

# 5 Implementation of Article 12 of the UN Convention on the Rights of Persons with Disabilities in Austria

*Igor Adamczyk and Jakob Fortunat Stagl*

## Introduction

Legal capacity and capacity to act are regulated in Austrian law by the civil code Allgemeines bürgerliches Gesetzbuch from 1811 (hereinafter ‘ABGB’).<sup>1</sup> The ABGB itself, although more than 200 years old, has been continuously amended and adapted by the legislator to current social or economic needs. Among other things, the regulation of legal capacity, including in particular the position of adults who, for health – especially mental – reasons, are unable to fully manage their own affairs, has been subject to changes recently. The legislative changes were carried out to implement the Convention into the Austrian legal order.<sup>2</sup>

At the outset, reference should be made to the procedure itself for the signing and ratification of the Convention by the Republic of Austria. Austria signed the Convention on the first possible day according to Article 42, i.e. on March 30, 2007.<sup>3</sup> The Convention was approved by the National Council (Nationalrat), signed by the president and countersigned by the chancellor, then the instruments of ratification for the Convention and the Optional Protocol were deposited with the secretary-general of the United Nations on September 26, 2008. On September 26, 2008, it was ratified.<sup>4</sup>

The Convention and the Optional Protocol were published in the Austrian Federal Law Gazette on October 23, 2008, in the authentic English and French versions with a German translation.<sup>5</sup> At the same time, the National Council decided in accordance with Article 49 § 2 B-VG<sup>6</sup> that the other authentic languages would be available for public inspection at the Federal Ministry for European and International Affairs. Pursuant to

1 Kaiserliches Patent vom 1. Junius 1811: Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>, accessed October 22, 2022.

2 Erwachsenenenschutz-Gesetz. Regierungsvorlage – Erläuterungen, 1461 der Beilagen XXV. GP pp. 1–4, [https://www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_01461/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/index.shtml), accessed October 22, 2022.

3 [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en), accessed October 22, 2022.

4 Instruments of ratification, Bundesgesetzblatt (Federal Law Gazette; hereinafter BGBl) III Nr. 155/2008, <https://www.ris.bka.gv.at/eli/bgbl/III/2008/155>, accessed October 22, 2022.

5 BGBl. III Nr. 155/2008.

6 B-VG – Bundesverfassungsgesetz BGBl. Nr. 1/1930, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138>, accessed October 22, 2022; M. Schauer, Das UN Übereinkommen über die Behindertenrechte und österreichisches Sachwalterrecht. Auswirkung und punktueller Anpassungsbedarf, *Interdisziplinäre Zeitschrift für Familienrecht (iFamZ)*, May 2011, p. 258.

Article 45 § 2 of the Convention and Article 13 § 2 of the Optional Protocol, the two treaties entered into force for Austria on October 26, 2008.<sup>7</sup>

In general, the Convention is not directly applicable. The Austrian National Council decided that it ‘shall be fulfilled by enacting laws’.<sup>8</sup> This decision of the National Council means that citizens are excluded from being able to directly assert the rights under the Convention. This interpretation has been confirmed by Austrian courts.<sup>9</sup> The National Council usually proceeds in this form with regard to state treaties regulating human rights. However, the authorities and courts must interpret these laws and all state law in conformity with international law. The reservation therefore does not violate the *pacta sunt servanda* principle of Article 26 of the Vienna Convention on the Law of Treaties.<sup>10</sup> Austria made neither a reservation nor a declaration on the Convention.<sup>11</sup>

Austria passed or amended the bills *inter alia* on monitoring of people’s rights arising from the UN Convention on the Rights of Persons with Disabilities and modernised the law regarding the capacity to undertake legal actions. The most significant acts passed or amended because of the Convention are Bundesbehindertengesetz (BBG – The Persons with Disabilities Act),<sup>12</sup> Volksanwaltschaftsgesetz (VolksanwG – The Ombudsman Act)<sup>13</sup> Zweites Erwachsenenschutzgesetz (2. ErwSchG – The second Adult Protection Act).<sup>14</sup>

With regard to legal capacity, the most relevant law in the implementation of the provisions of the Convention was the latter, the 2. ErwSchG, which was published in the BGBl on April 25, 2017, and which entered into force on July 1, 2018. Its main objective was to provide as much support as possible for persons with disabilities to participate in legal transactions while at the same time being as independent as possible in carrying out legal acts. To this end, the legislator, in creating the new norms, was guided by the so-called four-column model (German: Vier-Säulen-Modell) consisting of (1) precautionary power of attorney (German: Vorsorgevollmacht) or an adult representative (German: Erwachsenenvertreter), (2) elective representative (German: gewählter Vertreter),

7 BGBl. III Nr. 155/2008, <https://www.ris.bka.gv.at/eli/bgbl/III/2008/155>, accessed October 22, 2022.

8 Ibid.

9 Decision of the Austrian Supreme Court of May 15, 2013, case file No. 3Ob97/13f, [https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_20130515\\_OGH0002\\_0030OB00097\\_13F0000\\_000](https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130515_OGH0002_0030OB00097_13F0000_000), accessed October 22, 2022.

10 B. Eccher, ed., *Gutachten über die aus dem UN-Übereinkommen über die Rechte von Menschen mit Behinderungen erwachsenden Verpflichtungen Österreichs*, Innsbruck, 2014, pp. 19–20.

11 BGBl. III Nr. 155/2008.

12 Bundesgesetz vom 17. Mai 1990 über die Beratung, Betreuung und besondere Hilfe für behinderte Menschen (Bundesbehindertengesetz – BBG), BGBl. I Nr. 100/2018, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008713>, accessed October 22, 2022.

13 Bundesgesetz über die Volksanwaltschaft (Volksanwaltschaftsgesetz 1982 – VolksanwG), BGBl. I Nr. 56/2021, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000732>, accessed October 22, 2022.

14 Bundesgesetz, mit dem das Erwachsenenvertretungsrecht und das Kuratorenrecht im Allgemeinen bürgerlichen Gesetzbuch geregelt werden und das Ehegesetz, das Eingetragene Partnerschaft-Gesetz, das Namensänderungsgesetz, das Bundesgesetz über Krankenanstalten und Kuranstalten, das Außerstreitgesetz, die Zivilprozessordnung, die Jurisdiktionsnorm, das Rechtspflegergesetz, das Vereinsachwalter-, Patienten-anwalts- und Bewohnervertreterergesetz, das Unterbringungsgesetz, das Heimaufenthaltsgesetz, die Notariat-sordnung, die Rechtsanwaltsordnung, das Gerichtsgebührengesetz und das Gerichtliche Einbringungsgesetz geändert werden (2. Erwachsenenenschutz-Gesetz – 2. ErwSchG), BGBl 59/2017, [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2017\\_I\\_59/BGBLA\\_2017\\_I\\_59.pdfsig](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_59/BGBLA_2017_I_59.pdfsig), accessed October 22, 2022.

(3) statutory representative (German: gesetzlicher Vertreter), and (4) court-appointed representative (German: gerichtlicher Vertreter).<sup>15</sup>

Austrian law, like Polish law, assumes that all human beings, natural persons (German: natürliche Personen), have full legal personality from the moment of birth.<sup>16</sup> This is derived from § 16 ABGB,<sup>17</sup> which is imbued with a legal-naturalistic concept. According to this provision, every human being has inherent and reasonably justifiable rights and should therefore consequently be regarded as a person in the legal sense (subject of the law).<sup>18</sup>

Along with legal capacity, there is of course legal capacity to act. Austrian law uses a slightly different framework than Polish law in this matter. The starting point for the description of a person's capacity to independently transform his/her legal situation is the notion of *Handlungsfähigkeit*, regulated in § 24 (1) ABGB as the capacity of a natural or legal person to undertake actions under any legal circumstances in order to acquire rights or incur obligations.<sup>19</sup> The term *Handlungsfähigkeit* has no direct equivalent in Polish and is best translated as the capacity to take action. It is not a capacity to act within the meaning of Article 11 et seq. of the Polish Civil Code but a broader concept. Indeed, Austrian law distinguishes between the constituent capacities of legal capacity to act (*Geschäftsfähigkeit*) and tortious capacity (*Deliktsfähigkeit*). In this study we are interested in the first-mentioned capacity.<sup>20</sup>

A capable person according to the law is one who has the capacity to make a decision. The ABGB defines decision-making capacity as the ability to understand the meaning and consequences of one's behaviour in every legal situation, to base one's will and decisions on this. At the same time, the law presumes that an adult is capable of making decisions.<sup>21</sup> Thus, it can already be seen at this stage that the capacity for *Handlungsfähigkeit* does not derive from the mere fact of birth; it is necessary that a person is at an appropriate stage of psycho-physical development. On the other hand, this does not mean that the ABGB

15 R. Welsch, A. Kletečka, *Bürgerliches Recht. Bd. I*, Wien, 2018, pp. 635–636; M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 148–157.

