairs be kept confidential.

3.4 To reimburse to my Attorney any out-of-pocket costs reasonably and necessarily incurred in consequence of acting as my Attorney.

3.5 To act as my legal representative in relation to any and all matters within the scope of the powers conferred by this Power of Attorney.

Adrian D. Ward
3rd April 2007

Presentation and evaluation of the German legislation on enduring powers of attorney– a model other countries should consider adopting?

Background Paper
by Prof. Dr. Volker Lipp
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I. Preface

For obvious reasons I adhere to the terminology and abbreviations suggested by Adrian Ward. In addition I will use the following abbreviations:[3]

Guardianship Directive – GD	- *Betreuungsverfügung*
Advance Directive – AD	- living will, *Patientenverfügung*
Guardian	- *Betreuer*
(Enduring) Power of Attorney - POA	- *Vorsorgevollmacht*
Basic Agreement	- *Vorsorgeverhältnis*
Monitoring Guardian	- A guardian who controls an attorney and exercises the rights of the grantor under the basic agreement (*Überwachungsbetreuer)*
Monitoring Attorney	- An attorney entrusted with the task of controlling the attorney under a primary POA and exercising the rights of the grantor under the basic agreement (*Überwachungsbevollmächtigter)*

I also may add that the purpose of this background paper is to inform on the German law on enduring powers of attorney in a more comprehensive manner whereas the presentation will focus on the evaluation.

II. Introduction

[3] Within the footnotes the following abbreviations are used: AcP (Archiv für die civilistische Praxis); BayObLG (Bayerisches Oberstes Landesgericht); BGB (Bürgerliches Gesetzbuch – German Civil Code); BGBl. I (Bundesgesetzblatt Teil I [Publication of the German Federal Legislation, Part 1]); BGH (Bundesgerichtshof); BGHZ (Entscheidungen des Bundesgerichtshofes in Zivilsachen); BR-Drucks. (Bundesrats-Drucksache); BT-Drucks. (Bundestags-Drucksache); BtPrax (Zeitschrift für soziale Arbeit, gutachterliche Tätigkeit und Rechtsanwendung in der Betreuung); BVerfG (Bundesverfassungsgericht); BWNotZ (Zeitschrift für das Notariat in Baden-Württemberg); FamRZ (Zeitschrift für das gesamte Familienrecht); HK-BUR (Heidelberger Kommentar zum Betreuungs- und Unterbringungsrecht); JZ (Juristenzeitung); LG (Landgericht); MDR (Monatsschrift für deutsches Recht – Zeitschrift für die Zivilrechtspraxis); MittRhNotK (Mitteilungen der Rheinischen Notarkammer); MünchKommBGB (Münchener Kommentar zum Bürgerlichen Gesetzbuch); MünchKommZPO (Münchener Kommentar zur Zivilprozessordnung); NJW (Neue Juristische Wochenzeitschrift; NJW-RR (Neue Juristische Wochenzeitschrift – Rechtsprechungs-Report); NStZ (Neue Zeitschrift für Strafrecht); OLG (Oberlandesgericht); VersR (Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht); ZPO (Zivilprozessordnung – Code of Civil Procedure); ZRP (Zeitschrift für Rechtspolitik).

The increasing expectancy of life and the progress of medical science make it more likely than before that, due to an accident, disease or old-age, we may become incapable of managing our own affairs one day.

In these cases the guardianship court, according to Sec. 1896 et seqq. BGB, may appoint a Guardian ("*Betreuer*") for an adult[4] who is not able to manage his own affairs due to his mental or physical incapacity.[5] However, it is also possible to provide an attorney[6] with an enduring power of attorney (POA) ("*Vorsorgevollmacht*")[7]. Thus the grantor[8] is able to prevent the guardianship court from appointing an unknown third person as his guardian. POAs are also in the public interest as they avoid costly guardianship proceedings as well as the appointment of guardians who, if the ward is poor, have to be paid for by the general public.

POAs can be distinguished by the subject-matter the attorney is appointed for:

1. Enduring Powers of Attorney (POA) dealing with property and financial matters have been legally acknowledged by the BGB, i.e. for more than a hundred years.[9] General powers of attorney are very common and, due to their general nature, also cover cases of temporary absence and of enduring incapacity due to an accident, disease or old age. Therefore every power of attorney may, in principle, become an enduring power of attorney.[10] The principles which govern general powers of attorney do also apply to POAs which are especially designed for the case of incapacity.
2. The use of a POA for personal welfare matters (Welfare Powers of Attorney – WPA) is comparatively new and has been heavily disputed since the 1990s.[11]

[4] An adult is a person of full age. According to Sec. 2 BGB, in Germany people attain full age at the age of 18.

[5] It should be pointed out, that this "incapacity" has to be distinguished from the legal incapacity which makes a purported transaction void according to sec. 104, 105 BGB.

[6] The person acting under a POA – not to be confused with the U.S. use of "attorney" for lawyer.

[7] This phrase was coined by *Müller-Freienfels*, in: Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag, München 1982, Vol. II, 395 et seqq.: „*Altersvorsorge-Vollmacht*".

[8] The grantor is the person granting a POA.

[9] *Gernhuber* FamRZ 1974, 189, 195 et seqq.; *Müller-Freienfels*, in: Festschrift Coing (supra n. 7), 395, 403 et seqq.

[10] BT-Drucks. 11/4528l, 122; *Baumann* MittRhNotK 1998, 5; *Damrau*, in: Damrau/Zimmermann, Betreuungsrecht, Kommentar, 3rd ed., Stuttgart 2001, Sec. 1896 BGB No. 23; *Jürgens*, in: Jürgens, Betreuungsrecht, Kommentar, 3rd ed., München 2005, Sec. 1896 BGB No. 19.

[11] Advance Directive: BGHZ 154, 205 et seqq. = NJW 2003, 1588 et seqq.; *BVerfG* NJW 2002, 206; *OLG München* NJW-RR 2002, 811; for Powers of Attorney: *LG Göttingen* VersR 1990, 1401 et seq.; *LG Stuttgart* BtPrax 1993, 64 et seqq.; *OLG Stuttgart* BtPrax 1994, 99 et seqq.; *LG Frankfurt/Main* FamRZ 1994, 125; see also *Lipp* FamRZ 2004, 317 et seqq.; *Taupitz* in : 63. Deutscher Juristentag, Verhandlungen des 63. Deutschen Juristentages, Vol I 2000, Gutachten, Part A, 96 et seqq.; *Keilbach* FamRZ 2003, 969 et seqq.; *Vosseler* BtPrax 2002, 240 et seqq.; *Eisenbart*, Patienten-Testament und Stellvertretung in Gesundheitsangelegenheiten: Alternativen zur Verwirklichung der Selbstbestimmung im Vorfeld des Todes, 2nd ed., Baden-Baden 2000, 47 et seqq., 208 et seqq.; *Langenfeld*, Vorsorgevollmacht, Betreuungsverfügung und Patiententestament nach dem neuen Betreuungsrecht,

The implementation of Sec. 1904 subsection 2 and Sec. 1906 subsection 5 BGB, which came into force on 1 January 1999,[12] clarifies that an attorney may also be appointed for personal welfare matters. However, some basic issues have not been solved yet. I would like to give two examples: It is still discussed whether, and under which conditions, an attorney provided with a WPA is also authorised to withhold or withdraw consent to life-sustaining medical treatment,[13] or whether he can be given the power to prevent the grantor to inflict harm onto himself or to his property, i.e. to act in contradiction of the will of the grantor like a guardian.[14] Sec. 1906 subsection 5 BGB states that an attorney, under certain conditions and with permission of the guardianship court, can take measures concerning the deprivation of liberty. Outside the scope of sec. 1906 BGB the question remains open to discussion.

III. Enduring power of attorney

1. Purpose and task

The grantor of a POA – generally speaking – pursues the following aims:

- The grantor seeks to appoint the attorney himself to ensure that his personal matters are not taken care of by an unknown person or somebody he does not confide in.
- The grantor seeks to prevent the guardianship court and other public authorities to interfere in his affairs.
- Therefore the attorney should be able to take care of the entire affairs of the grantor and to the same extent as a guardian.
- The attorney should follow the directives and wishes of the grantor when taking care of the grantor's affairs.

Konstanz 1994, 5 et seqq., 87 et seqq., 178 et seqq.; *Röver* Einflussmöglichkeiten des Patienten im Vorfeld einer medizinischen Behandlung, antezipierte Erklärung und Stellvertretung in Gesundheitsangelegenheiten, Frankfurt am Main [et al.] 1997, 79 et seqq., 170 et seqq.

[12] BR.Drucks. 960/96, p. 34.

[13] For Advance Directives see in detail *Lipp*, Patientenautonomie und Lebensschutz : zur Diskussion um eine gesetzliche Regelung der "Sterbehilfe", Göttingen 2005, 21 et seqq.; for the recent discussion see *Bienwald* MDR 2003, 694 et seqq.; *Höfling/Rixen* JZ 2003, 884 et seqq.; *Holzhauer* FamRZ 2003, 991 et seq.; *Kutzer* ZRP 2003, 213 et seqq.; *Lipp* FamRZ 2004, 317 et seqq.; *Paehler* BtPrax 2003, 141 et seqq.; *Spickhoff* JZ 2003, 739 et seqq.; *Uhlenbruck* NJW 2003, 1710; *Verrel* NStZ 2003, 449 et seqq.; for Powers of Attorney: *Walter* Die Vorsorgevollmacht: Grundprobleme eines Rechtsinstituts unter besonderer Berücksichtigung der Frage nach Vorsorge im personalen Bereich, Bielefeld 1997, especially on p. 43 et seqq.; *Langenfeld* Vorsorgevollmacht (supra n. 11), 5 et seqq.; *Röver* Einflussmöglichkeiten (supra n. 11), 170 et seqq.; *Eisenbart* Patienten-Testament (supra n. 11), 208 et seqq.

