Austrian Guardianship Law – status 2016 and upcoming reform

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I. Introduction

The origin of the existing guardianship law in Austria goes back to 1984 when the "*Entmündigungsordnung 1916*" was replaced by the "*Sachwalterrecht*". This lead to a shift from a protection-based perspective to a human-rights- and self-determination-based-perspective for people with mental disabilities.[1] At this time the Austrian guardianship law was – compared on an international level – very advanced, taking into account the deinstitutionalization developments in psychiatry in the 1980s.[2]

Contrary to other countries (e.g. Germany and Switzerland), decisions about the deprivation of liberty were separated from guardianship law and were put into a public law system.[3]

Even though guardianship is supposed to be subsidiary to all other forms of advocacy, there has been a massive increase in the number of guardianships over recent years. These and some other legal developments, especially the UN-Convention on the Rights of Persons with Disabilities (UN-CRPD), made and are still making it necessary to adapt the law. Therefore, an extensive reform is prepared.

Some aspects were already reformed in 2007:[4] newly introduced were the ex-lege Substitution by Family Members,[5] the enduring Power of Attorney[6] and the *Sachwalterverfügung*, which refers to the opportunity to choose a guardian in advance. The role of the associations of guardians (*Sachwaltervereine*)[7] was enhanced by giving them the mandate for a *Clearing* process, before starting the guardianship procedure at court. Another recently developed instrument/legal institution to protect the will of mentally disabled people

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[1] People with physical disabilities are not subject to guardianship, but they can choose an attorney to substitute their decisions like everyone else.

[2] The process was mainly influenced by the Italian psychiatrist *Franco Basaglia*; see https://en.wikipedia.org/wiki/Franco_Basaglia (21.6.2016).

[3] Until 1991 in the *Entmündigungsordnung* and then in the *Unterbringungsgesetz* 1991 for psychiatries and in the *Heimaufentaltsgesetz* 2005 for nursing homes, institutions for people with disabilities and hospitals.

[4] *Sachwalterrechts-Änderungsgesetz* 2006, BGBl 2006/92.

[5] *Vertretungsbefugnis nächster Angehöriger*; §§ 284c – 284e ABGB (Civil Code).

[6] *Vorsorgevollmacht*; §§ 284f – 284h ABGB.

[7] In Austria, there are four associations of guardians.

is the Living Will, regulated by Austrian law in 2006.[8] The provision enables people to make exact decisions on the refusal of medical treatment in advance. The aim of these new instruments is to reduce the numbers of (public) guardianships and to enhance self-determination and self-responsibility of people.[9]

II. Status quo[10]

1. Instruments

a. Clearing

In the *Clearing* process, social workers (staff of the guardianship associations)[11] establish contact with the concerned persons, their family and acquaintances. They check which areas of living are affected by the disability, where and what kind of help is needed, who of the family members and acquaintances would be capable and willing to undertake a guardianship and inform them about what opportunities exist. The social workers have to file a report to the court about what they found out and make a recommendation if a guardian should be appointed or if the proceeding should be stopped because an alternative has been found. The whole process should be finished within 6 months. This clearing process is optional at the moment and it depends on the judges if it is used or not. But it shall become obligatory within the new reform.

b. Adult Guardianship

The most important legal instrument to support mentally disabled people is adult guardianship (*Sachwalterschaft*).[12] Guardians have to organize issues of the person by concluding contracts (e.g. rent a flat, medical treatment), filing applications to authorities (e.g. for pension) etc., but do not have to provide these services theirselves.

A guardian is appointed by court and substitutes the ward in certain matters that are determined by the judge in advance. A guardian must not be appointed if the person himself/herself has the cognitive ability to make informed and reasonable decisions or if someone else takes care in a sufficient way of the matters in question. Therefore, guardianship

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[8] *Patientenverfügungsgesetz 2006*.

[9] And certainly also to reduce the growth of the public costs.