16 The ABGB also takes into account the legal situation of unborn children (*nasciturus*) cf. § 22 ABGB.

17 § 16 ABGB: *Every individual has inherent rights, already evident from common sense, and must thus be recognised as a person. Slavery or serfdom, and the exercise of any power in this regard, is prohibited in these countries.* – All translations into English of ABGB paragraphs being in force after July 1, 2018 are from: P. Eschig, E. Pircher-Eschig, *Das österreichische ABGB – The Austrian civil code*, Wien, 2021. All other translations are own.

18 The Code uses the phrase 'persona' to describe a person's legal status; this approximates the Roman separation of *persona* from *homo*; see in detail J. F. Stagl, Persona: A mask with a human face. On the legal archaeology of personal law, *Studia Iuridica*, 2020, vol. 86, pp. 254–285.

19 § 24 (1) ABGB: *The capacity to act is the capacity of a person to acquire rights and assume obligations by his own actions depending on the respective legal circumstances. The capacity to act is subject to a person's capacity to make decisions unless the law provides otherwise. The law may impose further conditions depending on the individual circumstances.*

20 It is regulated in § 176 ABGB: *If a fault cannot already be attributed to a minor child (§ 1310), such child will be deemed liable in tort pursuant to the rules relating to tort upon having reached the age of discretion.* For a detailed account of the capacity in tort of *Deliktsfähigkeit*, see P. Bydlinski, *Bürgerliches Recht. Allgemeiner Teil*, Wien, 2018, pp. 63–66.

21 § 24 (2) ABGB: *Anyone who has the capacity to understand the meaning and consequences of his actions in the respective circumstances and who is able to determine his will by taking into account these circumstances and to act accordingly, has the capacity to make decisions. If in doubt, an adult is deemed to have the capacity to make decisions.*

makes the capacity of each individual dependent on his own characteristics like a group of jurists in ancient Rome called the Sabinians.<sup>22</sup> Security of legal trade requires the adoption of uniform rules, which Austrian law also does by making the sub-types of capacity, i.e. legal capacity and capacity in tort, in principle dependent on the age of the natural person.<sup>23</sup> Only then can this capacity be subject to restrictions due to the possible limitations of a particular person, such as, for example, in the case of disabled adults, primarily mentally ill, who do not understand the meaning of their own decisions.

Legal capacity to act has been defined as the ability of a person (natural or legal) to acquire rights or obligations by his own action.<sup>24</sup> It depends primarily on the age of the individual. There are four age categories: (1) persons under 7 years of age, (2) persons between 7 and 14 years of age, (3) persons between 14 and 18 years of age, and (4) persons over 18 years of age (adults).

## 1. Capacity on grounds of age

### *a. Persons under 7 years of age*

In general, legal transactions undertaken by children under the age of 7 are absolutely void.<sup>25</sup> Consequently, it is only the legal representative who can bind himself and acquire rights on behalf of such a child subject to specific statutory provisions, e.g. with regard to possible court's approval.

The ABGB, like the the Polish Civil Code, accepts one exception to this rule. Acts usually concluded by persons under 7 years of age and concerning daily living needs become retroactively effective since the conclusion at the time of the child's performance of the contract.<sup>26</sup>

It should also be noted that, pursuant to § 865 (2) ABGB, any person, including a child under the age of 7, may only perform acts for his benefit.<sup>27</sup>

Prior to the entry into force of the 2. ErwSchG on July 1, 2018, children under the age of 7 and any person who was unable to manage his own affairs could not even carry out acts that exclusively benefited them.<sup>28</sup>

22 Institutions of Gaius, G. 1, 196.

23 Vide infra.

24 § 865 (1) ABGB: *Legal capacity is the capacity of a person to acquire rights and assume obligations by his own conduct. It requires that the person is capable of making decisions and it is assumed that adults have such capacity. Paragraph 170 and 171 must be considered in connection with minors and § 242 (2) in connection with adults.*

25 § 865 (4) sentence 1 ABGB: *Any conduct relating to the entering into of legal transactions of a minor who is less than seven years old does not have any legal effect.*

26 § 170 (3) ABGB: *If a minor child concludes a legal transaction which is usually concluded by minors of the same age and which relates to a minor matter of daily life, such a legal transaction becomes legally binding retrospectively upon satisfaction of the child's obligations even if the requirements of (2) have not been satisfied.*

27 § 865 (2) ABGB: *Every person can accept a promise which has only been made to his benefit.*

28 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz, *iFamZ*, March 2017, p. 163.

*b. Persons between the ages of 7 and 14*

Persons between the ages of 7 and 14 have limited legal capacity. Apart from minor acts of everyday life, in order to enter into an obligation, persons between the ages of 7 and 14 must either be represented by a legal representative or obtain the consent of such a representative to enter into the act, either expressly or tacitly (§ 170 (1) ABGB).<sup>29</sup> Of course, like children under the age of 7, they may perform acts that are intended to result in their exclusive profit. In addition, according to § 310 ABGB, from the age of 7 a person may acquire possession of things on his own.

Unlike actions by children under 7 years of age, those concluded by persons in the age currently discussed without the approval of the legal representative are ineffective until the subsequent approval of the action will be made by the representative.<sup>30</sup> Nevertheless, from the moment the act is concluded, the minor's counterparty is bound by the declaration he has made. However, he cannot require the performance of the minor's obligation until the action is confirmed by the legal representative. We are then dealing with a 'limping contract' (*negotium claudicans*).<sup>31</sup> In order to protect the legal turnover and the minor's counterparty, the ABGB in § 865 (5) grants the counterparty the possibility to set a time limit for the minor's legal representative to confirm the action, after the ineffective expiry of which the counterparty becomes free.<sup>32</sup> Such a time limit should be appropriate.<sup>33</sup> Of course, it cannot be disregarded that in certain situations the approval of the legal representative will not be sufficient and the approval of a court of protection will be required.<sup>34</sup> Moreover, the minor himself can confirm the effectiveness of the concluded act in writing once he has reached the age of majority.<sup>35</sup> Once the minor has reached the age of majority, his counterparty may call upon the minor to validate the act, and again a reasonable time must be allowed for this. If the incumbent minor fails to make any statement or objects, the transaction becomes absolutely void.<sup>36</sup>

The structuring of the legal action for this category of persons does not differ from the pre-2018 regulations.

29 § 170 (1) ABGB: *A minor child can neither contract nor oblige itself by way of entering into a legal transaction without the express or implied consent of its legal representative.*

30 § 865 (4) sentence 2 ABGB: . . . *In the case of other minors, such conduct is effective upon approval by his representative and, if applicable, upon the additionally required court approval.*

31 G. Wesener, *Die Stellung des Kindes im Recht der Altösterreichischen Länder (Vom Mittelalter bis zum A.B.G.B.), L'enfant. Recueils de la Société Jean Bodin*, 1976, vol. 36, pp. 453–492.

32 § 865 (5) ABGB.