[14] See e.g. Sec. 1901 subsection 2 and subsection 3 sentence 1, 1906 subsection 1 BGB *Lipp* BtPrax 2005, 6 et seqq.; *Lipp,* Freiheit und Fürsorge: Der Mensch als Rechtsperson. Zu Funktion und Stellung der rechtlichen Betreuung im Privatrecht, Tübingen 2000, 60 et seqq., 75 et seqq.

2. Basic principles

a. Autonomy of the grantor and POA

The right to grant a power of attorney, including an enduring one, derives from the constitutional right of self-determination[15]. It incorporates not only the right to take decisions oneself but also the right to delegate this power to a third person. The priority of a POA over the appointment of a guardian by the guardianship court is expressed in Sec. 1896 subsection 2 sentence 2 BGB and complies with the recommendations of the Council of Europe.[16]

b. Basic Agreement ("*Vorsorgeverhältnis*") and POA

The grantor and his attorney have to establish a basic agreement ("*Vorsorgeverhältnis*").[17] This agreement provides the basis for the POA. It authorises and obliges the attorney vis-à-vis the grantor to deal with the affairs of the grantor. It provides the guideline for the attorney when acting in the interest of the grantor and regulates his powers and his rights. Under German law, this agreement constitutes either a non-remunerated mandate or a remunerated agency agreement. In both cases the attorney is bound by the explicit instructions of the grantor, even if this will mean that it does harm to the grantor.[18] On the other hand, the grantor may allow the attorney to deviate from his instructions under certain conditions, e.g. if this is in the best interest of the grantor. Unless otherwise stated in the contract, the latter is presumed to be agreed between the parties according to Sec. 665 BGB.

Furthermore, the attorney needs an authorisation to act as a representative of the grantor towards third parties. Under German law, the POA is a legal instrument which is separate from the basic agreement mentioned before. However, one is very often not clearly distinguished from the other despite their different legal requirements.[19]

The POA gives the attorney the capacity to represent the grantor externally towards third parties,[20] but whether he is allowed to exercise this capacity is determined by the internal relationship between grantor and attorney.[21] If the basic agreement has been effectively established, it lasts even if the grantor becomes incapable in the course of time[22] and the POA, once granted, persists as well since the basic agreement provides for this.[23]

It is generally recommended to grant the POA unconditionally. All conditions under which the attorney is allowed or obliged to make use of the POA should be laid down in the basic agreement instead. It is possible, however, to insert the purpose of the POA or the conditions under which it should be exercised in the document containing the POA.

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[15] *Müller-Freienfels* in: Festschrift Coing (supra n. 7), 395, 399; *Lipp* Freiheit und Fürsorge (supra n. 14), 194 et seq.

[16] Recommendation R (99) 4 of the Committee of Ministers to Member States on Priniciples Concerning the Legal Protection of Incapable Adults, Principle 2, subsection 7; Explanatory Memorandum, subsection 33.

[17] The terminology was coined by *Langenfeld*, Vorsorgevollmacht (supra n. 11), 116 et seqq., 147.

[18] See Sec. 665, 675 subsection 1 BGB.

[19] See Sec. 1908f subsection 1 No. 2a BGB.

[20] See Sec. 164 subsection 1 sentence 1, sec. 166 subsection 1 BGB.

[21] See Sec. 168 sentence 1 BGB.

[22] Sec. 104 No. 2, Sec. 672 sentence 1, sec. 675 BGB.

[23] Sec. 168 sentence 1 BGB, and Sec. 51 subsection 3, sec. 86 ZPO.

But in this case the POA is restricted to this purpose or condition. That leads to significant difficulties: If the attorney wants to make use of a POA containing the purpose or conditions of its use he has to show that the purpose or condition is met, e.g. that the grantor is incapable.[24] This will very often be either practically impossible for the attorney or at least it will take up some time, and thus makes the POA ineffective and the appointment of a guardian necessary.

c. Controlling the Attorney

With a POA, the attorney has a wide opportunity for action which is independent from status and capacity of the grantor. This may be very dangerous for the grantor. If he becomes incapable, nobody controls the attorney and exercises his rights under the basic agreement.[25] For this very reason, in most European countries powers of attorney traditionally cease to have effect upon the incapacity of the grantor. However, the German BGB has followed a different road since 1900. If the basic agreement intends the POA to cover also the case of incapacity, the POA remains valid. Like any other power of attorney, the enduring POA needs neither to be registered nor to be approved by a public authority in order to be or become operational. Moreover, unlike a guardian, the attorney does not need an approval of the guardianship court for specific transactions or decisions, unless explicitly prescribed by law – as in Sec. 1904 subsection 2 (consent to medical treatment), and in Sec. 1906 subsection 5 BGB (consent to restriction of freedom of movement).[26]

The control of the attorney and the exercise of the rights of the grantor under the basic agreement are entrusted to a guardian who is given these tasks by the guardianship court according to Sec. 1896 subsection 3 BGB. He is called "*Überwachungsbetreuer"* (monitoring guardian).[27] Under Sec. 1896 subsection 2 BGB a guardian to control the attorney may only be appointed if necessary. A monitoring guardian need not be appointed, however, if a second attorney – who might be called "*Überwachungsbevollmächtigter*" (monitoring attorney) – accomplishes this task instead. The grantor would have to mandate another person with this task and provide a POA for this special purpose. Both, the primary attorney and the secondary attorney, may also be appointed to control themselves mutually.[28]

3. Scope of Attorney's Duties

A POA will only hinder the appointment of a guardian, if the attorney can fulfill all functions of guardianship, i. e.

- firstly, to re-establish the capacity of the incapable to act (assistance), and
- secondly, to protect the incapable from inflicting harm onto himself or on his property (protection).

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[24] *Langenfeld*, Vorsorgevollmacht (supra n. 11), 147.

[25] *Müller-Freienfels*, in: Festschrift Coing (supra n. 7), 395, 398 et seq., 403.

[26] *BGH* NJW 1969, 1245, 1246; *Schwab* in: MünchKommBGB, Vol. 8, Familienrecht II, Sec. 1589 – 1921, 4th ed., München 2002, Sec. 1896 No. 52; *Müller-Freienfels*, in: Festschrift Coing (supra n. 7), 395, 403 et seqq.; see also *Lipp*, Freiheit und Fürsorge (supra n. 14), 207 et seqq.

[27] *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1896 No. 229.

[28] BT-Drucks. 11/4528, 123; *Bühler* BWNotZ 1990, 2 et seq.; *Bauer* in: HK-BUR, loose-leaf edition (43rd delivery, Dec. 2004), Sec. 1896 BGB No. 257; *Bienwald* in: Bienwald/Sonnenfeld/Hoffmann, Betreuungsrecht, Kommentar, 4th ed., Bielefeld 2005, Sec. 1896 BGB No. 133 – „*Bevollmächtigter*"; *Langenfeld* Vorsorgevollmacht, (supra n. 11), 75 et seqq., 83; *Perau* MittRhNotK 1996, 297; *Walter* Vorsorgevollmacht (supra n. 13), 170 et seqq.; *LG Augsburg* BtPrax 1994, 176 et seq. *Jürgens*, in: Jürgens, Betreuungsrecht (supra n. 10), Sec. 1896 BGB No. 36.

a. Assistance and Representation of the Grantor
The attorney can always assist and counsel the grantor if the grantor is still acting in person. He may represent the grantor, if he acts under a valid POA and if the matter at hand is not excluded from representation. Under German law, a power of attorney can be granted for all matters unless the law states otherwise.

It has long been debated, e.g., whether an attorney, under a POA, can bring a lawsuit on behalf of the grantor. On 1 July 2005, Sec. 51 subsection 3 *Zivilprozessordnung* (ZPO – Code of Civil Procedure) became effective,[29] which ended this controversy. An attorney will be able to act in civil proceedings,

- if he has been authorised expressly and in writing as a legal representative by the grantor, and
- if the POA is equivalent to a guardianship.

b. Protection of the Grantor
The attorney is empowered to counsel and advise the grantor and thus protect him against inflicting harm onto himself. The obligation to do so arises from the basic agreement – at least by interpretation since otherwise the POA would not hinder the appointment of a guardian.

The attorney will not infringe the duties arising from the basic agreement if he asks the grantor to clarify his wishes or even if he acts against an instruction of the grantor to prevent harm. However, if the grantor insists that the attorney should obey his instructions he can only ask the guardianship court to appoint a guardian.

In some cases the grantor, due to his mental condition, may not be able to comprehend the scope and the consequences of his instructions. In this event he is legally incapable according to Sec. 104 and 105 BGB. Then the attorney is not bound by a harmful instruction: It is invalid.[30] Instead, the attorney has to act according to the presumed will of the grantor.[31]

By "relaxing" the obligation of the attorney to obey his instructions the grantor can improve the protection against self-inflicted harm which I mentioned above: Taking the regulation on a guardian in Sec. 1901 subsection 3 sentence 1 BGB as a lead, he could insert a provision in the basic agreement allowing the attorney to neglect an instruction, if he thinks that the instruction is caused by incapacity and that it harms the incapable grantor. By this, in effect the attorney would have a position equal to a guardian.