[10] This chapter is an excerpt with a few adaptations from: *Ganner/Dabove* (2015): Developments in Austrian and Argentine Guardianship Law, in: *Coester-Waltjen/Lipp/Waters* (eds.), Liber Amicorum Macoto Arai, p. 318 - 340 (2015; http://www.nomos-shop.de/_assets/downloads/9783848720590_lese01.pdf)

[11] *Fuchs*, Sachwalterschaft und Clearing, iFamZ 2014, p. 71 ff.

[12] *Barth/Ganner* (Ed.), Handbuch des Sachwalterrechts[2], 2010; *Maurer*, Das österreichische Sachwalterrecht in der Praxis[3], 2007.

is subsidiary to all other instruments that are suitable to protect the adult person from harm because of her/his mental disability (§ 268 para. 2 ABGB).

Guardianship may cover nearly all matters of a person's life. Only in strictly personal (*höchstpersönliche*) issues, a substitute decision is banned. This is the case e.g. with testaments, a Living Will, a Power of Attorney, the voting right and marriage. Another exception is the restriction of physical liberty in psychiatric facilities and homes for elderly and people with disabilities. The consent to restrictions in these cases can only be given by people with decision-making ability for their own restriction, but can never be substituted by another person. A decision for restrictions in these institutions can be made by the responsible person according to the *Unterbringungsgesetz* (for psychiatric hospitals it is always a medical specialist) or *Heimaufenthaltsgesetz* (for homes for elderly and people with disabilities it's a doctor or a nurse). Restrictions according to the *Unterbringungsgesetz* must be, and restrictions according to the *Heimaufenthaltsgesetz* can be, reviewed by court (see II.2.c).

When it comes to the question of who should become a guardian, the Austrian law, in general, prefers the "family model". This means, that primarily, a family member is appointed by court, if he/she is suitable and willing to be a guardian. Secondly, an association of guardians (*Sachwalterverein*)[13] is appointed, but as they are funded poorly by the Ministry of Justice they can only cover 13,3 %[14] of all guardianships in Austria. A lot of guardianships are conducted by lawyers or notaries, who are obliged to undertake up to five guardianships by law. The legal application against this rule with the argument that this practice is "forced labour" and therefore a violation of Art. 4 para. 2 ECHR, was refused by the European Court of Human Rights, who stated that it was an honour to be guardian.[15]

The ward should, as far as possible, live according to her/his own wishes and needs (§ 281 para. 1 ABGB). Therefore, wishes are legally relevant if the ward has the mental ability to form and express them (natural will). The guardian has to investigate and declare the ward´s will and wishes (*Wunschermittlungspflicht*; § 281 para.1 ABGB) and has to act accordingly if it is not against the ward's best interest. Moreover, the guardian has to support the ward actively to form and express her/his own wishes. Hence, will and wishes have to be taken into consideration in all matters of the guardianship regardless if it concerns financial or very personal matters (like health etc.). The obligation to explore the wishes of the ward also includes investigations in the social environment to find out about her/his personal interests

[13] In Austria, there are four associations of guardians.

[14] Status of 1.1.2014; the total number of guardianships was 59.910; parliamentary request 549/J-NR/2014; also see *Fuchs/Hammerschick*, Sachwalterschaft, Clearing und Alternativen zur Sachwalterschaft, 2013, p. 18 (http://www.irks.at/assets/irks/Publikationen/Forschungsbericht/SW%20und%20Clearing_Endbericht_IRKS300813.pdf, 27.6.2016).

[15] ECHR, 18.10.2011, Nr. 31950/06, *Graziani-Weiss* vs. *Austria*.

and needs. The guardian is controlled via an annual report by court. The court has to check if the guardianship is still necessary for the ward's welfare (§ 278 ABGB) at least every five years.

c. Substitution by Family Members[16]

The substitution by family members comes into effect automatically (ex-lege) when a full aged person, who is suffering from a mental disability, is not able to take care of her/his own issues. These are the same requirements when appointing a guardian. This instrument is subsidiary to an already existing guardian or chosen substitute (Power of Attorney).[17]

Family members in this sense and therefore possible substitutes are: parents for full aged children, children over 18 for their parents, a spouse and registered homosexual partner living in the same household and a partner living in the same household for at least three years. All suitable "family members" can act as a substitute at the same time.[18] If their declarations of intent are contradictory, none of those are valid.