33 P. Rummel, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 865 ABGB, No. 10.

34 R. Welsch, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2018, p. 60.

35 § 168 ABGB: *If a legal transaction requires the consent of the legal representative, the consent of the other parent or the approval of the court of protection, the adult child will only be validly obliged without such consent or approval if it declares in writing to accept these obligations as legally effective. If the creditor requests the person having become an adult to make a declaration pursuant to the first sentence, the creditor must grant a reasonable period of time to provide such declaration.*

36 C. Fischer-Czermak, *ABGB-ONI.05*, ed. A. Kletečka, M. Schauer, 2018, commentary § 168, [https://rdb.manz.at/document/1102\\_abgb\\_105\\_p0168](https://rdb.manz.at/document/1102_abgb_105_p0168), accessed October 22, 2022.

*c. Persons between 14 and 18 years of age*

The ABGB distinguishes a category of persons with a broader, partial legal capacity. Their legal situation does not generally differ from that of persons between the age of 7 and 14. However, these persons can freely enter into contracts of services, with the exception of contracts concluded for the purposes of education, including vocational training.<sup>37</sup> In addition, a person in the discussed age may dispose of remuneration for work performed and things given to him for his exclusive use to such an extent that the satisfaction of his living needs would not be in danger.<sup>38</sup>

Children between the age of 14 and 18 also have the capacity to make a will. However, this capacity is not absolute. Indeed, a minor can only draw up a will before a court or a notary, except in emergency situations.<sup>39</sup> The will of the minor testator is subject to review by the court or notary from the perspective of the freedom and consideration in making it.<sup>40</sup> The legal capacity of this category of persons does not differ before the 2. ErwSchG came into force.

**2. Mental capacity – adults**

The extent of legal capacity is generally determined by age. However, it happens that adults, due to their mental state, are not able to independently perform legal acts on their own. In such cases, the legal capacity is corrected due to the mental state. An important change in the regulations concerning this field of the Austrian law was brought about by the entry into force of the already mentioned 2. ErwSchG, which aimed to bring national law into line with the Convention. Subsequently, the most important pre-2018 regulations will be presented first, and then the changes introduced by the 2. ErwSchG.

*a. Pre-2018 status**i. Guardianship (Sachwalterschaft)*

Prior to 2018, ABGB in § 865 provided that all persons over the age of 7 who lacked the capacity to make an independent decision lacked legal capacity to act, as did children under the age of 7. An exception was made for minor actions undertaken in daily

37 § 171, sentence 1, ABGB: *Unless provided otherwise, a minor child having reached the age of discretion can oblige itself by contract to the performance of services, except services pursuant to an apprenticeship contract or other training contracts.*

38 § 170 (2) ABGB: *After reaching the age of majority, however, he may dispose of and commit himself to property that has been left to his free disposal and to income from his own earnings to the extent that this does not jeopardise the satisfaction of his necessities of life.*

39 § 569, sentence 1–4, ABGB: *Underage persons do not have the capacity to declare a last will. Minors having reached the age of discretion can only declare a last will orally at court or in front of a notary public except in case of emergency (§ 584). The court or the notary public must be convinced that the last will has been declared freely with consideration.*

40 C. Mondel, G. Knechtel, *ABGB-ON1.04*, ed. A. Kletečka, M. Schauer, 2020, commentary § 569, [https://rdb.manz.at/document/1102\\_abgb\\_104\\_p0569](https://rdb.manz.at/document/1102_abgb_104_p0569), accessed October 22, 2022.

needs.<sup>41</sup> The ABGB did not provide for a gradation of legal capacity for such adults before 2018. The person could be either capable or not. However, it was recognised that such a distinction could often lead to overly arbitrary decisions. Therefore, it was accepted that, in relation to the legal actions of persons who are slightly limited in making conscious decisions, it should be examined in relation to the particular act whether they had the capacity at this time, especially the awareness of the decision during performing the legal act.<sup>42</sup>

Persons who were mentally disabled to such an extent that they could not make decisions independently and consciously, and thus could not perform legal acts, had to obtain a guardian (*Sachwalter*). This guardian was appointed for all or selected affairs of such a person, depending on the mental state.<sup>43</sup> By the term affairs we mean not only legal actions but also other actions causing legal effects for the person being represented, like conducting court proceedings.<sup>44</sup> The appointment of a guardian was made on the basis of a court order with constitutive effect, which was issued in non-contentious proceedings.<sup>45</sup> The appointment of a guardian resulted in the deprivation of full capacity to act of a disabled person in the matters entrusted to the guardian. A legal act undertaken within the scope of the guardian's authority by the incapacitated person required his explicit or tacit consent.<sup>46</sup> Such a person could, however, undertake acts on her own only for the benefit and in the ordinary activities of daily life. His capacity thus did not differ from that of children between the ages of 7 and 14.

In the legal doctrine, it was already pointed out long before 2018 and the entry into force of the 2. ErwSchG, as well as before the entry into force of the Convention itself, that the appointment of a guardian was of a flexible nature and should correspond to the needs of the person being under the guardianship.<sup>47</sup> Moreover, the institution of a guardian was seen as a subsidiary, an *ultima ratio*, to be used as a last resort. Such a need would not exist if the person was already being represented by another legal representative or could be assisted in other ways, such as being represented by a family member.<sup>48</sup>

Like the appointment, the termination of the guardianship was effected by a constitutive court order, of course, if the need for which the guardian had been appointed had ceased. It was also possible to change the guardian if the welfare of the person under guardianship

41 § 865, sentence 1, ABGB pre-2018: *Children under seven years of age and persons over seven years of age who do not have the use of reason are incapable of making or accepting a promise, except in cases under § 170 (3).*

42 H. Koziol, R. Welsler, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 63; P. Steinbauer, *Die Handlungsfähigkeit geistig Behinderter nach dem neuen Sachwalterrecht*, Österreichische Juristenzeitung, 1985, pp. 385–427, <https://rdb.manz.at/document/rdb.tso.LI0920000644>; C. Fischer-Czermak, *Einsichts- und Urteilsfähigkeit und Geschäftsfähigkeit*, Österreichische Notariatszeitung, October 2004, pp. 302–309.

43 § 268 (1) ABGB pre-2018: *If a person of full age who suffers from a mental illness or is mentally disabled (disabled person) is unable to manage all or some of his or her affairs without risk of disadvantage to himself or herself, a guardian shall be appointed for this purpose at his or her request or ex officio.*

44 W. Tschugguel, F. Parapatits, *ABGB-ON1.03*, ed. A. Kletečka, M. Schauer, 2014, commentary § 268, No. 3, [https://rdb.manz.at/document/1102\\_abgb\\_103\\_p0268](https://rdb.manz.at/document/1102_abgb_103_p0268), accessed October 22, 2022.

45 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 268 ABGB, No. 16.

46 § 280 ABGB pre-2018.

47 P. Steinbauer, *Die Handlungsfähigkeit geistig Behinderter nach dem neuen Sachwalterrecht*, Österreichische Juristenzeitung, 1985, pp. 385–427.

48 § 268 (2) ABGB pre-2018; H. Koziol, R. Welsler, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 65.

required it or if the guardian did not provide a guarantee for the proper performance of the function held or for some other reason could not perform the function, e.g. death.<sup>49</sup> A change in the health of the person under guardianship may also not have justified the revocation of the guardianship *per se* but may have a change in the scope of the guardian's mandate and thus in the scope of the affairs that the person under guardianship was able to conduct independently.<sup>50</sup> The court was also obliged to review the necessity of continuing the guardianship at appropriate intervals, but not longer than five years.<sup>51</sup>

*ii. Power of attorney granted to close relatives*

In 2006, i.e. even before the Convention came into force, the Austrian legislator decided to introduce into the ABGB, alongside the institution of guardianship, the possibility of empowering a close relative to manage certain affairs. The introduction of this institution was intended to reduce the excessive number of guardianships.<sup>52</sup>

A close relative was supposed to act on behalf of the disabled person in his daily affairs, as well as to provide for his care needs or medical services. An agent could be appointed not only for persons with disabilities but also for those who require support due to elderly age, poor health or poverty.<sup>53</sup> The appointment of an agent was made *ex lege*. Neither a declaration of intent by the person concerned nor a corresponding decision by, for example, a court of protection, was therefore necessary.<sup>54</sup> However, the party himself could, despite his lack of capacity, oppose the appointment of a representative, which did not require any form.<sup>55</sup> ABGB contained also a legal definition of a relative. These were parents, adult children, a spouse or registered partner living with the represented adult in a common household and a cohabiting partner, provided he or she had been living in a common household with the represented adult for three years.<sup>56</sup> A representative could not be appointed if a guardian had already been appointed or a precautionary power of attorney (German: Vorsorgevollmacht) had been granted.