However, the POA can only provide limited protection against self-inflicted harm because the grantor always has the irrevocable right to withdraw the POA and / or to terminate the basic agreement at any time.[32] A disclaimer of these rights is invalid as it

[29] Zweites Gesetz zur Änderung des Betreuungsrechts (2nd law amending the law of guardianship) of 21 April 2005, BGBl. I 2005, 1073 et seqq

[30] Sec. 104 No. 2, 105 subsection 1 BGB and Sec. 105 subsection 2 BGB respectively.

[31] Sec. 665 BGB.

[32] Prevailing opinion, see *Flume*, Das Rechtsgeschäft, Allgemeiner Teil II, 3rd ed., Berlin 1979, § 53, 6, p. 883 et seqq.; *Pawlowski*, Allgemeiner Teil des BGB: Grundlehren des bürgerlichen Rechts, 7th ed., Heidelberg 2003, No. 765; *Sack*, in: Staudinger, BGB-Kommentar, Allgemeiner Teil 4, Sec. 134 – 163, 13th ed., Berlin 2003, Sec. 137 No. 26; *Schramm*, in: MünchKommBGB, Allgemeiner Teil, Vol. 1/1, Sec.

is impossible to give up one's legal capacity: Nobody can renounce the right of self-determination.[33]

c. Monitoring POA

If the grantor is incapable to exercise his rights under the basic agreement or the right to withdraw the POA, a monitoring guardian ("*Überwachungsbetreuer*") may be appointed to exercise these rights if necessary. However, a monitoring guardian may also be substituted by a monitoring attorney. Yet the legal limits described above also apply to a monitoring attorney. Thus the recommendation of some experts[34] to exclude a revocation of the primary POA from the monitoring POA means that the right of the grantor to revoke is not covered by the monitoring POA. Since the grantor can always revoke any POA, it may then become necessary to appoint a monitoring guardian instead.[35] The best advice is, then, to grant the task and authority to control to both attorneys so that the primary attorney and the secondary attorney may control themselves mutually.

4. Personal Matters

a. Representation in Personal Matters

Under German law, a power of attorney for personal matters is not excluded but explicitly provided for in Sec. 1904 subsection 2 BGB (consent to medical treatment), and in Sec. 1906 subsection 5 BGB (consent to restriction of freedom of movement). However, some provisions do not allow legal representation for specific legal acts or transactions which are of a very personal nature.

b. Coercive Measures

The prohibition of private coercion restricts the content of basic agreements and of POAs. The right of self-determination cannot be irrevocably delegated to a third person. Thus, the exercise of freedom of movement cannot be regulated by contract,[36] and consent to medical treatment cannot be given irrevocably.[37] If the incapable now decides otherwise by resisting consciously, his will prevails over the decision of the attorney.[38] Compulsory measures are only lawful if allowed by statute and authorised by a court or a public authority. An attorney, acting under a POA, is therefore only allowed to consent to measures depriving the grantor of his personal liberty under the conditions set out in Sec. 1906 subsection 5 BGB, which are, inter alia, a written POA explicitly comprising these measures, and the approval of the guardianship court.[39] The

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1 – 240, 5th ed., München 2006, Sec. 168 BGB No. 18, 21; *Walter* Vorsorgevollmacht (supra n. 13), 180 et seqq.

[33] See also *Schwab* in: Festschrift für Joachim Gernhuber zum 70. Geburtstag, Tübingen 1993, 817, 819.

[34] *Bühler* BWNotZ 1990, 3; *Langenfeld* Vorsorgevollmacht (supra n. 11), 78; *Perau* MittRhNotK 1996, 297.

[35] *Müller-Freienfels* in: Festschrift für Max Keller zum 65. Geburtstag, 1989, 69.

[36] *Kohte* AcP 185 (1985), 138. With a statement based on constitutional law: *Canaris* AcP 184 (1984), 232 et seqq. See also *BayObLG* NJW 1983, 1680, 1681.

[37] *Walter* Vorsorgevollmacht (supra n. 13), at 208, 212, 223, 227 et seq.; Palandt-*Diederichsen*, BGB-Kommentar, 66th ed., München 2007, Sec. 1904 No. 7; *Kothe* AcP 185 (1985), 105, 138.

[38] As the provision for sterilisation (Sec. 1905 subsection 1 No. 1 BGB) shows, coercion implies the overcoming of any conscious resistance, see BT-Drucks. 11/4528, 143; *Jürgens*, in: Jürgens, Betreuungsrecht (supra n. 10), Sec. 1905 BGB No. 7.

[39] For an illustration of the law before the first law amending the law on guardianship (*Erstes Betreuungsrechtsänderungsgesetz* of 25 June 1998, BGBl. I 1998, 1580) came into force on 1 January 1999, see *Perau* MittRhNotK 1996, 285, 294 et seq.

attorney can deal with all health issues, but apart from measures depriving the grantor's liberty, he does not have the right to give consent to, or even to exercise coercive measures.[40]

If the grantor does not have the mental competence to give consent, the attorney may have to give his consent instead. But the incapable grantor can still resist to a medical treatment as long as he is awake and able to act consciously. This is illustrated by Sec. 1905 subsection 1 sentence 1 No. 1 and 2 BGB, which deals with sterilisation of an incapable who has been placed under the care of a guardian: According to this provision a sterilisation of an incapable cannot be executed against his "will", meaning any voluntary resistance.[41]

c. Euthanasia, POAs and ADs

If the attorney is authorised to deal with health issues, his POA generally comprises all decisions concerning treatment. However, according to Sec. 1904 subsection 2 BGB, for very dangerous medical treatments the attorney needs an expressive power of attorney in writing as well as the approval of the guardianship court. The same should apply in the event that the attorney renounces a life-supporting treatment which is medically indicated and offered by the doctor. In this case, the attorney would also have to ask for an approval of the guardianship court – like a guardian.[42]

But there may be good reasons to eliminate the need of an approval of the guardianship court for an attorney as has been suggested recently, inter alia, by the German Ministry of Justice:[43] It argues that the grantor has explicitly appointed an attorney he confides in to decide these matters, and that there is sufficient control of the attorney by the doctor and by the general power of the guardianship court to appoint a monitoring guardian.

An attorney who is authorised to deal with all health issues does not only have the task to decide on measures that a doctor proposes. Furthermore, he has to safeguard and promote the individual interests and welfare of the grantor as well as his present wishes and feelings through the entire treatment. Therefore, the attorney has to participate in the treatment from the very first beginning, even if an advance directive for medical treatment (AD) or "living will" (*"Patientenverfügung")* is at hand. As long as the grantor is capable to express his will the AD does not have to be taken into consideration. But if the grantor becomes incapable to express his will or his declaration is invalid by reason of incapability to give his consent, the AD expresses the will of the grantor with respect to his treatment. The attorney is confronted with the task to interpret, to implement and to enforce the AD. To the attorney, an AD is therefore nothing else than an instruction given by the grantor providing for the case that he cannot express himself any more.

5. Registration and the Duty to Deliver POAs

a. Registration

Based on Sec. 78a to 78c *Bundesnotarordnung* (Federal Law on Public Notaries) and the *Vorsorgeregister-Verordnung* (Regulation for the Central Register for Advance

[40] *LG Frankfurt/Main* FamRZ 1994, 125; *Schwab* FamRZ 1992, 493, 496.

[41] See Sec. 1905 subsection 1 sentence 1 No. 1 and 2 BGB.

[42] See BGHZ 154, 205 et seqq. for a guardian. Most authors apply these principles also to an attorney acting under a WPA.

[43] For the draft of the proposed legislation for a 3. Betreuungsrechtsänderungsgesetz (3rd law amending the law of guardianship) see *Lipp*, Patientenautonomie (supra n. 13).

Instruments) a Central Register for Advance Instruments was established with effect from 1 March 2005 at the German Federal Chamber of Public Notaries.[44] Originally, it should be open to all advance instruments (POAs, GDs and ADs). It should safeguard that all existing advance instruments would come to the knowledge of the guardianship court if guardianship proceedings were commenced with respect to the grantor.[45] However, because of the heated debate on euthanasia and ADs,[46] only POAs can now be registered.[47] GDs and ADs can only be registered if they are part of a package containing, inter alia, a POA.

Only guardianship courts have access to the Central Register (Sec. 78a subsection 2 sentence 1 BNotO, Sec. 6, 7 *Vorsorgeregister-Verordnung*).[48] Other public authorities and members of the public do not have access as there is no legal basis.

b. The Duty to Deliver Documents and the Duty to Inform

Before the 2nd law amending the law on legal guardianship (Zweites Gesetz zur Änderung des Betreuungsrechts– 2. BtÄndG)[49] came into force in 2005, according to Sec. 1901a sentence 1 BGB all GDs had to be delivered to the guardianship court. As POAs also comprise wishes of the adult – and can therefore be regarded as GDs –, it was controversial if POAs also have to be delivered.[50] Most notably POAs are not only addressed to the guardianship court and the guardian respectively but they grant the power to represent the grantor towards third parties. If the original document had had to be delivered to the guardianship court it would have been impossible for the attorney to use it in order to show his authority. The same is true for documents certified by a public notary: The original always remains with the notary.[51] Therefore, in 2005 Sec. 1901a sentences 2 and 3 BGB were inserted. Now, the attorney has a duty to inform the guardianship court about the POA and the guardianship court may request a copy.