The substitution by family members only gives the power to substitute in daily dealings[19], contracts about nursing needs, "simple" medical treatment and claiming "social rights" (pension, nursing allowance etc.). Therefore, medical treatments with usually serious consequences and important financial matters as well as the permanent change of domicile are excluded.

The substitution comes into effect without any legal procedure. Only a registration in the Austrian Central Substitution Register (*Österreichisches Zentrales Vertretungsverzeichnis*)[20] is obligatory. The registration requires a personal medical attendance report, which states that the concerned person lost his/her decision-making ability. The future ward has the possibility to oppose the substitution by family members (§ 284d para. 2 ABGB: "opting-out").

The Substitution by Family Members has also been discussed by German lawmakers but was refused because of possible danger of abuse. Switzerland followed Austria and established the Substitution by Family Members in 2013.

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[16] Regulated in §§ 284b-284e ABGB since 2007.

[17] *Maurer*, S. 168; *Barth/Kellner*, Die Vertretungsbefugnis nächster Angehöriger, in: *Barth/Ganner*[2], p. 461 ff.

[18] *Schauer*, Vorsorgevollmacht und gesetzliche Angehörigenvertretung nach dem SWRÄG 2006, in: Interdisziplinäre Zeitschrift für Familienrecht (iFamZ), 2006, p. 151 ff.

[19] "Daily dealings" are ordinary matters regarding the income and property of the person with disabilities concerned; *Barth/Kellner*, in: *Barth/Ganner*[2], p. 474 ff.

[20] The Austrian Central Substitution Register is lead by the notary.

d. Power of Attorney[21]

The Austrian civil law distinguishes between an "ordinary" mandate (*allgemeine zivilrechtliche Vollmacht*; §§ 1002 ff ABGB) and a Power of Attorney, which only comes into effect if the principal loses the capacity to understand and to judge (*Einsichts- und Urteilsfähigkeit*) or the capacity to contract (*Geschäftsfähigkeit*). But the Power of Attorney is a "lex specialis" to the ordinary mandate.

The law provides two forms: (1) The Power of Attorney – rarely used – for ordinary matters, which can be drafted easily (e.g. by writing and signing by one´s own hand, notarial deed etc.), and the widely used (2) Power of Attorney for important matters wherefore a lawyer, solicitor or the court has to be consulted. Important matters, which make it obligatory to fulfil the formal requirements of the power of attorney for important matters, are medical treatments with severe consequences, the permanent change of domicile and important matters of legal estate.

A Power of Attorney has to be created personally; substitution is not possible. The selected attorney is not allowed to have a close relationship to the institution the ward is living in (e.g. nursing home). Otherwise, it is only an ordinary mandate (*allgemeine zivilrechtliche Vollmacht*; §§ 1002 ff ABGB). The scope of power must be described in detail. The Power of Attorney can be revoked at any time; decision-making capacity is not necessary.

Contrary to guardianship law, attorneys are not controlled by anyone and they never need an additional authorization by court or a personal medical attendance report from a physician where medical treatments are concerned.