49 § 278 (1) ABGB pre-2018: *The court shall transfer the guardianship (curatorship) to another person upon application or ex officio if the guardian (curator) dies, does not have the required qualification, he cannot reasonably be expected to exercise the function, one of the circumstances of § 273 (2) occurs or becomes known or the welfare of the person in care requires this for other reasons. § 178(3) shall apply accordingly.*

50 § 278 (2) ABGB pre-2018: *The guardian (curator) shall be removed upon application or ex officio if the prerequisites for his or her appointment under §§ 268 to 272 cease to apply; if these prerequisites cease to apply only to part of the matters entrusted to the guardian (curator), his or her scope of action shall be restricted. His or her scope of action shall be extended if this is necessary. If the ward dies, the guardianship (curatorship) expires. § 183 (2) shall apply accordingly.*

51 § 278 (3) ABGB pre-2018.

52 P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, p. 461.

53 § 284 b (1) ABGB pre-2018: *If a person of full age is unable to take care of legal transactions of daily life himself due to mental illness or mental disability and if he does not have a guardian or any other legal or appointed representative, he may be represented by a next of kin in these legal transactions, provided that they correspond to his living conditions. The same applies to legal transactions to cover the need for care as well as the assertion of claims due to elderly age, illness, disability or poverty, in particular claims under social insurance law, claims to care allowance and social assistance as well as fee exemptions and other benefits.*

54 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 284b ABGB, No. 5.

55 § 284 d (2) ABGB pre-2018.

56 § 284 c (1) ABGB pre-2018.



A close relative of the person being represented was required to have the representation recorded in the Austrian Central Representative Register (*Österreichische Zentrale Vertretungsverzeichnis*, or *ÖZVV*),<sup>57</sup> but the entry in this register, for the reason of being *ex lege*, had only a declaratory and not a constitutive effect.<sup>58</sup> The inclusion of the power of attorney in the register should have protected the good faith of the contracting parties of the empowered person.<sup>59</sup>

The revocation of the power of attorney by close relatives followed by a subsequent objection of the represented adult,<sup>60</sup> the death of either party, the appointment of a guardian, divorce (in case if the spouse was empowered) or the cessation of the ground for which the power of attorney was established.<sup>61</sup>

### iii. Precautionary power of attorney (*Vorsorgevollmacht*)

A precautionary power of attorney could only be granted by a person with full legal capacity anticipating the event that he or she lost his capacity to act. The precautionary power of attorney had to contain at least a generically defined scope of the affairs.<sup>62</sup> It should also have been handwritten and signed by the empowering party.<sup>63</sup> If the precautionary power of attorney was to authorise actions in especially important matters, such as medical treatment or transfer of residence, it had to be granted before an advocate, notary or court.<sup>64</sup> The precautionary power of attorney could be disclosed in the Austrian Central Representative Register (*ÖZVV*). Disclosure, as in the case of precautionary power of

57 The Austrian Central Representative Register is an online register, but with a restricted access. In general, only courts, the registering entities (notary's office, advocate's offices, adult protection associations) as well as social insurance and social welfare institutions, and the represented people with their representatives may check the register. All the other persons can obtain information from the register only if they submit the request in writing and prove the legal interest; see [https://www.justiz.gv.at/home/service/erwachsenenschutz/a-z-des-erwachsenenschutzrechts/oesterreichisches-zentrales-vertretungsverzeichnis\(oezvv\).3a.de.html](https://www.justiz.gv.at/home/service/erwachsenenschutz/a-z-des-erwachsenenschutzrechts/oesterreichisches-zentrales-vertretungsverzeichnis(oezvv).3a.de.html), October 22, 2022.

58 J. Stabentheiner, *ABGB – Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, ed. P. Rummel, M. Lukas, Wien, 2014, commentary § 284b ABGB, No. 5.

59 M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284b, No. 5–10, [https://rdb.manz.at/document/1102\\_abgb\\_102\\_p0284b](https://rdb.manz.at/document/1102_abgb_102_p0284b), accessed October 22, 2022; M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284e No. 18–23, [https://rdb.manz.at/document/1102\\_abgb\\_102\\_p0284e](https://rdb.manz.at/document/1102_abgb_102_p0284e), October 22, 2022; P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, pp. 553–559.

60 § 284 d (2) ABGB pre-2018.

61 M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284d, No. 6–12, [https://rdb.manz.at/document/1102\\_abgb\\_102\\_p0284d](https://rdb.manz.at/document/1102_abgb_102_p0284d), accessed October 22, 2022.

62 § 284 f (1) ABGB pre-2018: *A precautionary power of attorney is a power of attorney which, according to its content, is to become effective if the grantor of the power of attorney loses the legal capacity or the capacity of insight and judgement required to take care of the matters entrusted to him loses his ability to express himself. The matters for which the power of attorney is granted must be specified. The authorised representative may not be in a relationship of dependence or in any other close relationship with a hospital, a care home or any other institution in which the principal is staying or by which the principal is being cared for.*; M. Schauer, *ABGB-ON1.02*, ed. A. Kletečka, M. Schauer, 2017, commentary § 284f No. 8, [https://rdb.manz.at/document/1102\\_abgb\\_102\\_p0284f](https://rdb.manz.at/document/1102_abgb_102_p0284f), accessed October 22, 2022.

63 § 284 f (2) ABGB pre-2018; as a rule, these are form requirements as for wills; see also P. Barth, M. Ganner, eds., *Handbuch des Schwalterrechts*, Wien, 2010, pp. 357–361.

64 § 284 f (3) ABGB pre-2018.

attorney by close relatives, caused that a third party acting in good faith could claim the truthfulness of the information in the register.<sup>65</sup>

#### *b. Status after 2018*

##### *Introductory remarks*

As already mentioned, the 2. ErwSchG led to the amendment of the ABGB provisions on the legal capacity of persons with disabilities, especially those with mental limitations. The legislator was guided by the provisions of the Convention and tried to take into account the autonomy of the individual as much as possible, which is reflected in the introductory explanations to the 2. ErwSchG:

*The judicial care for persons who are no longer able to take care of their own affairs is to be reorganised. The autonomy of these persons is to be expanded. They should – as far as this is possible, expedient and justifiable – determine their legal relationships themselves. The possibilities for autonomous provision and self-determined decision-making are to be expanded in this sense, and the persons concerned are to be accompanied and supported in the often not easy decision-making processes to a greater extent than before. Judicial legal care should be reduced to its core, namely the representation of persons in legal matters. The representative and the court should therefore no longer take over tasks of social welfare or disability assistance in place of the responsible institutions.<sup>66</sup>*

As already mentioned in the introduction, the so-called four-column model shaping the legal capacity of adults with disabilities has been adopted in Austria in the 2. ErwSchG, consisting of legal institutions, such as the precautionary power of attorney and three types of representation (elected, statutory, court-appointed).<sup>67</sup>

The general rules provided by the legislator in the provisions of §§ 239–259 ABGB apply to all types of adult representation and precautionary power of attorney. First of all, the subsidiary nature of all types of substitution must be pointed out.<sup>68</sup> The essence of this principle is indicated by its insertion at the very beginning of the § 239 (1) ABGB, according to which efforts should be made to ensure that an adult who is limited in his ability to make independent decisions in legal trade as a result of a mental illness or other disability but is able to manage his affairs as independently as possible, with the possible support<sup>69</sup> of, for example, family or special entities established to support the disabled.<sup>70</sup> The use of one of the forms of adult representation in legal trade can be used

65 § 284 h (2) ABGB pre-2018; C. Spruzina, *Rechtsnatur und Bedeutung notarieller Bestätigungen*, *Notariatszeitung*, vol. 31, Wien, April 2010, pp. 104–105.

