

## Austria

Prof. Marianne Roth

### **Adoption of the CRPD and the Hague Convention as well as major reforms thereafter:**

Austria has signed both the Convention on the Rights of Persons with Disabilities (below: CRPD) and its Optional Protocol on March 30, 2007. After ratification by the Austrian Parliament, the CRPD and its Optional Protocol became effective as of September 26, 2008. In 2013, Austria signed and ratified the Hague Convention of 13 January 2000 on the International Protection of Adults (below: Hague Convention). It entered into force on February 1, 2014.

The adoptions of the CRPD and its Optional Protocol as well as the Hague Convention further fostered legislative reforms regarding adult protection in Austria. In 2013, the Hague Convention was implemented by the adoption of the Adult Protection Law (*Erwachsenenschutz-Gesetz*)<sup>1</sup>, which extensively revised and organized the international jurisdiction, the applicable law as well as the recognition and enforcement of foreign measures of protection in Austria. With the enactment of the Second Adult Protection Law (*2. Erwachsenenenschutz-Gesetz*)<sup>2</sup>, effective as of July 1, 2018, the legislator continued the in 1984 initiated paradigm shift towards more autonomous decision-making of vulnerable adults as well as demand-orientated assistance and built on the preceding reform of the guardianship system in 2006. Furthermore, the legislative amendment modified and modernized the statutory terminology by *inter alia* replacing the term “guardianship” (*Sachwalterschaft*) with “adult representation” (*Erwachsenenschutz*) as well as the term “person with disability” (*behinderte Person*) with “concerned, full aged, or represented person” (*betroffene, volljährige oder vertretene Person*).

**General Overview of the Specific Comprehensive Legal Framework and definition of vulnerable adults:** The Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, below: ABGB) defines “persons in need of protection” as minors or persons, who, due to other reasons than age, cannot take care of all or particular affairs on their own (sec. 21 para 1 ABGB). The protection of minors and adults, i.e. individuals above 18 years old, are regulated separately.

The substantive rules on the protection and representation of adults are comprehensively organized in the Sixth Chapter of the First Part of the Austrian Civil Code. The main thread throughout the relevant rules is already stated at the beginning of the chapter: The autonomous decision-making of full aged persons, who, due to a mental illness or comparable impairment, are strained in their decision-making capacity, shall be maintained as long as possible (see sec. 239 para 1 ABGB). A legal presumption applies that adults have (full) decision-making capacity (*Entscheidungsfähigkeit*), i.e. the ability to understand the significance and consequences of one’s acts, to determine one’s will thereafter and to act correspondently. The decision-making capacity forms the basis for the legal capacity to act (*Handlungsfähigkeit*) and contract (*Geschäftsfähigkeit*). Only if necessary to protect particular interests, adults shall be (occasionally) supported in their decision-making, primarily by family members, persons similarly close or specialized institutions. Representation shall be a measure of last resort and, as far as possible, subject to the self-determination of the concerned person. Furthermore, each of the four types of adult representation provided for in secs. 260 *et seq.* of the Austrian Civil Code, i.e. enduring power of attorney (*Vorsorgevollmacht*, below: EPoA), elected representation (*gewählte Erwachsenenvertretung*), statutory representation (*gesetzliche Erwachsenenvertretung*) and court-appointed representation (*gerichtliche*

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<sup>1</sup> Federal Law Gazette I 2013/158 (ErwSchG).

<sup>2</sup> Federal Law Gazette I 2017/56 (2. ErwSchG).

*Erwachsenenvertretung*), is demand-orientated and prescribes representation only for specified property and personal affairs. Regarding the latter category, however, representation for particular strictly personal interests is not allowed (e.g. marriage).

Even if an EPoA, elected, statutory or court-appointed representation applies, the legal capacity of the vulnerable adult to act is neither automatically excluded nor restricted. However, certain legal acts of the concerned person are only valid after approval by the representative or court (e.g. specific procedural acts before administrative authorities or extrabudgetary expenses, sec. 242 para 2 ABGB).