Powers of Attorney, their coming into effect as well as their termination, their revocation and their cancellation can be registered in the Austrian Central Substitution Register (*Österreichisches Zentrales Vertretungsverzeichnis*). This is not obligatory.[22]

e. Living Will[23]

The Austrian regulation of the Living Will provides – compared with other systems (e.g. Germany) – very little room for maneuver. It only enables to refuse certain medical treatments in advance, but it does not provide the opportunity to choose within different medical methods etc. Like the Power of Attorney, the Living Will has to be created personally and can

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[21] Regulated in §§ 284f-284h ABGB since 2007; see *Ganner*, Vorsorgevollmacht, in: *Barth/Ganner*[2], p. 345 ff.; *Schauer*, Vorsorgevollmacht und gesetzliche Angehörigenvertretung nach dem SWRÄG 2006, in: iFamZ, 2006, p. 149 ff. *Schauer*, Schwerpunkte des Sachwalterrechtsänderungsgesetzes (SWRÄG 2006). Teil 2, in: Österreichische Juristische Zeitung (ÖJZ), 2007, p. 219 ff.

[22] 52.772 powers of attorney have been registered until 30 April 2015 (Austrian Notary Chamber), but as registration is optional, the real number is unknown.

[23] Patientenverfügungsgesetz 2006; see *König/Pesendorfer*, Patientenverfügung, in: *Barth/Ganner*[2], p. 379; *Ganner*, Grundzüge des Alten- und Behindertenrechts[2], 2014, p. 127.

be revoked at any time. It cannot be registered in the Central Substitution Register but in registers of the Notary Chamber and the Lawyers Chamber.[24] The law provides two forms: (1) the binding Living Will and the (2) considerable Living Will. The binding Living Will requires medical and legal consultation and has to be renewed every five years.[25] It has to be in writing and must describe the specific medical treatment which the patient wants to have avoided. A binding Living Will represents the actual will of the person and therefore has to be fulfilled (by the physician) directly, without any further involvement of a substitute (guardian, attorney etc.) or court. The considerable Living Will is any expression of wishes, in writing or in other ways, concerning medical treatments. The more detailed and sober the expression of a binding Living Will is and the more formal requirements of a binding Living Will are fulfilled, the more importance is awarded to the document. The considerable Living Will only represents the presumed will and has not to be obeyed directly (by the physician), but serves as an important information and guideline for the substitute (guardian or attorney), who has to make the decision in this case.

2. Decisions by Topics

a. Decisions about Personal Matters

For some personal issues, such as marriage, voting,[26] making a testament, a Living Will or a Power of Attorney, substitution is not possible. If the person does not have the required mental or physical capability he or she is excluded from this legal institution.

For other personal matters (medical treatment, change of domicile, copy right etc.)[27], substitution is possible and the decision-making system in general is the same as for financial matters (see below). Special regulations exist concerning medical treatment and the permanent change of domicile.

Guardians have to decide about a simple medical treatment (treatment that usually does not lead to severe or long lasting consequences) on their own. If the recovery time is more than 24 days or the treatment concerns vital organs (= grievous physical harm), the guardian has the choice to ask for authorization by the court or to ask for a personal medical attendance report

[24] In March 2014, 15.660 were registered there.

[25] This is not the case if the (mental) capacity to renew the Living Will was lost in the meantime.

[26] There is no cognitive ability required for voting in Austria. No one can be excluded from the right to vote because of a mental disability. This marks a difference to most other countries; see *Ganner*, Stand und Perspektiven des Erwachsenenschutzes in rechtsvergleichender Sicht, in: *Coester-Waltjen/Lipp/Schumann/Veit* (Ed.), Perspektiven und Reform des Erwachsenenschutzes, 2012, p. 41, 51.

[27] But also: change of name; resign from church or change of religion; contracts about care if the main part is done by people who are not family members except contracts with homes for elderly and people with disabilities; acquisition or waiving of citizenship; premature ending of contracts of employment, apprenticeship contracts or articles of traineeship; § 167 ABGB.

from a physician, who is independent from the attending doctor. Authorization by court is always necessary for a medical treatment against the will of the ward. Treatments for the purpose of research and treatments, that could cause loss of fertility, also require an additional authorization by the court (§ 284 ABGB). In reality, outside of psychiatric facilities, treatments cannot be enforced against active resistance of the ward. This refers to the same practice as with decisions about the change of domicile.