IV. Are there Alternatives to a POA?

In any event, POAs do have their limits. Due to the very rigid German *Rechtsberatungsgesetz* (German regulation on legal advice), apart from a "*Rechtsanwalt*" (solicitor, or attorney in the U.S.) only the partner or a close relative can be appointed as attorney by a grantor. Therefore a POA is not always the best instrument to organise care in advance.[52] Furthermore POAs inherently carry a great potential to be abused and thus require a trusting relationship between the grantor and his attorney. It should therefore at least be mentioned that German law knows of another instrument to organise how one's affairs are taken care of in case of incapacity: the Guardianship Directive – GD ("*Betreuungsverfügung*")[53].

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[44] See Art. 2b of the Law of 23.4.2004, BGBl. I 2004, 598, and the "*Vorsorgeregister-Verordnung*" of 21.2.2005, BGBl. I 2005, 318.

[45] BT-Drucks. 15/2253, 17 et seqq.

[46] BR-Drucks. 118/1/04, 3 et seqq.

[47] Sec. 1 subsection 1 No. 6b and 6c of the *Vorsorgeregister-Verordnung.*

[48] Notification of the Bundesnotarkammer BtPrax 2004, 67.

[49] Of 21 April 2005, BGBl. I 2005, 1073 et seqq.

[50] For a report on this iussue see *Bienwald* in: Bienwald/Sonnenfeld/Hoffmann, Betreuungsrecht (supra n. 28), Sec. 1901a BGB No. 8.

[51] See BT-Drucks. 15/4874, p. 58; *Bienwald* in: Bienwald/Sonnenfeld/Hoffmann, Betreuungsrecht (supra n. 28), Sec. 1901a BGB No. 2.

[52] *Ahrens* BtPrax 2005, 163 et seqq.

[53] For terminology see *Bienwald* BtPrax 2002, 227, footnote 1; see also BT-Drucks. 15/2253, 17 et seqq.

1. Guardianship Directive (*"Betreuungsverfügung")*
With a GD the grantor can nominate a person he confides in to become his guardian. The guardianship court then has to appoint the person suggested by the grantor unless compelling reasons speak against this person (Sec. 1897 subsection 3 and 4 BGB). In addition, the grantor may also give directives to the guardian how to manage his affairs which are legally binding for the guardian unless this would harm the ward (Sec. 1901 subsection 3 sentence 2 BGB). This enables the grantor to "customise" the regulations given for guardianship according to his needs.

Since German guardianship law places a great emphasis on autonomy "within" legal guardianship, a grantor may use the GD to regulate all matters in advance in which his views and wishes have to be followed by the guardian or the guardianship court. The grantor may thus regulate the selection of the guardian and how the guardian has to perform his duties. On the other hand, neither the substantive requirements for the appointment of a guardian nor the tasks and competences of the guardian[54] are at his disposition.

2. Consequences of Neglecting a GD
An order of the guardianship court is effective and binding, even if the wishes of the grantor concerning the procedure or the selection of a guardian are disregarded. However, the order is subject to appeal ("*Beschwerde"*, Sec. 19 *Gesetz über die Freiwillige Gerichtsbarkeit* – FGG, [the Law on Non-Contentious Proceedings]).

If the guardian disregards a binding GD, he is in breach of his duties, which are laid down in Sec. 1901 subsection 3 BGB. As to the consequences it has to be distinguished between the following:

a. Internal Relationship Between the Adult and His Guardian
The guardianship court has to supervise the guardian. If the guardian neglects his duties arising under the GD the court will have to intervene ex officio (Sec. 1908i subsection 1 sentence 1, Sec. 1837 subsection 1 to 3 BGB)[55] and discharge him if necessary (Sec. 1908b subsection 1 BGB). These measures do not require fault as they are no sanctions but they intend to protect the adult.[56] Not only the person concerned (Sec. 66 FGG) but every third person can address the court and initiate supervising measures.

If the guardian infringes the GD at least negligently, the adult is entitled to compensation (Sec. 1901i subsection 1 sentence 1, Sec. 1833 BGB). The guardian may even be criminally liable (e.g. for breach of trust, Sec. 266 *Strafgesetzbuch* [Penal Code]).

b. External Relations
A breach of duty arising under a GD does not restrict the capacity of the guardian to represent the adult towards third parties.[57] But in case of an abuse the guardian will lose this capacity[58] if the third party knows the abuse[59] or if the abuse is evident.[60]

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[54] *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1896 No. 32.

[55] *Bienwald* in: Bienwald/Sonnenfeld/Hoffmann, Betreuungsrecht (supra n. 28), Sec. 1901 BGB No. 45 et seqq.

[56] *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1908b No. 5.

[57] Prevailing opinion, see e.g. *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1901 No. 20.

3. Practical Usage of GDs

However, in practice GDs are rarely used as sole instrument,[61] but mainly as part of a "package of advance instruments" containing a POA, a GD and an AD.[62]

V. Practical Summary

To sum it up very shortly, it may be said that if you trust somebody you should grant him a POA to the widest extent which is legally possible. If you want more control over your attorney or if you do not know anybody you trust in, you should choose a GD. Both instruments can also be combined with an AD, which would operate as an instruction for the attorney or as a special kind of GD. An "isolated" AD, however, may only "bridge the gap" until a guardian is appointed.

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[58] *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1901 No. 20 and Sec. 1902 No. 16; *Bauer* in: HK-BUR (supra n. 28),, Sec. 1901 BGB No. 57.

[59] Of course, this does also comprise secret agreements for a fraudulent purpose (collusion).

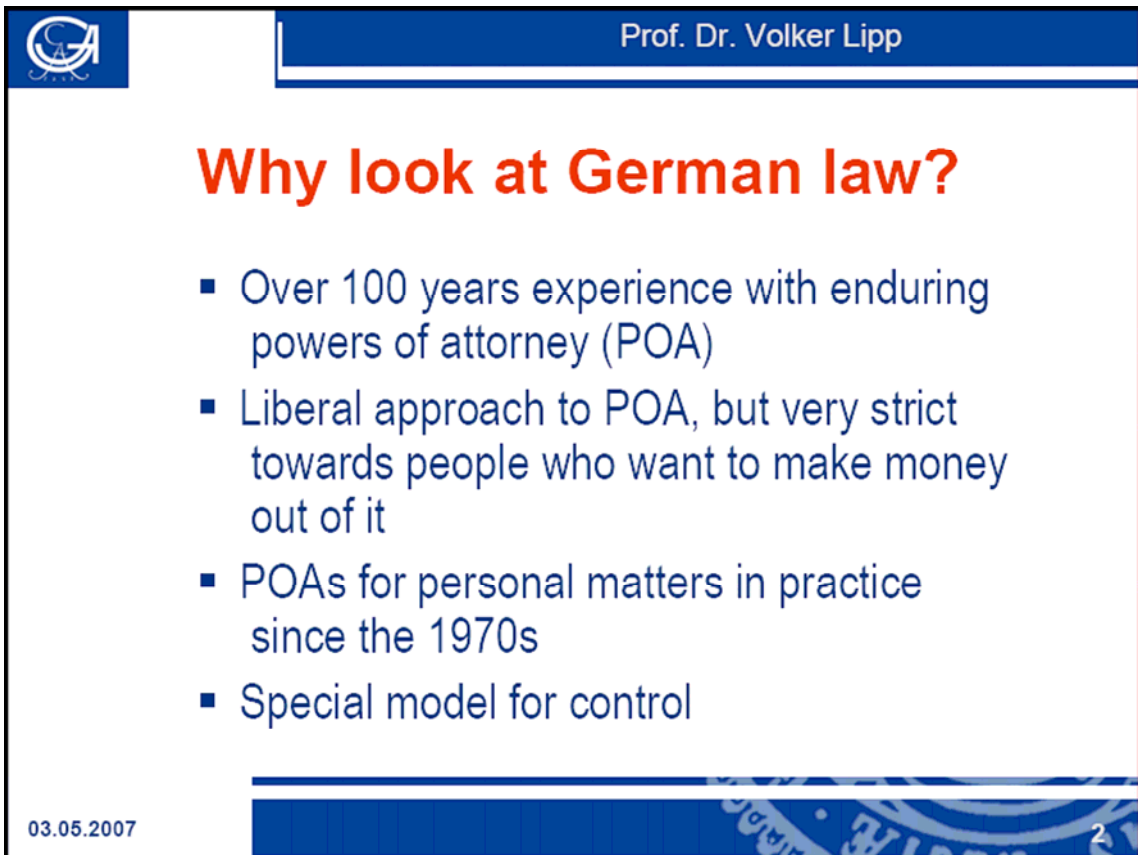
[60] *Schwab* in: MünchKommBGB (supra n. 26), Sec. 1901 No. 20 and Sec. 1902 No. 16; *Bauer* in: HK-BUR (supra n. 28) Sec. 1901 BGB No. 57.

[61] See in contrast *Epple* BtPrax 1993, 156 et seqq., and *Perau* MittRhNotK 1996, 285 et seqq.

