Dear clients and business friends

We are all getting older: that’s a statistical fact. Despite medical advances, increased life expectancy is resulting in a higher incidence of age-related diseases and thus also increases the risk of becoming permanently incapable of judgement (e.g. due to dementia). Younger people can also be affected, usually as a result of accidents.

Wills and contracts of inheritance only take effect on death, and it is quite common for no precautions to be taken against the eventuality of becoming incapable of judgement.

The former “guardianship” law (Vormundschaftsrecht) was completely revised as of 1 January 2013. A central objective of the amendments was to improve the individual’s right to make choices for the eventuality of their judgement becoming impaired at some point in the future. The new “law on the protection of adults” (Erwachsenenschutzrecht) includes provisions for an advance care directive (Vorsorgeauftrag).

This enables individuals to make personal and financial arrangements in good time to cater for the possibility of becoming incapable of judgement at a future point in time.

We know from our advisory practice that even now, two years after it was introduced, the advance care directive is still widely unknown. The following article explains this instrument which is actually quite simple.

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1. What arrangements can be made with an advance care directive?

Governed by Art. 360 et seq. of the Swiss Civil Code (ZGB), the advance care directive enables any person with legal capacity to specify in good time who, in the event of possible future incapability of judgement, is to deal with his or her financial affairs and take responsibility for his/her personal care.

Where the care of assets is concerned, it may be a matter, for example, of who is to administer bank accounts or properties, who exercises control over them, and who handles payment transactions on behalf of the person affected.

In the area of personal care, it generally relates to help with everyday living, such as dealing with mail, taking decisions about the grantor’s residential situation and handling other administrative matters. It can also include taking decisions on medical treatment and care, unless this is the subject of a separate “patient decree” (Patientenverfügung, which approximates to a ”living will” – see section 4 below).

Finally, the advance care directive also includes representing the grantor in legal matters, for example entering into contracts and representing him or her vis-à-vis official bodies and courts.

We recommend that these tasks and transactions be set out as explicitly as possible, and that instructions for their performance be issued.

An advance care directive may be established by any person with legal capacity. As well as natural persons with legal capacity, the advance care directive can also be used to appoint legal entities. It is also possible to appoint different people to handle different areas.

Since appointees are not required to sign the advance care directive when it is drawn up and can refuse to undertake the tasks entrusted to them when the grantor becomes incapacitated, we recommend that they be consulted beforehand. The advance care directive often specifies a substitute appointee. This caters for the possibility that the primary appointee may be found unsuitable by the adult protection authority, or may reject the appointment or subsequently terminate it.

2. How do things stand if there is no advance care directive?

Even without an advance care directive, the new adult protection law permits a spouse (or registered partner) to open and deal with mail on behalf of an incapacitated partner, to provide normal asset management, and to undertake all legal acts that are normally necessary to ensure that living expenses are met. However, for larger-scale transactions – such as the sale of a property – the consent of the adult protection authority must be obtained.

The adult protection authority can also withdraw or restrict a spouse’s powers of representation if the interests of the incapacitated person are threatened or no longer safeguarded.

Despite the spouse’s legally prescribed right of representation, it may be the case in an emergency – especially with older couples – that the spouse no longer wishes to deal with all the affairs of an incapacitated partner. Depending on the circum-
stances, it may therefore be advisable - even in the case of married couples - to draw up an advance care directive appointing a trusted party (often a family member) to deal, for example, with financial and certain administrative matters. It is often found in practice that descendants wish to legally represent a parent who is incapacitated - because of dementia, for example - without being legally authorised to do so. Where everyday matters are concerned, this need not necessarily lead to problems. But as soon as a more complex matter arises, such as a banking or property transaction, the descendants will encounter problems.

Except where there is partner representation as mentioned above, if there is no advance care directive nor any valid authorisation under the old law (for more detail on this see section 5 below), then the adult protection authority will in principle require a needs-based guardianship.  

3. How is an advance care directive set up?

For the advance care directive to be valid, the document - like a holographic will - must be entirely written by hand, dated and signed. An alternative possibility is notarisation, which is to be recommended for lengthy documents.

As long as the grantor is still capable of judgement, he or she can revoke the advance care directive at any time in one of the permissible forms (in writing, dated and signed, or notarised). The document can also be destroyed.

We recommend registering the storage location of the advance care directive with the responsible Registry Office and handing a copy to the appointee.

4. Relationship to a patient decree

The new adult protection law also sets out regulations governing the patient decree. The patient decree enables a person to specify the nursing care and especially the medical treatments which he or she consents to (or rejects) in the event of incapacity, and the situations in which that consent or rejection applies. It is also possible to appoint a trusted party who may take decisions on medical treatment should the incapacity scenario materialize.

A patient decree can in principle be incorporated in the advance care directive; unlike the advance care directive, however, a patient decree cannot appoint a legal entity. Usually, and especially where more comprehensive arrangements are defined, we recommend that two separate documents be drawn up. This enables one document to be amended or revoked without the other one being affected. They can also be stored at different locations.

5. Relationship to powers of attorney issued previously

There is as yet no absolute legal certainty about which existing powers of attorney established before the new adult protection law came into force (1 January 2013) remain valid today. Where the power of attorney includes a continuation clause for the eventuality of the grantor becoming legally incapacitated, then its validity hardly seems to be in doubt if the onset of such incapacity was prior to 1 January 2013.

In our opinion, such powers of attorney are basically also valid for cases in which the grantor of the power of attorney did not become incapacitated until after 1 January 2013. However, we recommend asking a lawyer to examine existing powers of attorney, and in cases of legal uncertainty to prepare an advance care directive.

6. Conclusion

By introducing the advance care directive, the new adult protection law responds better to the need to make one's own choices for the eventuality of (e.g. age-related) incapacity of judgement. As a rule, it is a simple matter to prepare an advance care directive. For entrepreneurs, however, matters may be more complex - requiring careful, expert handling.