An EPoA allows adults of (full) legal capacity to autonomously determine future representation for specific or certain kinds of property and personal matters (e.g. medical treatment). Even in case of a restricted legal capacity to act, the concerned adult can choose one or more representatives for particular interests, provided that the concerned is still able to understand the consequences of the decision made. The agreement over the elected representation has to list the affairs and areas of representation (sec. 265 ABGB). The concerned person may further prescribe that representation over particular matters requires mutual agreement or approval by the concerned person. Furthermore, one or more family members can represent persons in need of protection. The so-called statutory representation is limited to property and personal affairs expressly listed in sec. 269 of the Austrian Civil Code. Finally, as an *ultima ratio*, Austrian courts may appoint a representative regarding specified property or personal affairs upon request of a concerned person or *ex officio* after suggestion by a third party (e.g. neighbor, see secs. 271 and 272 ABGB). The procedure is comprehensively regulated in the Austrian Non-Contentious Proceedings Act and the appointment is subject to the demands, needs and wishes of the concerned person. In deciding on the precise scope of representation, the suitable representative and whether there are available alternatives to the representation, the courts are assisted by adult protection associations (*Erwachsenenschutzvereine*), specialized in the consultation, representation and protection of vulnerable adults. Courts may also appoint such a specialized association as representative of the concerned.

EPoAs and elected representations have to be established in writing and signed in the presence of an attorney, notary or adult protection association (secs. 262 and 266 ABGB). Subsequently, the attorney, notary or adult protection association shall record the EPoA, elected and statutory representation in the Central Austrian Representation Register (*Österreichisches Zentrales Vertretungsverzeichnis*). Successful registration requires the presentation of a certificate regarding the medical condition of the person in need of protection. An attorney, notary or adult protection association can deny registration in case of doubts over the eligibility of the representative. Furthermore, if it is doubted that the requested registration is to the benefit of the concerned person, an attorney, notary or adult association may notify the competent court before performing the registration. After entry into the Central Austrian Representation Register, EPoAs and elected representations are effective indefinitely, whereas statutory representations have to be renewed after three years. The concerned person can object to and terminate the EPoA, elected and statutory representation at any time.

All forms of representation are subject to judicial supervision and control. Courts have jurisdiction to supervise and review *ex officio* any representation, especially after suggested by a third party. Particular legal acts require court approval (e.g. change of permanent residence of the concerned person or disagreement between the representative and the concerned over medical treatment or sterilization). Courts have the power to terminate EPoAs, elected and statutory representations. Furthermore, each representative is subject to far-reaching information duties. For instance, a representative has to inform the competent court annually about the personal rapport, the current mental and physical health condition, the residence, the financial situation as well as about the performed and the expected future affairs of the

concerned person. All representatives shall be held accountable for any personal harm or financial loss (sec. 249 para 1 ABGB).

**General Private Law Techniques** such as *negotiorum gestio* (secs. 1035 *et seq.* ABGB) and usury (sec. 879 para 4 ABGB) may also apply.

**Empirical Data:** In order to be effective, EPoAs, elected and statutory representations must be recorded in the electronic Central Austrian Representation Register since July 1, 2018 (see above). The Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice administers this register, which only certain bodies and institutions (e.g. notaries or courts) can access. As of July 2018, no official statistics have been made available to the public. The latest available data was published in 2016 in preparation of the Second Adult Protection Law. At that time, approximately 65k EPoAs, 60k guardianships (predecessor of the court-appointed representation) and 13k representations by close relatives (predecessor of the statutory representation) existed in Austria (general population ca. 9M).<sup>3</sup>

**Assessment of the empowerment and protection of vulnerable adults:** In Austria, empowerment and protection of vulnerable adults seems to be up to standard. Already in 1984, the Austrian legislator started the paradigm shift from protection and substituted decision-making towards autonomy and supported decision making as envisioned by the CRPD. The latest reforms constitute further milestones and embrace the fundamental principles of autonomy, self-determination, guided decision-making, demand-orientated assistance and subsidiarity of representation. Furthermore, representation pursuant to each of the newly introduced four models does not lead to an automatic loss of the legal capacity to act of the vulnerable adult. Austria, however, does not fully meet the requirement of statistics and data collection as provided for in art. 31 CRPD.

Legislation: <https://www.ris.bka.gv.at/defaultEn.aspx>

Ministry of Justice brochure (German and English versions): <https://www.justiz.gv.at/web2013/home/justiz/erwachsenenschutz/informationsbroschueren-zum-download~41.de.html>

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<sup>3</sup> <https://www.justiz.gv.at/web2013/home/presse/pressemitteilungen/pressearchiv/pressemitteilungen-2016/sachwalterschaft-modellprojekt-unterstuetzung-zur-selbstbestimmung-erfolgreich~2c94848b532dad1d01539db55de209d6.de.html>