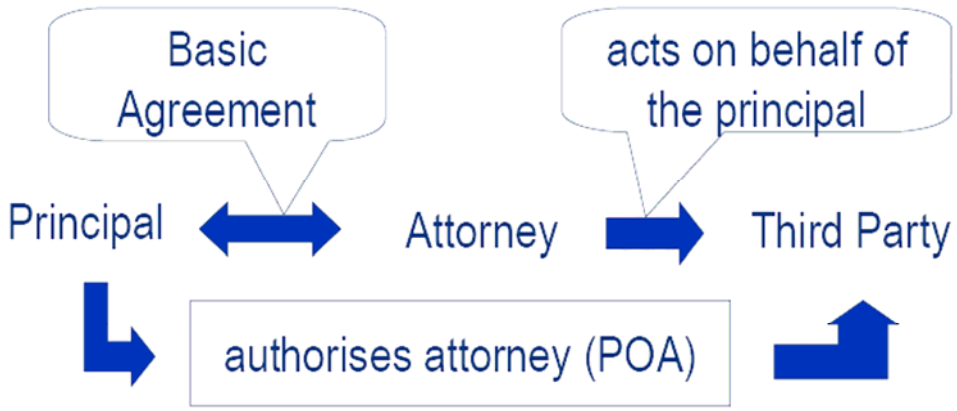
[62] The terminology was coined by *Langenfeld*, Vorsorgevollmacht (supra n. 11), 184.

Vorsorgevollmacht in German Law

av Prof. Dr. Volker Lipp



Basic Principles



German Civil Code 1900 (Bürgerliches Gesetzbuch)

- POA does not automatically cease to have effect upon incapacity of principal
- Basic agreement determines purpose and termination of POA (§ 168 BGB)
- Basic agreement determines whether POA shall have effect upon incapacity of principal
- Statutory presumption for continuity (§ 672 BGB)

Consequences

- Any POA may become an enduring POA
- A POA may be granted to operate specifically after loss of capacity of principal
- General rules of law of agency apply also to enduring POA: capacity, form etc.
- In principle, an enduring POA may be granted for all matters (financial and personal)

Legal Requirements

Requirements for legal validity of POA:

- Capacity (full age, no legal incapacity)
- Attorney must be the partner or a close relative, or a solicitor („Rechtsanwalt“)
- No requirements as to form (with a few exceptions, e.g. for land transactions)
- No registration required

Other Requirements

Requirements to avoid appointment of legal guardian by guardianship court:

- Attorney may not be employed by institution where principal lives
- Attorney is authorised and able to take care of principal's affairs to the same extent as a legal guardian

Recommendations (1)

- Certification by a public notary by way of officially recording the POA
  - principal understands document
  - no reason to believe that principal is incapable
- Attestation by a public notary or public authority
  - certifies only identity / signature of principal

Recommendations (2)

- Registration with the Central Register for Advance Instruments („Vorsorgeregister“)
  - to inform guardianship court in order to avoid appointment of legal guardian
  - registration in writing or via internet
  - information about principal, attorney(s), date of POA, powers, instructions etc.

Attorney‘s Duties (1)

- POA only provides authority to act on behalf of principal
- Tasks and duties of attorney are determined by basic agreement
- Principal duty:
  to act in accordance with the will of the principal (basic agreement and instructions) or according to his presumed will

Attorney's Duties (2)

- Secondary duties:
  fiduciary duty when handling principal's financial affairs, information, accounting etc.
- Special duty:
  to inform guardianship court about POA
- Civil and criminal liability for breach of duty

Duty to Protect?

Is there a duty to protect the principal if he is going to harm himself?

- No statutory provision except for committal to an institution (institutionalization): may be included in POA if explicit and in writing
- Depends on basic agreement
- Otherwise appointment of legal guardian

Control (1)

- Principal controls attorney
- Rights of control according to basic agreement (information, accounting etc.)
- Right to revoke POA and terminate basic agreement
- No special legal requirements for revocation or termination as to form etc.

Control (2)

If principal is incapable of exercising control and if control is necessary:

- Guardianship court appoints monitoring guardian
- for rights and obligations of the principal under basic agreement and POA
- including right to revoke POA and to terminate basic agreement

Control (3)

- Monitoring guardian may be substituted by a monitoring attorney
- No waiver of right to revoke POA and to terminate basic agreement

Personal Matters

- POA for health care and other personal matters acknowledged by statute since 1999
- Special requirements:
  POA must be in writing and name powers explicitely
- Additional control:
  approval by guardianship court for dangerous medical treatment and for institutionalization

Summary

- Liberal approach
  enduring POA rather as a special form of POA than as a form of guardianship
- Special legislation
  only when special problems so require, e.g. registration, personal matters
- Control
  if necessary by a monitoring guardian

Nærmere om den norske vergemålsutvalgets modell. Interessekonflikter, tilsyn og opphevelse

av Professor dr. jur. Peter Lødrup

I. Innledning.

I det norske vergemålsutvalget var det bred enighet om at det burde gis regler om fremtidsfullmakter. Utvalget tok ikke stilling til om det allerede etter norsk rett er adgang til å gi slike fullmakter. Etter min mening bør svaret – som i Danmark – være bekreftende. Skulle derimot svaret være det motsatte, burde det åpnes adgang til det.

Uansett hvilken rettstilstand som legges med senil demens eller lignende svekkelser av det mentale helse vil stige – vergemålsutvalget la til grunn at tallet i 2020 vil ha passert 60 000, mot ca. 55 000 i dag, NOU 2004: 16 s. 127. Når det samtidig må antas at disse i større grad enn i tidligere generasjoner har formue, aktualiseres ytterligere spørsmålet om regulering av hva som i dag betegnes som framtidsfullmakter.

Det norske utvalget har, som det svenske, valgt en enkelt modell, uten en så omfattende regulering som i noen andre land, og jeg viser her til den korte oversikt jeg har gitt tidligere i dag. Tankegangen bygger på den enkeltes selvbestemmelsesrett over sine eiendeler mens man lever, og at man derfor bør ha mulighet for innen enkle rammer å utpeke en eller flere personer til å handle for seg når man selv ikke lenger makter det. At en slik ordning også har sine negative sider, er velkjent og skaper et utvilsomt behov for visse kontrollordninger med fullmektigens disposisjoner og en mulighet for å – under bestemte vilkår – komme inn under den vergemålslovgiving som er statens regulering av de midler som en person ikke lenger makter å råde over.

II. Interessekonflikter.

I programmet for konferansen heter det at jeg i dette innlegget særlig skal ta for meg interessekonflikter, tilsyn og opphevelse.

Interessekonflikten, slik jeg ser det, er i første omgang mellom fullmaktsgiveren og de personer som står i arvingeposisjon. Når potensielle fullmaktsgivere gis adgang til å la en fullmektig – innen fullmaktens ramme – forvalte hans eller hennes midler, kan det som senere blir dødsboet bli mindre enn om forvaltningen hadde skjedd innen vergemålslovgivningens ramme. La meg bare ta to eksempler: Fullmektigens rett til å gi gaver kan være mer omfattende enn den som følger av vergemålslovgivningen, hvor gaver utover de sedvanlige stort sett er utelukket. Videre kan fullmektigens forvaltning av en verdipapirportefølje gjøres mer risikofylt enn den forvaltning av finansielle eiendeler som overformynderiet har

kompetanse til. Hertil kommer at i mange tilfelle vil nok arvingene - særlig hvor det er felles barn – ha større muligheter til å øve innflytelse over den gamles formue hvor det ikke foreligger noen fremtidsfullmakt, og vergemålslovgivningen heller ikke er kommet inn i bildet.

Adgangen til å gi fremtidsfullmakter kan også skape en konflikt mellom de offentlige interesser som vergemålslovgivningen skal verne – nemlig at personer som selv ikke lenger er i stand til å råde over sine midler av samfunnet skal hjelpes til å holde formuen i hevd og uten inngripen av verken arvinger eller andre. Fremtidsfullmakter innebærer en privatisering av forvaltningen av midler for samfunnet allerede har et vel gjennomtenkt tilbud for.

At disse interessekonflikter ikke bør være avgjørende ved vurderingen av fremtidsfullmaktens berettigelse, står for meg som lite tvilsomt.

III. Tilsyn.
At er regelverk om fremtidsfullmakter må har regler om tilsyn med fullmektigen, er klart. Fullmektigen kan misbruke fullmakten til egen vinning – dette byr også vergeinstituttet eksempler på. Erstatningskrav mot den svikaktige fullmektig vil i praksis lett være mindre verdt enn kravet mot den utro verge, hvor også overformynderiet/kommunen kan komme i ansvar for manglende tilsyn. Tvister om tolkingen av fullmaktens ramme ligger på et annet plan – at arvinger her kan gå til domstolene for å få svar, er nok på det rene. Men her vil deres manglende rett til innsyn i fullmektigens disposisjoner være en hindring.

Det norske utkastet har regler om tilsyn i §§ 10-11 og § 10-12.

Etter § 10-11 kan overformynderiet kreve opplysninger om fullmaktsforholdet, og det kan påby regnskapsførsel med innsynsrett. I praksis vil det ikke være ofte at overformynderiet uten et initiativ fra andre kan gripe inn – at det selv kommer over opplysninger som skulle berettige til dette, vil nok ikke forekomme ofte. Lovutkastet har ingen bestemmelser om hvem som kan henvende seg til overformynderiet, og hvilken dokumentasjon som skal kreves for at det kan kreve opplysninger om fullmakten og eventuelle misligheter. Tanken er her at det enhver som en interesse i det, kan henvende seg til overformynderiet, typisk fullmaktsgiverens arvinger. Eller det kan være en revisor som etter fullmakten skal revideres fullmektigens forvaltning. Videre gir utkastet § 10-11 rett til å påby regnskapsførsel, og at overformynderiet skal ha innsyn i dette. Allerede ved sin eksistens må det antas i bestemmelsen har en viktig preventiv funksjon.