66 2 Erwachsenenschutz-Gesetz. Regierungsvorlage – Erläuterungen, 1461 der Beilagen XXV. GP, pp. 1–4, [https://www.parlament.gv.at/PAKT/VHG/XXV/I/I\\_01461/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01461/index.shtml), accessed October 22, 2022.

67 M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 148–150.

68 H. Koziol, R. Welser, A. Kletečka, *Bürgerliches Recht*, Bd. I, Wien, 2014, p. 636.

69 § 239 (1) ABGB: *In connection with legal transactions entered into by adults it must be ensured that adults with limited capacity to make decisions due to a mental illness or a comparable impairment are able to take care of their own affairs to the greatest extent possible and, if required, with corresponding support.*

70 § 239 (2) ABGB.

only if the adult person himself sees the need for it or if it is necessary due to the necessity of safeguarding his interests or rights.<sup>71</sup> At the same time, the legislator has decided, following the experience of the legal experience of guardianship, to limit the appointment of representatives if the adult receives the necessary support or has granted a precautionary power of attorney.<sup>72</sup> On the other hand, even if the adult receives a representative or has granted a precautionary power of attorney, the person acting on his behalf should, as far as possible, take into account the expectations of the represented adult and notify him of the intended actions affecting him.<sup>73</sup>

Following the wording of Article 12 of the Convention, the legislator assumed in the 2. ErwSchG that the establishment of any form of representation does not at the same time lead to an automatic incapacity of an adult.<sup>74</sup> Therefore, it can be seen, at first glance, a significant difference from the previous model, in which, for example, appointing a guardian in the constitutive court decision could lead also to the complete incapacity of an adult. In the current state of the law, a person who has an appointed representative or agent may still manage his affairs independently and effectively carry out legal actions, provided that he has the capacity to discern the meaning of the actions performed and the action falls within the scope of the representative's authority.<sup>75</sup> If, in a particular case, he does not have the capacity to make decisions on his own, the effectiveness of the action is suspended and subject to confirmation. If the adult does not have a representative or agent and did not have the capacity to make the legal act independently, it is invalid.<sup>76</sup> Exceptionally, when a court-appointed representative has been appointed for the adult and, at the same time, the court has foreseen the requirement for the ward to obtain the prior consent of the representative or the court (in matters exceeding the ordinary management of the ward's assets), the legal act always requires confirmation.<sup>77</sup>

In addition, 2. ErwSchG has broadened the scope of activities that an adult can undertake independently in everyday matters. This is because the legislator has deleted

71 § 240 (1) sentence 1 ABGB: *The persons specified in § 239 (1) only require a representative to participate in legal transactions if this has been intended by such person himself or if a representation is absolutely necessary to safeguard such person's rights and interests.*

72 § 240 (2) ABGB: *If an adult receives the required support in connection with the management of his affairs or has specifically provided for the required support in connection with such management, in particular by way of a precautionary power of attorney, it is not permitted to appoint a representative of adults for such person.*

73 § 241 (1) ABGB: *A representative authorised pursuant to a precautionary power of attorney or a representative of adults must seek to ensure that the represented person can arrange his living conditions in accordance with his wishes and ideas within his potential and possibilities, and the representative must enable this person to manage his affairs to the greatest extent possible.* § 241 (2) ABGB: *A representative authorised pursuant to a precautionary power of attorney or a representative of adults must notify the represented person of any decisions relating to such person or his property in a timely manner and must give him the opportunity to raise his opinion within a reasonable period of time. The declaration of the represented person must be considered unless this would severely prejudice his welfare.*

74 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. Erwachsenenschutzgesetz, *iFamZ*, March 2017, pp. 163–164. The need for changes due to the Convention was already discussed in 2011; see M. Schauer, Das UN-Übereinkommen über die Behindertenrechte und österreichisches Sachwalterrecht. Auswirkung und punktueller Anpassungsbedarf, *iFamZ*, May 2011, pp. 258–266.

75 § 242 (1) ABGB: *The represented person's capacity to act is not limited by a precautionary power of attorney or the appointment of a representative of adults.*

76 § 865 (3) ABGB.

77 § 242 (2) ABGB.

the attribute of minor matters.<sup>78</sup> As before, a legal act concerning the everyday matters becomes effective at the time of its performance. The exception to this is that, also for such matters, the judicial reservation of obtaining the consent of the court-appointed representative or the court applies.<sup>79</sup>

#### I. PRECAUTIONARY POWER OF ATTORNEY

The precautionary power of attorney (German: *Vorsorgevollmacht*), as seen earlier, had its place in the Austrian legal system even before the entry into force of the 2. *ErwSchG*. The legislator remodeled this institution having regard to the previous experience.<sup>80</sup>

As was the case prior to the time of the 2. *ErwSchG*, a precautionary power of attorney may be established by an adult for the event that the empowering person becomes incapable of making decisions on the matters covered by the precautionary power of attorney. The principal may also convert a previously existing ordinary power of attorney into a precautionary power of attorney.<sup>81</sup> A precautionary power of attorney may relate to specific matters or some sorts of affairs.<sup>82</sup> It is intended by the legislator only to have possible effects in the future. However, it must be established at a time when the principal has full decision-making capacity. The conditional nature of this type of power of attorney is therefore evident.<sup>83</sup>

The precautionary power of attorney must be granted in person, in writing before a notary public, an advocate or an adult protection association (*Erwachsenenschutzverein*),<sup>84</sup> cited in § 1 *Erwachsenenschutzverfahrensgesetz*.<sup>85</sup> The equalization of the position of the adult protection associations with advocates or notaries public is a novelty compared to the legal standing before 2018. A precautionary power of attorney drawn up, as well as the occurrence of an event actualising the representation, should be registered by the entity before which it was drawn up in the *ÖZVV*. Also, the termination of the precautionary power of attorney shall be effected by an entry in the *ÖZVV* by one of the aforementioned entities. The entry in the *ÖZVV* register therefore has constitutive effect.<sup>86</sup> This constitutes a novelty in relation to the previous state of the law. At the same time, the law instructs the notary, the advocate or the adult protection association to

78 F. Parapatits, S. Perner, Die Neuregelung der Geschäftsfähigkeit im 2. *Erwachsenenschutzgesetz*, *iFamZ*, March 2017, pp. 166–168.

79 § 242 (3) ABGB.

80 M. Schauer, Die vier Säulen des Erwachsenenrechts. *Vorsorgevollmacht*, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, pp. 150–151.

81 § 260 ABGB: *A precautionary power of attorney is a power of attorney which shall become effective upon the principal's loss of capacity to make decisions required in connection with the entrusted matters. The principal can also provide that an existing power of attorney shall be converted into a precautionary power of attorney subject to the occurrence of an event covered by the precautionary power of attorney.*

82 § 261 ABGB.

83 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 260, No. 1–2, p. 1436; M. Schauer, *ABGB-ON1.03*, ed. A. Kletečka, M. Schauer, 2019, commentary § 260 No. 7, [https://rdb.manz.at/document/1102\\_abgb\\_103\\_p0260](https://rdb.manz.at/document/1102_abgb_103_p0260), accessed October 22, 2022.

84 § 262 (1) ABGB.

85 Bundesgesetz über Erwachsenenschutzvereine (*Erwachsenenschutzvereinsgesetz – ErwSchVG*), BGBl. Nr. 156/1990, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002937>, accessed October 22, 2022.

