



### **Panel 3: Enduring Power of Attorney/Representation Agreement**

Thomas Renner, Germany; Barbara Wurster, Germany; Joanne Taylor, Canada; Moderator: Helga Steen-Helms, Germany

#### **Introduction:**

Helga Steen-Helms, Germany; Translation from German: Ekpenyong Ani

#### **Workshop aims and content**

- Meanwhile, enduring powers of attorney have become a widely used instrument for the legal protection of adults under private law. In December 2015, three million enduring powers of attorney were registered in the German central register of enduring powers of attorney (Zentrales Vorsorgeregister), and roughly the same number of non-registered powers of attorney is circulating.
- Increased prosperity and a growing mobility inevitably result in private provisions not ending at national borders. What needs to be taken into consideration here?
- Compared to other countries, German law allows for far reaching regulations regarding powers of attorney in the BGB (German Civil Code). The aim is to strengthen autonomy and self-determination and to avoid a court-appointed legal representation/ “Betreuung”.
- With the increase of enduring powers of attorney there is also a rise in the number of controversial agreements, which can often only be annulled by installing a court-appointed legal representation/ “Betreuung”.
- In view of the above, the risks persons granting and acting under the power of attorney face need to be addressed – combined with the question of which measures can be taken to prevent abuse and restriction of personal rights. Practical experiences in the context of the “Representation Agreement” in British Columbia (Canada) could be included here. Particularly regarding the monitoring mechanisms introduced there, which among other things include an obligation to observe the wishes and demands of the person granting the power of attorney and have furthermore resulted in the establishment of an institutional contact point for cases of suspected abuse.
- In Germany there also needs to be a repeated call for self-determination and supported decision-making. What are the future challenges this poses in the area of protective measures?

## German point of view:

Thomas Renner, Germany; Translation from German: Ekpenyong Ani

**Guiding theme: The significance of an enduring power of attorney in Germany as a “alternative” for state organized “Betreuung” (court appointed legal representation)**

### Position 1: German legislation allows for far-reaching powers of attorney

Sub-aspects:

- The BGB (German Civil Code) also allows for general powers of attorney.
- In Germany powers of attorney can be granted beyond death.
- Powers of attorney can have abstract wording (i.e. without itemization).
- Powers of attorney are also possible when it comes to personal matters (e.g.: decisions concerning surgery).
- Only few formalities apply to powers of attorney

### Position 2: Private protection of adults under an enduring power of attorney is favored and supported by the state

Sub-aspects:

- The law establishes a clear priority of the enduring power of attorney over “Betreuung”.
- Court decisions repeatedly reinforce the significance of the enduring powers of attorney.
- The public authorities for “Betreuung” (charged with the support and protection of vulnerable adults) have the duty to provide information about enduring powers of attorney.
- A specific jurisdiction was created with the public authority for “Betreuung” for the certification of enduring powers of attorney.

### Position 3: Notaries play an important part in enduring powers of attorney

Sub-aspects:

- Presently, enduring powers of attorney make up approx. 15 % of notarial deeds.
- Notarial enduring powers of attorney are recognized almost everywhere and without problems by other institutions and in legal dealings.
- More than 10 years ago, the Bundesnotarkammer (representing German civil law notaries) created an electronic nationwide central register of enduring powers of attorney, where approx. 3 million enduring powers of attorney are registered.

**Note:** the website [www.vulnerable-adults-europe.eu](http://www.vulnerable-adults-europe.eu) provides a good overview of the legal situation in various European countries (excluding the English-speaking countries and Scandinavia).

## Perspective of the Federal Ministry for Family, Seniors, Women and Youth:

Barbara Wurster, Germany; Translation from German: Ekpenyong Ani

Also in Germany, the proportion of elderly persons is constantly growing. In 2030 the percentage of persons over the age of 67 will have risen to 23.8% (approx. 18.7% in 2013). The percentage of persons over the age of 80 will rise from 5.4% of the total population in 2013 to 7.7% in 2030. According to the latest estimates of the Federal Office of Statistics, in 2050 there will be 9.9 million elderly persons in Germany. Therefore the question of growing old well with support will become an

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increasingly important topic for most of us. Currently roughly 1.3 million persons have a court-appointed legal representative (Betreuer). At least another 2.5 million are supported in legal matters based on an enduring power of attorney – in most cases family members take on these supporting tasks.

In order to strengthen the right of self-determination of older persons with support needs already prior to court-appointed legal representation (Betreuung), the provision of “other forms of support” on the ground as primary instruments could be intensified in the future. Therefore it is important to encourage family members and persons in the social environment to take on these kinds of voluntary support tasks – often, but not necessarily, the provision of these tasks is currently based on an enduring power of attorney.

However, in the Federal Ministry for Family, Seniors, Women and Youth we are also looking for new innovative approaches to further develop the legal protection of adults already prior to court-appointed legal representation (Betreuung). Within a three-year practice-based project – conducted by the Bundesarbeitsgemeinschaft der Seniorenbüros (federal working group of senior citizen offices) – we aim to encourage voluntary supporters, particularly family members but also persons from the immediate social setting, to gradually grow into an assisting role – with professional support – already prior to court-appointed legal representation (Betreuung).