§ 10-12 kan sies å være sanksjonsbestemmelsen mot misbruk. Ved at fullmaktsgiveren kan begjæres satt under vergemål, kan fullmaktsforholdet kunne bringes til opphør hvor vurderingen basert på kriteriene i bestemmelsens annet ledd tilsier dette, jf. § 10-13.

IV. Opphør.

Når fullmakten skal opphøre eller falle bort, reiser vanskelige vurderingsspørsmål. Enklest er det hvor den er begrenset i tid, eller til bestemte oppdrag. Det normale vil imidlertid være at den ikke selv sier noe om den skal falle bort.

Så lenge fullmaktsgiveren har evnen til å treffe rettslige disposisjoner, kan han eller hun tilbakekalle den. Å gjøre den ugjenkallelig, bør det ikke være adgang til. Tilbakekallet følger de vanlige regler i avtalelovens §§ 12-18.

Praktisk viktig er forholdet til reglene om når en person som har opprettet en fremtidsfullmakt kan settes under vergemål, med den følge at de vanlige regler om oppnevnelse av verge kommer til anvendelse. I utgangspunktet er jo fremtidsfullmaktens formål å reduserer behovet for vergemål; fullmektigen skal utføre de funksjoner som ellers tilkommer en verge. Når et sentralt vilkår for å bli satt under vergemål både etter gjeldende rett og etter utkastet til ny vergemål er behovet for en representant til å ivareta vedkommendes interesser, ligger det i dagen at eksistensen av en fremtidsfullmakt vil redusere dette behovet, og medføre at vilkåret for vergemål ikke er oppfylt. Dette er i det norske utkastet formulert § 10-12 annet ledd. Forslaget innebærer at overformynderiet har en begrenset mulighet til å sette fullmaktsgiveren under vergemål. Når det skal legges vekt på om fullmektigen ivaretar fullmaktsgiverens interesser i henhold til fullmakter, kan ikke denne settes under vergemål fordi overformynderiet er uenig i de rammer som er satt for fullmektigens arbeid. At det skal ytes midlere til formål som overformynderiet finner lite verd å støtte, er således ikke grunn til å sette fullmaktsgiveren under vergemål. I det hele må de hensyn som ligger bak adgangen til å opprette fremtidsfullmakter også styre overformynderiets vurderinger. Uoverensstemmelser mellom arvinger eller mellom arvinger og fullmektigen, vil derfor normalt ikke være opphørsgrunn. Konflikter innen familien kan lett motivere opprettelsen av en fremtidsfullmakt. Konflikter innen familien kan nettopp være det forhold som har motivert fullmaktsgiveren til å opprette fullmakten. Jeg har ikke helt forstått de som hevder at fremtidsfullmakter ikke bør opprettholdes i slike tilfelle. Det må også tilføyes at når man har valgt en fullmektig, er det fordi man ønsker en egnet person man har personlig kjennskap til å ivareta ens interesser i stedet for en ukjent person oppnevnt av overformynderiet.

Det bør også erindres at når vergemålet skal tilpassen behovene i det enkelte tilfellet, kan det supplere fullmektigen på områder den ikke gjelder, og også på enkelte områder som ligger innenfor fullmaktens ramme.

Til slutt: Hva skjer med fullmakten når fullmaktsgiveren dør? Etter avtalelovene i Norden medfører ikke uten videre at en fullmakt faller bort. Her må det antas at regelen blir den samme – de hensyn som ligger bak den generelle regelen gjelder også her.

Presentation av förslagen till svenska och norska lagregler om framtidsfullmakter

Anförande från svenskt perspektiv
av Bo Broomé

När vi nu har hört redogörelser för gällande lagstiftning i Skottland och Tyskland och för de norsk-svenska förslagen (och dessutom beaktar vad vi vet om den nya finländska lagstiftningen), kan vi konstatera att regleringen av framtidsfullmakter och över huvud taget av representationsskapet för människor med bristande beslutsförmåga i alla fallen präglas av respekt för människors autonomi, integritet och värdighet. Kort sagt är synsättet nära förknippat med en i vidsträckt mening demokratisk grundsyn. Det är också frapperande att samma problem, samma byggstenar kommer till synes i de olika regelkomplexen. Vad som skiljer åt är den slutliga kompositionen. Delvis – men långtifrån helt – handlar detta om juridisk-tekniska frågor.

Den svenska utredningen var en enmansutredning, med mig som formellt beslutande. Ensam var jag dock inte. Jag hade hjälp och stöd av – förutom två sekreterare – ett 20-tal experter och sakkunniga. Dessa fick, om de ville, foga avvikande meningar till betänkandet, något som också skedde i flera fall. En av experterna var dr. juris Svend Danielsen.

Den svenska utredningens uppdrag var mindre långtgående än den norska utredningens. Vi hade bl.a. att bekymra oss för luckor i den svenska lagstiftningen om vem som företräder vuxna med sviktande beslutskapacitet, främst på det personliga planet och inte minst på hälso- och sjukvårdens område. Ambitionen blev att få till stånd en heltäckande reglering av företrädarfrågan. Basen i det föreslagna systemet är fortfarande ordningen enligt den svenska ”föräldrabalken” (en i detta sammanhang missvisande lagrubrik) med myndighetsutsedda företrädare i gestalt av ”gode män” och ”förvaltare” (närmast motsvarande dansk-norska verger). Som alternativ och komplettering har vi emellertid fört in bl.a. framtidsfullmäktige i bilden.

De vägledande idéerna bakom förslaget om framtidsfullmäktige har jag redan angett. Vi har alltså sett framtidsfullmäktigen som ett alternativ för den som vill ordna sina angelägenheter för kommande svåra tider utan inblandning eller insyn från myndighetsvärlden eller med ett minimum av det slaget – med de risker detta onekligen kan innebära för vederbörande själv. Vi har emellertid också tagit med i beräkningen att det blir allt svårare att rekrytera ”gode män” allt eftersom antalet äldre i samhället växer och därmed behovet av företrädare. Dessutom är det nog nödvändigt att slå fast på vilka villkor en från början giltig fullmakt har verkan på rättshandlingar som fullmäktigen vidtar efter det att fullmäktigen har förlorat sin beslutskompetens. F.n. är detta ganska oklart i svensk rätt.

I allt väsentligt sammanfaller de norska och svenska förslagen i sak. Jag kan därför hänvisa till professor Lödrups redogörelse och påpekanden om punkter

värda att diskutera. Ett par redaktionella skillnader förtjänar kanske uppmärksamhet.

De norska reglerna om framtidsfullmakt föreslås bilda ett kapitel i loven om vergemål. Enligt det svenska förslaget kan de sägas ha fått en egen lag, dock får de där dela plats med ett kapitel med bestämmelser om behörighet för anhöriga till beslutsoförmögna vuxna att företräda dem i vardagsekonomiska angelägenheter.

De norska lagreglerna enligt förslagen är vidare färre än de svenska. Detta förklaras helt enkelt av att sista paragrafen i det norska kapitlet om framtidsfullmakter allmänt hänvisar till avtalelovens bestämmelser om fullmakter, medan vissa av motsvarande bestämmelser i den svenska avtalslagen i upplysningssyfte har återgetts direkt i den särskilda lagen om framtidsfullmakter.

Beträffande det sakliga innehållet i förslagen kan noteras att frågan om verkan av ”vanliga” fullmakter sedan fullmaktsgivaren har blivit beslutsinkapabel har föranlett delvis ny lydelse i 22 § i resp. avtalslag. Lydelserna sammanfaller inte. Innebörden av det svenska förslaget är att fullmakten i princip förlorar sin giltighet. Jag är inte riktigt på det klara med den norska ståndpunkten härvidlag.

Hur går det då med det svenska utredningsförslaget? Inom utredningen hade förslaget ett starkt stöd. Kritik riktades dock från bankhåll mot den tänkta ordningen för hur en framtidsfullmakt skall aktiveras så att den vinner tilltro hos tredje man; en prövning av t.ex. överförmyndaren förordades. Många remissinstanser anslöt sig till denna mening. I stort var dock remissopinionen positiv till det nya institutet, men en mer kallsinnig hållning intogs av en del instanser, de flesta myndigheter.

(Vid seminariet uttalade sig härefter departementsrådet Dag Mattsson från det svenska justitiedepartementet om behandlingen av det svenska betänkandet. Han upplyste att handläggningen var inriktad på ett etappvis genomförande och att han hoppades att en proposition angående fullmaktsfrågorna skulle kunna presenteras för riksdagen under år 2009.)

Framtidsfullmakter på det personliga området. Förhållandet till hälso- och sjukvårdslagstiftningen

av Bo Broomé

Min redogörelse i det följande grundar sig i huvudsak på förslagen i det svenska betänkandet (SOU 2004:112). Av särskilt intresse är det där framförda förslaget till lag om ställföreträdare för vuxna med bristande beslutsförmåga inom hälso- och sjukvården m.m. (LSH, se s. 1032 ff i betänkandet).

Framtidsfullmakter kan enligt det norsk-svenska förslaget till lagstiftning avse inte bara ekonomiska utan också personliga angelägenheter. I den delen sträcker sig tillämpningsområdet längre än det som gäller för fullmakter enligt avtalslagarna. Dessa torde dock ha tillämpats mer eller mindre analogt också i fråga om personrelaterade frågor.