86 M. Ganner, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 263 ABGB, No. 3, p. 395.

control the act being performed. If any of these entities becomes reasonably doubtful about the principal's capacity to make decisions at the time of the granting of the precautionary power of attorney, the occurrence of the event justifying the granting of the precautionary power of attorney or the recovery of the principal's capacity or the consent of the authorised person to accept the power of attorney, they are then obliged to refuse to draw up the precautionary power of attorney or to register any of these events in the ÖVZZ and, in case that there are grounds for believing that the welfare of the adult is at risk, to inform the relevant court of protection without any delay.<sup>87</sup>

A precautionary power of attorney expires upon the death of either party, by court order, by an entry in the ÖVZZ register: an information that the reason for granting it has ceased to exist, as well as by revocation or termination by the mandator. For the latter actions, it is sufficient for the substituted person to make it known that he no longer wishes to be substituted. This can be done in any way that indicates that the precautionary power of attorney is no longer valid. A mere factual conduct is sufficient.<sup>88</sup> The possibility of revoking the precautionary power of attorney cannot be waived by the principal.<sup>89</sup>

## II. ELECTIVE REPRESENTATION

Elective representation is intended to enable an adult to appoint a representative when he has lost the capacity to act due to his mental illness or other infirmity so that he cannot fully take care of himself and at the same time does not have a representative or has not previously appointed a precautionary agent. A prerequisite for the effectiveness of his choice is that the adult still understands the meaning and consequences of the appointment of a representative and that he is capable of determining his will and expressing it appropriately. The adult may appoint one or more representatives from among those close to him people<sup>90</sup> – not necessarily in the sense of blood ties. It could be, for example, a friend or neighbour. There must be a certain relationship of trust with the selected person.<sup>91</sup>

The representative is appointed by means of a contract concluded between him and the adult to be represented, which defines the scope of his empowerment.<sup>92</sup> In defining the scope of empowerment the legislator's particular emphasis on the autonomy of the adult can be seen. Indeed, the parties may stipulate that any action, with the exception of representation before a court, will be undertaken by the representative with the consent of the

87 § 263 ABGB.

88 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 246, No. 23, pp. 1382–1383.

89 § 246 (1) sentence 2 and 3 ABGB: *It is sufficient for the revocation or objection by the represented person if the represented person expresses his intention that he no longer wants to be represented. These rights cannot be waived.*

90 § 264 ABGB: *If an adult is not able to take care of his own affairs due to a mental illness or a comparable impairment of his capacity to make decisions and such adult does not have a representative and is no longer able to establish a precautionary power of attorney but is, irrespective thereof, able to have a basic understanding of the importance and consequences of the granting of a power of attorney and to form a corresponding will as well as to act accordingly, he can select one or several of his close contacts as his representative of adults in order to manage these affairs.*

91 M. Schauer, *ABGB-ON1.04*, ed. A. Kletečka, M. Schauer, 2019, commentary § 264, No. 12–15, [https://rdb.manz.at/document/1102\\_abgb\\_104\\_p0264](https://rdb.manz.at/document/1102_abgb_104_p0264), accessed October 22, 2022.

92 § 265 (1) ABGB: *The adult and his elective representative of adults must enter into an agreement (§ 1002) which specifies the powers of representation of the representative of adults.*

adult or by the adult himself with the consent of the representative.<sup>93</sup> Such an arrangement should ensure the autonomy of the adult, which also comes to the fore in Article 12 of the Convention.<sup>94</sup> The scope of the representative's authority may indicate specific affairs or types of affairs of the represented adult.<sup>95</sup>

As in the case of the precautionary power of attorney, the ABGB sets that the appointment of an elective representative must be made in person and in writing before a notary public, an advocate or an adult protection association.<sup>96</sup> This document must also be registered in the register (ÖZVV), and the persons before whom it is drawn up must, if they have any doubts about the grounds for appointing a representative or the agreement of the parties, refuse to prepare it, and if there is any reason to believe that the welfare of the adult is at risk, immediately inform the proper court of protection.<sup>97</sup> Also in this case, registration of the establishment of an elective representative has a constitutive effect.<sup>98</sup> Termination occurs in situations analogically to the termination of the precautionary power of attorney.<sup>99</sup>

### III. STATUTORY REPRESENTATION

The situation is slightly different with regard to statutory representation, which can be considered the equivalent of the pre-2018 institution of representation by close relatives.<sup>100</sup> Its appointment is possible if certain acts of an adult, as catalogued in the ABGB, cannot be performed independently due to mental illness or other comparable infirmity limiting the capacity to make a decision and, at the same time, the adult cannot take care of himself without danger of harm. At a first glance, it is apparent that the situation of the adult person justifying the appointment of a legal representative is more serious than this of the elective representation, which does not require the prerequisite of danger of harm.<sup>101</sup> In addition, the ABGB requires that the adult has no other representative, is unable or unwilling to choose a representative and has not objected in advance to the appointment of a statutory representative. Such an objection must be registered in ÖZVV.<sup>102</sup>

Also, the catalogue of people who can become legal representatives has been restricted in comparison to elective representation. These can only be immediate and close relatives, such as parents, grandparents, and adult children.<sup>103</sup> There is no order of appointment

93 § 265 (2) ABGB: *The agreement relating to the elective representation of adults can – with the exception of the representation at court – provide that the representative of adults shall only be entitled to perform acts of representation with a legal effect subject to the agreement with the represented person. The agreement can – with the exception of the representation at court – also provide that the represented person shall only be able to make declarations with legal effect subject to the approval of the representative of adults.*

94 P. Barth, Das 2. Erwachsenenschutz-Gesetz. Eine Annäherung, *iFamZ*, March 2017, p. 144.

95 § 265 (3) ABGB: *The powers of representation can relate to individual matters or certain types of matters.*

96 § 266 (1) ABGB.

97 § 267 (1) and (2) ABGB.

98 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 267, No. 1, p. 1451.

99 § 246 (1) point 1, 2, 4.

100 M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, p. 152.

101 M. Schauer, *ABGB-ONI.04*, ed. A. Kletečka, M. Schauer, 2019, commentary § 268, No. 2, [https://rdb.manz.at/document/1102\\_abgb\\_104\\_p0268](https://rdb.manz.at/document/1102_abgb_104_p0268), accessed October 22, 2022.

102 § 268 (1) ABGB.

103 § 268 (2) ABGB.

between them. Anyone of them may request a notary, an advocate or an adult protection association to be entered in the register as a representative. If no one offers to serve as a representative, the court should appoint a representative (court-appointed representation).<sup>104</sup>

The catalogue of matters for which a representative may be appointed is enumerative and is set out in § 269 ABGB.<sup>105</sup> These include such matters as (1) representation in administrative and administrative-court proceedings, (2) representation in court proceedings, (3) management of the adult's income, assets and liabilities, (4) conclusion of legal transactions for the purpose of meeting care needs, (5) deciding on and concluding contracts relating to medical services, (6) change of residence and conclusion of contracts relating to residence in care homes, (7) representation in other legal-personal matters relating to the deponent, and (8) conclusion of other legal transactions.

The form and registration of statutory representation is of the same nature as for elective representation. First of all, the constitutive effect of the registration should be mentioned.<sup>106</sup> Also in this situation, it is possible to raise an objection by a notary, an advocate and an adult protection association against the appointment of the representative.<sup>107</sup>

In principle, statutory representation is terminated in the same way as the elective representation, i.e. by death or court order. It also expires as a result of an objection of the represented adult or the representative. Unlike the elective representation, the statutory representation is time-limited and expires three years after the date of registration in the ÖZVV register, unless it is re-established in advance.<sup>108</sup>

#### IV. COURT-APPOINTED REPRESENTATION

Court-appointed representation is the equivalent of the former guardianship. An adult's representative may be appointed by the court in particularly justified situations, i.e. when the adult cannot manage his own particular affairs. The ABGB specifies that this refers to situations where a mental illness or other similar impairment interferes with the adult's ability to make decisions and conduct legal acts, resulting in a risk of harm to the adult. In addition, the person may have no other representative or may be unable or unwilling to choose one, and it is not possible to appoint a representative. The intention of the legislator was therefore to use this institution as a last resort.<sup>109</sup>

A court-appointed representative, as the name suggests, is appointed by the court *ex officio* or on application.<sup>110</sup> The court, in its order, is required to specifically indicate the

104 M. Hinteregger, *Familienrecht*, Wien, 2019, p. 283.

105 § 269 (1) ABGB.

106 C. Voithofer, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284, Erwachsenenschutz*, ed. A. Fenyves, F. Schöner, A. Vonkilch, Wien, 2020, commentary § 263 ABGB, No. 16–19, pp. 461–462.