For a permanent change of domicile (e.g. move into a home for elderly or people with disabilities) the guardian also needs the authorization by the court (§ 284a ABGB). For a temporary change (holidays, hospital etc.) the guardian can decide on her/his own.

b. Decisions on Financial Matters

If a person loses – usually because of a mental disability – the capability to conclude contracts or similar legal acts (*Geschäftsfähigkeit)*, a substitute has to make the decisions instead. This can be an attorney with (enduring) power, if one was appointed before. If the Power of Attorney does not provide any restrictions, the attorney can decide freely and without any control (by court or another authority) on the financial issues of the ward, but has the obligation to act according to the (presumed) will of the ward. If abuse is assumed, anyone can apply to the court. The court can revoke the Power of Attorney and appoint a guardian instead.

If no Power of Attorney exists, family members can represent the ward within the scope of the ex-lege substitution by family members. In this case, representation power is limited to daily dealings (see above).

If no Power of Attorney exists and the representation power according to the substitution by family members is not enough to organise the main issues of the ward or if there are no family members or they are not willing to act, a guardian has to be appointed by court. The guardian can decide on his/her own on simple financial issues, but if extraordinary financial issues are concerned, the guardian needs an additional authorization by court. Extraordinary financial issues are all transactions which are unusual for the ward (*außerordentliche Vermögensverwaltung*; § 167 para. 3 ABGB).This depends on the income and property of the ward. Examples for extraordinary financial issues are: selling or mortgaging a real estate; formation, sale, buy and cancellation of a company; waiving a right in a succession or accepting a heritage without conditions; accepting a donation which includes a burden or rejecting a donation; financial investment except “secure” ones mentioned in §§ 216 and 217 ABGB; taking legal action against someone and other matters concerning a trial.

c. Decisions on Deprivation of Physical Liberty

In case of deprivation of physical liberty because of mental disabilities, the Austrian law provides a unique system, which strongly differs from other countries. Substitutes (e.g. guardians, attorneys or family members) never have the right or the obligation to decide about compulsory measures. If compulsion is necessary (to protect the ward or other persons from heavy damages) special proceedings, depending on where the person lives, are provided. If the person lives in a home for elderly or people with disabilities, the deprivation of physical liberty can be conducted according to the *Heimaufenthaltsgesetz*[28]. Compulsory medical treatments are not allowed in homes for elderly or people with disabilities. In all other cases, compulsory measures (deprivation of physical liberty and compulsory treatment) have to be conducted in psychiatric facilities according to the *Unterbringungsgesetz*[29].

The main premise in both systems is a mental disability, which leads to serious and very probable peril for the physical integrity or life of someone. The applied compulsory measures have to be the most appropriate (*gelindestes Mittel*) and proportional (*Verhältnismäßigkeit*) ones.

Physicians decide on the compulsory hospitalization in psychiatric facilities and the deprivation of physical liberty and compulsory treatment. This is also the fact for deprivations of physical liberty in homes for elderly and people with disabilities, if the measure is a medical treatment (e.g. sedation with drugs). If that is not the case, the assigned nurse (in nursing homes etc.) or pedagogical head (homes for people with disabilities) has to make the decision.

Those decisions are controlled by court. Every single deprivation of physical liberty and every single compulsory treatment in psychiatric facilities is supervised by a legal commission consisting of a judge, an independent expert and a representative of the ward (*Patientenvertreter*). Deprivations of physical liberty in homes for elderly or for people with disabilities are only supervised by such a legal commission, if someone applies for it. This is usually done by the *Bewohnervertreter*, who is the representative in these cases, instead of the *Patientenvertreter*.[30]

III. Reform 2016

The Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by Austria in 2008, enforces the rethinking of the existing instruments. The CRPD was ratified

[28] *Strickmann*, Heimaufenthaltsrecht[2], 2012.

[29] *Kopetzki*, Grundriss des Unterbringungsrechts[3], 2012.