Hur skall man skilja mellan ekonomiska och personliga angelägenheter? Det är inte helt oproblematiskt. I detta sammanhang är dock problemen mindre. Fullmaktsgivaren kan själv dra upp gränserna i fullmakten, om han inte rentav vill gå så långt som att ge en generalfullmakt.

Bortsett från detta är det inte komplikationsfritt att låta framtidsfullmakter omfatta också den personliga sidan. Här kan man komma den enskilde så nära in på livet att särskilda regler i vissa delar är motiverade.

En allmän bestämmelse om detta finns i den svenska lagen om framtidsfullmakter, 1 kap. 3 §. Via en hänvisning till en regel i föräldrabalken om ”god mans” kompetens (11 kap. 6 § enligt förslaget) avskärs från behörigheten i princip angelägenheter av ”utpräglat personlig karaktär”. Som exempel nämns bl.a. fråga om samtycke till äktenskap. Kopplingen till godmanskap förklaras i viss mån av att yttergränserna för de båda typerna av representantskap bör vara desamma; det kan ju enligt förslaget bli aktuellt att ersätta en framtidsfullmäktig med en god man. Konsekvensen av att en fråga faller utanför behörigheten blir att den tänkta åtgärden eller rättshandlingen inte kan komma till stånd för en person utan rättslig beslutskapacitet.

Konfrontationen med människors integritetskänsligaste angelägenheter blir särskilt märkbar när vi kommer in på hälso- och sjukvårdens områden. Här föreslår vi specialregler om representation som träffar också framtidsfullmäktige. Besläktade regler föreslås inom den sociala välfärdens domän och i fråga om vetenskaplig forskning på person, men jag tänker här koncentrera mig på hälso- och sjukvården. Det kräver en viss översikt över den föreslagna lagstiftningen om ställföreträdare inom hälso- och sjukvård, även om den berör även andra ställföreträdare än framtidsfullmäktige.

Sverige saknar i dag en särskild lagstiftning om patienters rättigheter, av det slag som finns i de andra nordiska länderna. Det är osäkert vad som gäller om företrädare för sjuka som saknar beslutsförmåga. Utredningen har velat täppa igen denna lucka genom den förut berörda ställföreträdarlagen. När förslaget till denna lag har utarbetats, har vi sneglat på de gällande nordiska lagarna om patienträttigheter.

Kärnfrågan är – vem lämnar samtycke till en vård- eller behandlingsåtgärd, när den sjuke är ur stånd att göra det? Finns det begränsningar i en ställföreträdares behörighet eller särskilda villkor för att behörigheten skall inträda? Hur kan en viss ställföreträdare ersättas av en annan? – Som vi strax skall finna, är en framtidsfullmäktiges rörelsefrihet mera begränsad på detta område än annars.

Innan frågan om rätt ställföreträdare väcks i det praktiska livet måste det först konstateras att patienten själv – ”uppenbarligen” – saknar samtyckesförmåga vid den aktuella tidpunkten och beträffande den aktuella åtgärden. Prövningen görs inom sjukvårdens ram. Patientens självbestämmanderätt har alltså alltid prioritet.

Vilka ställföreträdarna är och rangordningen dem emellan regleras i 5 § LHS. Först kommer en av patienten utsedd person: en framtidsfullmäktig eller ett s.k. vårdombud. I andra hand har man att vända sig till en anhörig till patienten; vilka de anhöriga är anges i en särskild paragraf. Först på tredje plats nämns ”god man” enligt föräldrabalken. Detta är emellertid en sanning med modifikation. Finns redan en god man förordnad med behörighet i fråga om hälso- och sjukvård har han företräde, och i vissa fall, som jag strax skall beröra, skall en god man förordnas med förbigående av andra möjliga företrädare.

I täten av ställföreträdare finns alltså en vederbörligen förordnad framtidsfullmäktig. Ett par särregler gäller för framtidsfullmäktigs behörighet inom hälso- och sjukvård. För det första blir fullmäktigen behörig redan vid ett kortvarigt bortfall av beslutskompetensen (annorlunda enligt 1 kap. 1 § i lagen om framtidsfullmakter), t.ex. i samband med en operation. För det andra krävs för behörighet att det i fullmakten uttryckligen sägs att denna omfattar åtgärder inom hälso- och sjukvård. Meningen är att fullmaktsgivaren verkligen skall tänka efter om han eller hon nominerar rätt person för den känsliga uppgiften. Motsvarande villkor gäller f.ö. för god mans behörighet på sjukvårdens område.

Vad är ett vårdombud? Det kan sägas vara ett slags ad-hoc fullmäktig. Avsikten är att en beslutskapabel person skall kunna peka ut en person att vid behov företräda honom eller henne under pågående vård. Två personer inom sjukvården skall ta emot förordnandet, som kan göras sedan patienten har skrivits in på en sjukvårdsinrättning. Motsvarande gäller när en person blir boende på vissa vårdhem. Finns redan ett förordnande för en framtidsfullmäktig får detta vika för förordnandet av vårdombud. Framtidsfullmäktigens förordnande kan emellertid aktualiseras på nytt, när vården eller boendet upphör.

Låt oss härefter se närmare på framtidsfullmäktigens (och andra ställföreträdares) roll i beslutsprocessen i fråga om vård eller behandling. Tre aktörer kan sägas medverka i denna process, nämligen patienten själv (som förutsätts sakna samtyckesförmåga), hennes ställföreträdare och den ansvarige läkaren. Jag skall med viss förenkling redogöra för tre typfall.

Fall A
Förutsättningar: Läkaren förordar en viss åtgärd. Patienten förhåller sig passiv. Ställföreträdaren motsätter sig åtgärden.

I princip gäller företrädarens nej (se dock fall C). Men detta är inte orubbligt. Läkaren kan agera till skydd för patienten. Om han anser att ställföreträdaren vägrar åtgärden i klar strid med patientens intresse skall han anmäla behovet av en god man hos överförmyndaren. Denne kan utverka rättens beslut om god man och f.ö. också fatta interimistiskt beslut om detta. Som annars tar den gode mannens behörighet över annan ställföreträdares behörighet. Dessutom är det så att läkaren utan att avvakta beslut kan vidta den tänkta behandlingsåtgärden, om han anser att det är fara å färde med dröjsmål (21 § LSH). Framtidsfullmäktigens (och övriga företrädares) bestämmanderätt är alltså ganska kringskuren. Den här redovisade ordningen kan också tillämpas, om läkaren rent allmänt bedömer framtidsfullmäktigen som ”uppenbart” olämplig.

Fall B
Förutsättningar: Läkaren föreslår en viss åtgärd. Ställföreträdaren samtycker. Patienten förklarar att hon motsätter sig behandlingen.

Att genomföra åtgärden mot patientens vilja, den må vara aldrig så ogrundad, får anses innebära tvång, även om det inte går till handgripligheter. Över tvångsåtgärder förfogar inte ställföreträdaren. Skall behandlingen komma till stånd måste den kunna stödjas på en särskild bestämmelse i lag eller rättfärdigas av straffrihetsregeln om handlande i nöd i brottsbalken.

Till tvång räknas också frihetsberövande. S.k. smygmedicinering – ett begrepp som torde tala för sig självt – jämställs med tvång. Tvång anses däremot enligt förslaget inte föreligga enbart därför att patienten underlåter att bejaka åtgärden; förhåller hon sig likgiltig får ställföreträdarens besked vitsord. – Den princip om skydd mot tvångsåtgärder som här angetts får i förslaget genomslag också på det socialrättsliga området och när det gäller forskning på person.

Fall C (Specialfall av A)
Förutsättningar: Läkaren vill sätta in eller fortsätta med (fallen likställs!) livsuppehållande behandling. Patienten är ur stånd att uttala sig. Ställföreträdaren motsätter sig behandlingen eller, annorlunda uttryckt, vill inte samtycka till den.

I detta fall gäller enligt förslaget (19 § LHS) som huvudregel att ställföreträdaren inte kan motsätta sig behandlingen; han kan omvänt inte med rättslig relevans

samtycka till den. Samråd bör naturligtvis ske med ställföreträdaren, men avgörandet ligger till syvende och sist hos den ansvarige läkaren. Här görs dock ett undantag som just tar sikte på en framtidsfullmäktig. Befogenhet att avböja rent livsuppehållande behandling tillkommer fullmäktigen i en situation då patienten är oåterkalleligen döende eller i ett permanent medvetslöst tillstånd, förutsatt att patienten i fullmakten uttryckligen har medgett befogenheten.

Vi närmar oss här ett svårbemästrat och känsligt område, där signalorden är livstestamente och dödshjälp. Ingen bestämmelse i förslaget ger stöd för dödshjälp i aktiv mening, alltså en positiv åtgärd som direkt syftar till att förkorta livet. Däremot lanseras s.k. livstestamente, med termen livsslutsdirektiv (se 24 § LHS). Genom ett sådant kan en person i förväg på ett i princip bindande sätt avböja rent livsuppehållande behandling i livets slutskede (respiratorbehandling, dropp m.m.). Beskedet skall lämnas på ungefär samma sätt som en framtidsfullmakt upprättas. Men det har principiellt en annan innebörd än en fullmakt: den medicinska åtgärden beskrivs till sitt sakliga innehåll och beskedet riktar sig direkt till sjukvården. Det är en variant av vad som brukar benämnas vårddirektiv.