107 § 270 (2) ABGB.

108 § 246 (1) point 5 ABGB.

109 P. Barth, Das 2. Erwachsenenschutz-Gesetz. Eine Annäherung, *iFamZ*, March 2017, p. 145; M. Schauer, Die vier Säulen des Erwachsenenschutzrechts. Vorsorgevollmacht, gewählte, gesetzliche und gerichtliche Erwachsenenvertretung, *iFamZ*, March 2017, p. 153.

110 § 271 ABGB: *The court must appoint a court-appointed representative of adults upon request of an adult or ex officio if: 1. the adult is not able to manage specific affairs himself due to a mental illness or a comparable impairment of his capacity to make decisions without the risk of any resulting disadvantage for the adult concerned, 2. the adult does not have a representative for these matters, 3. the adult is not able, or does not want, to select a representative, and 4. the statutory representation of adults is not an option.*

scope of the representative's mandate, which refers to a specific affairs or type of affairs.<sup>111</sup> However, the court cannot appoint a representative for all of the adult's affairs. It is also not possible to define the scope of the affairs or type of affairs on the off-chance.<sup>112</sup> Once an action has been performed or the handling of affairs has been completed, the court is obliged to either limit the scope of the representative's mandate accordingly or to revoke it.<sup>113</sup> There is also nothing to prevent a court-appointed representative and a statutory representative from coexisting at the same time – both of course with a different scope of authority.<sup>114</sup>

In choosing a representative, the court should be guided by the needs of the represented adult and take into account his wishes, obtain the potential representative's consent to the appointment and take into account the nature of the matters to be dealt with by the representative.<sup>115</sup> As to the person who should handle this function, the Code provides for specific categories of people. In the first instance, these should be e.g. person who has been designated by the adult as a precautionary agent or who were to act as an elective representative.<sup>116</sup> It seems to be clear that for the legislator, it was important that the representative possibly were the person who the adult himself would have chosen and therefore in whom he would most likely have confidence.

As mentioned earlier, the effectiveness of a legal act performed by an adult, as well as his actions in administrative and judicial-administrative proceedings, may be subject to the approval of the representative and sometimes even of the court. The court must include such a reservation in the order appointing the court representative, together with an indication of the matters in which the confirmation is needed.<sup>117</sup> This additional restriction is intended to resist any serious risk to the adult person being replaced. Pending confirmation, the effectiveness of the action is suspended.

A court-appointed representative, like a statutory representative, may be appointed by the court for a maximum period of three years. On the other hand, nothing prevents the representative from being reappointed, if the need of the person being replaced so requires, before the expiry of that period. The cessation of the representation takes place in the court order (the revocation, German: *Widerruf*) and by such obvious events as the death of either party.<sup>118</sup>

This type of representative should be also registered in the ÖZVV register; however, because the appointment is made by court order, such registration has only a declaratory nature. The situation is analogous in case of the recall of the representative by the court.

111 § 272 (1) ABGB: *The court-appointed representative of adults can only be appointed for specific current matters or specific types of current matters which must be described in detail by court.*

112 P. Barth, I. Koza, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 272 ABGB, No. 3, p. 517.

113 § 272 (2) ABGB: *The court-appointed representation of adults must be limited or terminated following the completion of the entrusted matter. The representative of adults must submit a corresponding request to court without undue delay.*

114 P. Barth, I. Koza, *ABGB. Großkommentar zum ABGB – Klang-Kommentar – 239 bis 284. Erwachsenenschutz*, ed. A. Fenyves, F. Kerschner, A. Vonkilch, Wien, 2020, commentary § 272 ABGB, No. 92, p. 531.

115 H. Weitzenböck, *ABGB Praxiskommentar*, ed. M. Schwimann, G. E. Kodek, Wien, 2018, commentary § 273, No. 2–3, pp. 1472–1473.

116 For specific categories see. § 274 ABGB.

117 § 242 (2) ABGB.

118 § 245 (3) and § 246 (1), p. 5 ABGB.



### 3. Active legal capacity of the persons with disabilities and its restrictions in the light of statistical data before the UN Convention on the Rights of Persons with Disabilities was ratified and afterwards

Before 2018 and, even earlier, before the ratification of the CPRD, the number of the guardianships was still increasing. Since the entry into force of the 2. ErwSchG and the remodeling of the legal capacity system for adults with disabilities, there has been a clear downward trend in court representation (formerly guardianship). Prior to the entry into force of the 2. ErwSchG, 52,746 guardianships were established. At the beginning of 2022, the number of court-appointed representation was approximately 36,500. This is therefore a decrease of as much as 30% in the period of only four years. At the same time, there is an upward trend in the number of existing elective and statutory representations. From 2018 to 2022, the number has increased from 1,812 and 9,114 to 5,599 and 21,091, respectively. The increase is therefore more than 300% and 200%, respectively. And the number of the precautionary powers of attorney granted as of January 1, 2020, was 150,607.<sup>119</sup> These changes send a clear signal that the changes that came into force in 2018 are effective and the four-column model based, among other principles, on the principle of subsidiarity and autonomy is working.<sup>120</sup>

The institution of power of attorney granted to close relatives being the predecessor of statutory representation was not mandatorily registered in the ÖZVV register, and therefore, we do not have reliable data on their number prior to the entry into force of the 2. ErwSchG.

The average duration of adult protection proceedings was four months in 2021.<sup>121</sup>

### 4. The relations between private law restrictions of active legal capacity and protection of persons with disabilities under criminal law

The persons with disabilities, among other vulnerable groups of people, are protected by the Austrian penal law. In this context two dispositions of the Austrian Penal Code (hereinafter StGB) should be mentioned, i.e. § 154 and § 155. The scope of this provisions is broader and not limited only to the protection of the persons with disabilities.

§ 154 StGB penalizes the so-called money usury (*Geldwucher*). It refers to the situation when someone exploits another person's predicament, recklessness, inexperience or lack of judgement by promising or allowing to be granted to himself or to a third person a pecuniary advantage for a service which serves to satisfy a pecuniary need, in particular for granting or arranging a loan or for deferring a pecuniary claim or arranging such a deferral, which pecuniary advantage is strikingly disproportionate to the value of his own service. The StGB provides for such a crime a prison sentence of up to three years. From the perspective of the topic under discussion, the prerequisite of lack of judgement is relevant. This prerequisite is understood broadly. It occurs not only when a person is completely lacking judgement but also when a person lacks it to a significant degree.

119 I. Koza, 2. Erwachsenenschutz-Gesetz in Zahlen. Eine erste Zwischenbilanz per 1.1.2020, *iFamZ*, January 2020, p. 24.

120 Detailed see the following charts. Currently, only partial statistics are available. The Ministry of Justice of the Republic of Austria plans to present a report on the five years of the 2. ErwSchG in 2023, including also broadly statistics.

121 <https://www.justiz.gv.at/home/justiz/daten-und-fakten/verfahrensdauer.1e7.de.html>, accessed October 22, 2022.

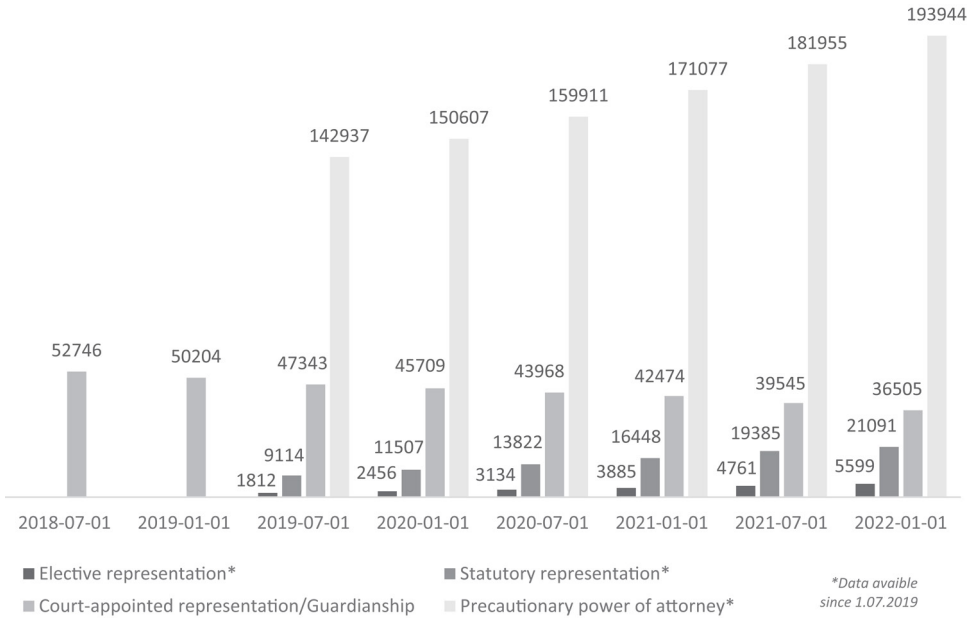


Chart 5.1 Representation of vulnerable persons in Austria since 2018.