[30] *Patientenvertreter* and *Bewohnervertreter* are professional representatives who are employed at the associations of guardians.

by Austria without reservations and without interpretative explanations,[31] but is under the condition that the Convention is not immediately applicable. Therefore, the CRPD has to be embedded into Austrian national law.[32] An important demand of the CRPD is to abandon or at least strongly reduce substituted decision-making instruments and adopt and improve supported decision-making instruments. With a delay of several years the implementation process, particularly concerning Legal Guardianship, started in 2013.

The Ministry of Justice initiated a reforming process by organizing regular meetings of all representatives of possible interest groups with a strong emphasis on the involvement of people with disabilities.[33]

<table>
<tr><td rowspan="3">Status quo</td><td rowspan="3"></td><td rowspan="3">Substitution by Family members</td><td>Guardian (Sachwalter)</td><td rowspan="3">Attorney (ePoA; Vorsorgevollmacht)</td></tr>
<tr><td>Annually report to court</td></tr>
<tr><td>Judicial approval with important matters</td></tr>
<tr><td rowspan="4">Reform 2016</td><td>Chosen substitute</td><td>Legal substitute</td><td>Judicial substitute</td><td>Attorney (ePoA; Vorsorgevollmacht)</td></tr>
<tr><td colspan="3">Registration obligatory</td></tr>
<tr><td colspan="3">Judicial approval with important matters</td></tr>
<tr><td colspan="3">Annually report to court</td><td></td></tr>
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The most important proposals for the new reform are:

- The ex-lege restrictions of the **capacity to contract** (*Geschäftsfähigkeit*; § 280 ABGB) or to marry (*Ehefähigkeit*, § 3 EheG) will be abolished. A restriction of the capacity to conduct proceedings in one´s own name shall remain.
- The establishment of the ***Chosen Substitute*** (*Gewählter Erwachsenenvertreter*): this one can be chosen by a person with a lower level of cognitive capacity than is required for a Power of

[31] Other countries like France, Norway, Australia and Canada declared explicitly that they will not abstain from substituted decision making instruments; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (12.7.2016).

[32] See *Ganner/Barth*, Die Auswirkungen der UN-Behindertenrechtskonvention auf das österreichische Sachwalterrecht, BtPrax 5/2010, p. 204 f.

[33] In 2012, the Austrian National Action Plan on Disability 2012-2020 in which the planned legislative measures to implement the CRPD into Austrian law are laid out, was already finalized and published. It lists existing services for people with disabilities and planned activities for the next years; in German, English and (German) easy reading version; https://www.sozialministerium.at/site/Service_Medien/Infomaterial/Downloads/Nationaler_Aktionsplan_Behinderung_2012_2020_englische_Version_ (22.6.2016).

Attorney. An agreement with the person is necessary, which can be concluded at an association of guardianship or an attorney at law or a notary. The scope of the substitution-issues depends on the agreement, but important financial matters are excluded. This instrument should be used if people already lost the mental capacity for making a Power of Attorney but have someone who they would like to give a mandate.