And – in line with a new type of generational contract – we also want to promote especially the involvement of senior citizens for (even) older senior citizens.

## Canadian point of view (British Columbia):

Joanne Taylor, Canada

Like many countries and other provinces and territories of Canada, British Columbia has laws that adults (19 years or older) may use to plan for incapacity, end-of-life, and other support needs. Nidus refers to this as personal planning.

Legal documents for personal planning end:

- When the adult who made it dies.
- If adult guardianship is imposed.

Traditionally, an adult must be mentally capable of understanding the nature and effect of the legal planning documents they are making. This can avoid adult guardianship.

Some adults are not considered mentally capable of understanding. They cannot make traditional planning documents. These adults are especially vulnerable to guardianship. For example:

- Some adults with a developmental disability (from birth) or adults who have a disability from an illness or injury when they were minor children.
- Other adults – who did not make legal planning documents when they were mentally capable – who now have advanced dementia; a serious brain injury from an accident or a stroke; other conditions that temporarily or permanently affect their mental understanding.

## CREATING A LEGAL ALTERNATE TO ADULT GUARDIANSHIP – THE REPRESENTATION AGREEMENT ACT

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In 2000, the Representation Agreement Act (RA Act) came into effect in B.C.

- The RA Act was initiated by citizens and community groups.
- The RA Act is the foundation of reform of adult guardianship. The goal was to create a legal alternative to adult guardianship for adults whose mental capability is in question.
- The authorities or powers a representative may have are listed in two sections of the RA Act – section 7 and section 9.
  - > These two sections have different tests of incapability.
  - > The scope and type of authorities are also different for each section.
- There are three roles: representative, alternate, and monitor.
- The duty of a representative is to act according to the adult's: 1) current wishes; 2) pre-expressed wishes; 3) known values and beliefs; 4) best interests as a last resort.
- A representative has authority to assist the adult or to act on the adult's behalf.

### Representation Agreement Section 7 (RA7)

- A Representation Agreement under section 7 lists standard powers:
  - > Routine management of financial affairs (as defined). If this authority is included, an extra safeguard is required such as naming someone as a monitor;
  - > Obtaining legal services and instructing counsel;
  - > Minor and major health care (as defined);
  - > Personal care including where live, arrange services, diet, exercise, and contact with others.
- There is no specific threshold or standard an adult must meet to be considered capable of making an RA7. The RA Act supports a different view of capability. For example:
  - > The RA Act says that an adult may **make an RA7 'even though they are incapable of making a contract'** (section 8).
- The Representation Agreement Act of BC was the model for **Article 12 of the UN Convention on the Rights of Persons with Disabilities**. It is also referred to as supported decision making.

## LEGAL PLANNING DOCUMENTS SIMILAR TO OTHER JURISDICTIONS

### Representation Agreement Section 9 (RA9)

- A Representation Agreement under section 9 of the RA Act (RA9) is the most comprehensive document for **health care and personal care authority**.
- The adult must sign the RA9 when they are mentally capable of understanding the nature and effect of making it.

### Enduring Power of Attorney (EPA)

- Governed by the Power of Attorney Act (Parts 2 and 3).
- An EPA is the most comprehensive document for **financial and legal authority**. Authority can be limited or restricted.
- The adult must sign the EPA when they are mentally capable of understanding the nature and effect.
- The duty of an attorney is to act in the adult's best interests (what the attorney thinks is best).
- An EPA is in effect when the adult is mentally incapable. It can also be in effect when the adult is capable (recommended).

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## ADULT GUARDIANSHIP IN BC

Adult guardianship overrides all personal planning documents and is difficult to reverse once it is imposed.

- The Public Guardian and Trustee has been willing to discharge their role as statutory property guardian **when an adult makes an RA7** that includes routine finances and a monitor is named.
- Adult guardianship is ended when the adult dies.

Adult guardianship is the last resort in BC. This is one of the principles of the law reform.

- Under guardianship, adults lose their rights, which is sometimes called civil death.
- The guardian's signature/consent is paramount. This the adult is a non-person.
- A guardian acts in the best interests of the adult (what the guardian thinks is best).

## PERSONAL PLANNING REGISTRY

Nidus launched a **voluntary online Registry system** for Representation Agreements and Enduring Powers of Attorney in 2002.

- The RA Act originally included a mandatory Registry.
- The BC government decided not to implement the expensive and intrusive model proposed by the Public Trustee's Office in 1995.
- The public always supported the idea of a Registry for communication purposes.
- Nidus updated the Registry system in 2014 with more features.
- The Registry is for secure storage of information and a copy of documents (in PDF format).
- The Registry is self-managed. Fees are charged only for registration. There is no fee to search or view.
- The Public Guardian and Trustee is authorized to search and view registrations.

## MORE INFORMATION

Go to [nidus.ca](http://nidus.ca) > Get Help > Teaching & Training > [Policy Makers and Researchers](#)

Information in this paper is not legal advice and is provided by:

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*Nidus is a non-government, charitable organization with expertise in Representation Agreements.*

*Nidus is a Latin term for nest: a symbol of support and safety.*

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