Dessa två typer av juridiska rättshandlingar kan emellertid flyta samman. En framtidsfullmakt lika väl som andra fullmakter kan innehålla besked, riktlinjer eller önskemål om hur ställföreträdaren skall handla. Betydelsen av detta har inte uttryckligen angetts i lagen om framtidsfullmakter, men det förutsätts att fullmäktigen är bunden av fullmaktsgivarens instruktioner (se 1 kap. 13 § och 18 § andra stycket i lagen om framtidsfullmakter). I lagen om ställföreträdare på hälso- och sjukvårdens område (22 §) finns emellertid bestämmelser om vad som skall styra en ställföreträdare som skall fatta ståndpunkt på patientens vägnar. Dessa innebär en modifikation i även en framtidsfullmäktigs bundenhet vid vårddirektiv (jfr förbehållet i 1 kap. 24 § lagen om framtidsfullmakter). Bestämmelserna 22 § LSH får ses som ett försök till en sammanvägning av tre olika modeller för ställföreträdande samtycke och annat beslutsfattande inom hälso- och sjukvården som har förekommit i den internationella debatten på området. Lagrummet återges här, med insprängda noteringar om de principer som påverkat utformningen.

När en ställföreträdare skall fatta ståndpunkt på patientens vägnar skall han eller hon söka bilda sig en uppfattning om vilken inställning som patienten skulle ha haft, om patienten hade haft beslutsförmåga vid den ifrågavarande tidpunkten och utövat denna under gynnsamma betingelser. Denna inställning skall i princip ligga till grund för ställföreträdarens ståndpunkt. (Principen om hypotetisk vilja.)
Ställföreträdaren skall ta sin utgångspunkt i den uppfattning som patienten i förväg, medan han eller hon hade beslutsförmåga, kan ha gett tillkänna i ett skriftligt vårddirektiv eller i någon annan form. (Förhandsbeskedsprincipen.)
Ställföreträdaren bör inför sitt avgörande samråda med patienten och ta hänsyn till de synpunkter som patienten då ger uttryck åt.

Om ställföreträdaren inte kan bilda sig någon uppfattning om patientens inställning enligt första stycket, skall ställföreträdaren självständigt ta ställning till vad som kan vara patientens bästa. (Principen om patientens bästa.)

Under remissbehandlingen har Statens medicinsketiska råd efter en utförlig diskussion i stället vela ge förord åt förhandsbeskedsprincipen.

Dansk vedvarende fullmakt

- en presentasjon ved advokat Jørgen U. Grønborg

Advokat Jørgen U. Grønborg har arbeidet med å utvikle en standardkontrakt for en vedvarende fullmakt i Danmark. Han presenterte denne fullmakten på seminaret. Standardkontrakten er gjengitt nedenfor.

Vedvarende fuldmagt.

§ 1. Parterne

1.1. Undertegnede Mogens Madsen, cpr. nr. 170646-0017, Enemærket 98, 5800 Nyborg,

giver herved mine sønner

Peter Madsen, Ringgade 66, 6400 Sønderborg, og

Søren Madsen, Algade 17, 4700 Nyborg

fuldmagt til at handle på mine vegne i det omfang, det er beskrevet nedenfor.

1.2 Såfremt en af fuldmægtigene ikke kan eller vil påtage sig opgaven, er det mit ønske, at min bror Ole Madsen, Søndergade 40, 8000 Århus C, skal indtræde som fuldmægtig.

§ 2. Ikrafttræden

2.1. Fuldmagten træder i kraft straks og vedvarer, efter at jeg på grund af sindslidelse, herunder demens, eller alvorligt svækket helbredstilstandmåttevære blevet ude af stand til at varetage mine anliggender.

2.2. Det påhviler fuldmægtigene at sætte fuldmagten i kraft, når betingelserne i pkt. 2.1 er opfyldte.

2.3. Fuldmægtigene har ret til at indhente lægeerklæring om mine helbredsforhold for at godtgøre, at jeg er ude af stand til at varetage mine anliggender.

2.4. Når fuldmagten træder i kraft, skal fuldmægtigene sende underretning herom samt kopi af fuldmagten til undertegnede Mogens Madsen samt til følgende af mine nærtstående:

§ 3. Fuldmagtens omfang

3.1. Fuldmægtigene har ret til at træffe alle beslutninger vedrørende mine økonomiske anliggender og hele min formue

eller

Fuldmægtigene har ret til at træffe følgende beslutninger på mine vegne:

3.2. Fuldmægtigene har ret til at alle beslutninger vedrørende mine personlige forhold.

eller

3.2. Fuldmægtigene har ret til at træffe følgende beslutninger vedrørende mine personlige forhold:

3.3. Fuldmægtigene har ret til at repræsentere mig i forhold til myndighederne i disse anliggender, jfr. forvaltningslovens § 8.

3.4. I relation til sundhedslovens § 18, stk. 1 skal fuldmægtigene betragtes som min nærmeste pårørende.

§ 4. Fuldmægtigenes dispositionsret

4.1. Fuldmægtigene har ret til hver for sig disponere på mine vegne i de retsforhold, der er omtalt i § 3. De skal dog handle i forening ved salg og pantsætning af fast ejendom og andelslejlighed

eller

4.1 Fuldmægtigene kan alene disponere på mine vegne i forening

4.2 Fuldmægtigene skal udføre hvervet personligt og har ikke ret til at give fuldmagten videre til andre.

§ 5. Administration og regnskab

5.1. Fuldmægtigene skal holde mine midler adskilt fra deres egne midler

5.2. Fuldmægtigene skal opbevare alle bilag og udarbejde årlige regnskaber over sine dispositioner. Regnskabet skal sendes til min hustru og mine børn og myndige børnebørn hvert år inden d. 01.07. i det følgende år.

(5.3. Fuldmægtigene har pligt til efter begæring fra statsforvaltningen på det sted, hvor jeg bor, at fremlægge de oplysninger om fuldmagtsforholdet, som statsforvaltningen kræver.)

§ 6. Selvindtræde og interessekonflikter

6.1. Fuldmægtigene må ikke på mine vegne indgå aftaler med sig selv eller med deres nære pårørende, eller hvis vore interesser kan være modstridende.

6.2. Fuldmægtigene er dog berettigede til at give gaver til sig selv og deres nærmeste samt at beregne sig et honorar inden for de rammer, der er fastlagt i §§ 7-8.

§ 7. Gaver

7.1. Fuldmægtigene kan give sædvanlige gaver, hvis værdi ikke er urimelige under hensyntagen til alle omstændigheder og særligt størrelsen af min formue.

Evt.

7.2. Der må alene gives gaver til mine børn, børnebørn og oldebørn, og de årlige gaver til hver gavemodtager må ikke overstige det afgiftsfrie grundbeløb, som i 2007 er på 55.300 kr.

Evt.

7.3. Der kan gives gaver til velgørende formål, i det omfang jeg tidligere har givet eller måtte forventes at ville give gave af denne karakter.

§ 8. Fuldmægtigenes udgifter og honorar

8.1. Fuldmægtigene har krav på at få godtgjort sine nødvendige udgifter i anledning af fuldmagtsforholdet.

8.2. Fuldmægtigene kan tillige beregne sig et rimeligt årligt honorar

§ 9. Tilbagekaldelse

9.1. Denne fuldmagt kan tilbagekaldes, så længe jeg har evnen til at handle fornuftmæssigt, og fuldmægtigene skal da efter anmodning straks give mig fuldmagten tilbage.

§ 10. Ophør

10.1. Fuldmagten ophører, hvis jeg kommer under værgemål eller samværgemål, jfr. værgemålslovens § 5 eller § 7, for så vidt angår de anliggender, der er omfattet af værgemålet eller samværgemålet.

10.1. Fuldmagten ophører endvidere ved min død.

§ 11. Oprettelse

11.1. Jeg underskriver eller vedkender denne fuldmagt for notaren i 2 enslydende eksemplarer, hvoraf det ene skal opbevares i notarialarkivet. Det eksemplar, som opbevares i notarialarkivet, har samme gyldighed som det originale eksemplar, som jeg opbevarer.

eller

11.1. Jeg underskriver eller vedkender denne fuldmagt under samtidig tilstedeværelse af to vidner, der straks efter skal skrive deres navne på fuldmagten. Vidnerne skal være til stede som vidner efter mit ønske, og de skal have kendskab til, at de bevidner oprettelsen af en fuldmagt. Vidnerne skal være fyldt 18 år og de må ikke være i familie med mig.

11.2. Fuldmægtigene underskriver tillige, idet de ved deres underskrift bekræfter deres kendskab til fuldmagten og erklærer sig villig til at påtage sig hvervet på de anførte vilkår.

Som fuldmagtsgiver: Som fuldmægtige:

_____ den _____ 200___ _____ den _____ 200___

_____ _____

Mogens Madsen Peter Madsen Søren Madsen

Undertegnede vidner erklærer herved,

at vi efter Mogens Madsens ønske har været til stede samtidigt ved underskriften eller vedkendelsen af foranstående fuldmagt, at vi straks har underskrevet fuldmagten som vidner, at underskriften er ægte og dateringen er korrekt, at Mogens Madsen efter vort skøn er i stand til fornuftmæssigt at udstede denne fuldmagt, at Mogens Madsen over for os har erklæret at være bekendt med virkningerne af fuldmagten, og at der i fuldmagten ikke findes iøjnefaldende rettelser eller tilføjelser

Udfyldes og underskrives af 2 uvildige vitterlighedsvidner. Fulde navn, stilling adresse, postnr. og by skal udfyldes med blokbogstaver:

Navn: Navn:

Stilling: Stilling:

Bopæl: Bopæl:

Underskrift Underskrift

_____ _____