- The *Substitution by Family Members* will be named ***Legal Substitute*** (*Gesetzlicher Erwachsenenvertreter*). Aside from spouse, parents, adult children and life partner in the same household, also siblings, nephews and nieces shall become substitutes ex-lege. The scope shall be expanded to all medical treatments. Important financial issues remain excluded. Regarding important matters, a judicial approval shall be necessary and an annually report has to be filed to the court.
- The *Guardian* will be named ***Judicial Substitute*** (*Gerichtlicher Erwachsenenvertreter*). This one should only be appointed if decisions about important financial matters have to be made. The *Legal and the Judicial Substitute* ends automatically after three years.
- It shall be possible to establish **Powers of Attorney** and **Living Wills**, not only at a civil law notary or a law office, but also at the guardianship associations, which is easier and cheaper for everyone concerned. For the Power of Attorney, a registration at the Austrian Substitution Register shall be required if the power is used. For the registration, a medical report will be necessary (like substitution by family members), which confirms the loss of the mental capacity of the ward. In contrary to the status quo, a judicial approval shall be necessary for decisions about important issues (change of domicile, medical treatment if patient refuses).
- Persons decide on their own (informed consent) about **medical treatment,** if they have the decision-making ability (*Einsichts- und Urteilsfähigkeit).* Decision-making ability is presumed with people of 14 years and older. What is new is that if the doctor has doubts about the decision-making ability of the patient he or she has to include relatives, persons of trust (*Vertrauenspersonen*) and professionals (for taking care of people with the certain kind of disability) into a supported-decision-making-process. A substitute decision is only possible if the patient is not able to decide on his or her own. If a patient without decision-making ability refuses a medical treatment, on which the attorney or substitute agreed, a judicial approval shall be necessary. A forced medical treatment against the physical resistance of the patient is still not allowed. This would only be possible in psychiatric hospitals according to the *Unterbringungsgesetz*.
- For the **permanent change of domicile,** a judicial approval shall be obligatory. If the decision is based on an enduring power of attorney, the judicial approval is only required if the new domicile is abroad.

- **Supervision**: any substitute, not an attorney (with an ePoA), shall file an annually report to the court about personal and financial matters.
- The **guardianship associations** (*Erwachsenenschutzvereine*) shall play a more important role. Their counseling function will be extended; it will be possible to establish a Power of Attorney or a Living Will there and the **Clearing** conducted by the associations shall become obligatory before appointing a substitute.
- The reform shall come into force in July 2018.

IV. Conclusion

Within the guardianship law, Austria prefers the family-model: preferably family members, in particular spouses, are appointed as substitutes or guardians. Secondary, a professional guardian (lawyer, notary or staff member of a guardianship association) is appointed. The costs, which arise, have to be paid by the ward. If he or she cannot afford this, the state has to bear the costs, but, in this case, the guardian is not paid.

Autonomy of the individual is already one of the most important rights guaranteed by constitutional law[34] and the CRPD in general, and by guardianship law for people with mental disabilities in particular. The reform strengthens this goal by stating that persons with (mental) disabilities should participate in all legal relations based on their own decision. Substitution will only be allowed if it is unavoidable. Primarily, the person shall be supported to make his or her own decisions. But there is still very few legal enforcement of a certain supported-decision-making process. This is true for the existing and also for the proposed law. An important reason for this is the allocation of competences within Austria. The Austrian state (*Bund*) is responsible for private-law substitution (guardianship law in the Austrian Civil Code) and the 9 federal states (*Bundesländer*) are responsible for social work. As supported decision-making is part of social work, the *Bundesländer* will have to organize this on their level.

The 2016 reform improves the existing system by abandoning restrictions of legal capacity and enhancing supported decision-making. A lack of enforceable supported decision-making instruments remains. In Austria, the most acceptable way to make provisions for all future issues is still an enduring Power of Attorney combined with a Living Will.

[34] Art. 8 European Convention on Human Rights.

Literature:

Barth/Ganner (Ed.), Handbuch des Sachwalterrechts[2], 2010.

Fuchs, Sachwalterschaft und Clearing, iFamZ 2014, p. 71 ff.

Fuchs/Hammerschick, Sachwalterschaft, Clearing und Alternativen zur Sachwalterschaft, 2013, p. 18 (http://www.irks.at/assets/irks/Publikationen/Forschungsbericht/SW%20und%20Clearing_Endbericht_IRKS300813.pdf, 22.6.2016).

Ganner/Barth, Die Auswirkungen der UN-Behindertenrechtskonvention auf das österreichische Sachwalterrecht, BtPrax 5/2010, p. 204 f.

Ganner, Grundzüge des Alten- und Behindertenrechts[2], 2014.

Kopetzki, Grundriss des Unterbringungsrechts[3], 2012.

Maurer, Das österreichische Sachwalterrecht in der Praxis[3], 2007.

Strickmann, Heimaufenthaltsrecht[2], 2012.