Source: VertretungsNetz, Wien (Vienna)

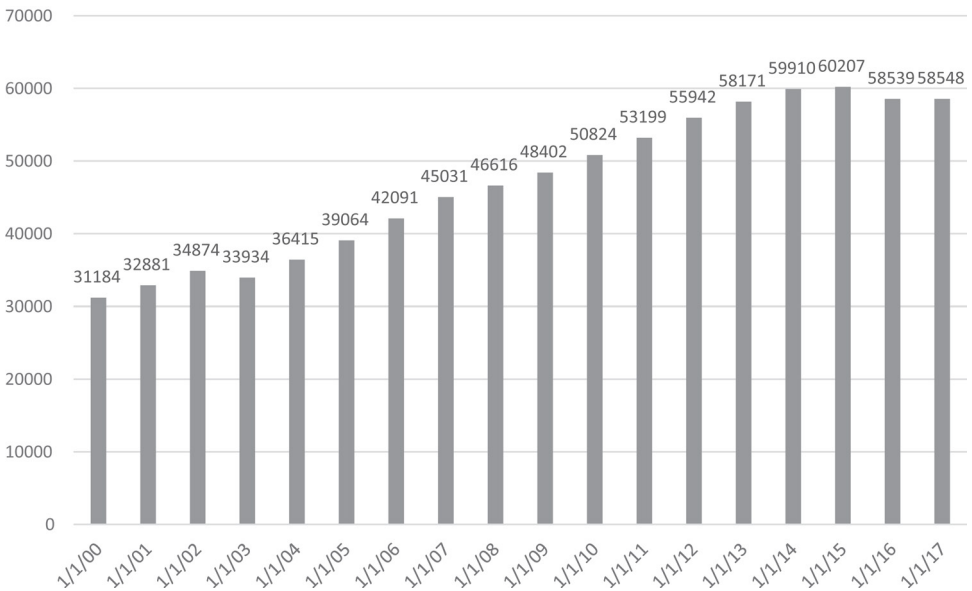


Chart 5.2 Guardianships in Austria, 2000–2017.

Source: A. Pilgram, G. Hanak, R. Kreissl, A. Neumann, Entwicklung von Kennzahlen für die gerichtliche Sachwalterrechtspraxis als Grundlage für die Abschätzung des Bedarfs an Vereinssachwaltschaft, Abschlussbericht Wien 2009; Bundesministeriums der Justiz; Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz (2019)

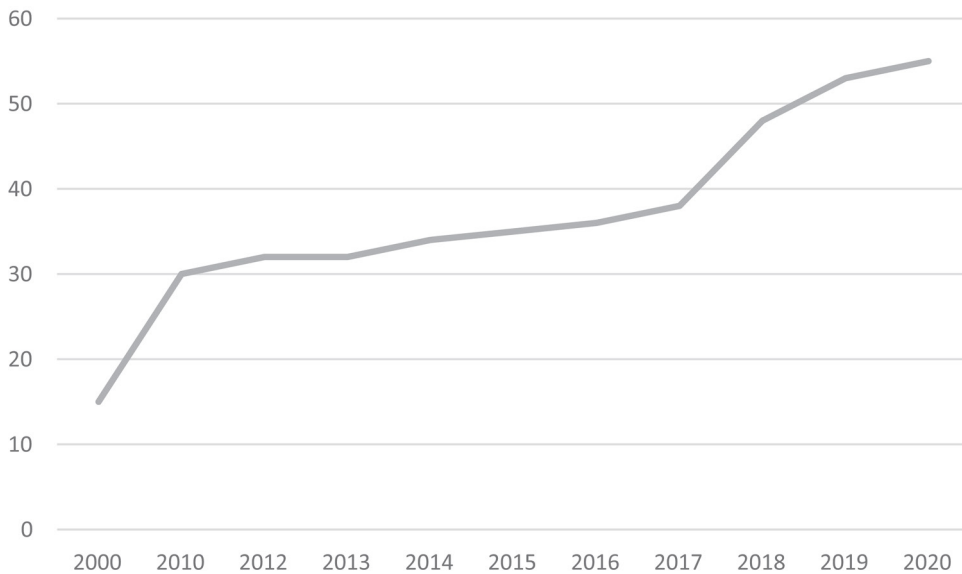


Chart 5.3 Expenditures in EUR Mio Adult's protection, patient advocacy and residents' representation in 2000–2020 (benefits in kind).

Source: Sozialschutz 1990–2020: Ergebnistabellen für Österreich, Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz, Die Anzahl Tabelle 71: Bewährungshilfe und Erwachsenenschutz

Lack of capacity for judgement is regarded as a significantly impaired ability to be led by rational motives and to correctly assess the mutual consideration and economic consequences of a legal transaction, which is often caused by a mental illness.<sup>122</sup>

§ 155 StGB, in comparison to its predecessor, deals with other examples of usury excluding monetary usury (*Sachwucher*). Also, this time, people who have a lack of judgement are protected by the Code. This prerequisite in the light of § 155 StGB is interpreted analogously. In addition, this type of usury must have the commercial aim to be penalized, which is not required in the case of money usury.<sup>123</sup>

## Summary

So far, it can be concluded that the 2017–2018 amendment of the legal capacity provisions in the ABGB significantly takes into account the values and requirements guiding the Convention and primarily those expressed in its Article 12 of the CRPD. The Austrian legislator has essentially realised the requirement that people with disabilities are recognised as

122 M. Eder-Rieder, *Salzburger Kommentar zum Strafgesetzbuch*, ed. O. Triffterer, C. Rosbaud, H. Hinterhofer, Wien, 2022, commentary § 154 StGB, p. 11, No. 31; M. Nemeč, A. Kern, *Wirtschaftsstrafrecht*, ed. M. Preuschl, N. Wess, Wien, 2018, commentary § 154 StGB, No. 3.

123 M. Eder-Rieder, *Salzburger Kommentar zum Strafgesetzbuch*, ed. O. Triffterer, C. Rosbaud, H. Hinterhofer, Wien, 2022, commentary § 155 StGB, p. 6, No. 20; E. Fabrizio, A. Michel-Kwapinski, B. Oshidari, *Strafgesetzbuch StGB und ausgewählte Nebengesetze. Kurzkomentar*, Wien, 2022, commentary § 155 StGB, No. 2.

subjects of the law and should enjoy the broadest possible legal capacity to act. Indeed, it should be noted that neither of the representation form or precautionary power of attorney automatically deprives an adult of legal capacity. The appointment of a representative or a precautionary agent does not prevent an adult, as long as he has the capacity to make a conscious decision, from acting independently. Furthermore, the scope of everyday matters that an adult can carry out on his own has been significantly widened by removing the prerequisite of their minority, as well as allowing incapacitated adults to effectively enter into legal transactions that only benefit them. This has ensured values such as party autonomy. It should be also noticed that all the forms of representation are subsidiary in nature. In particular, the most radical court-appointed representative should only be used in very exceptional situations.

Judging on the whole, it is doubtful whether any real progress is brought about by these reforms and whether they do not put additional burden and strain on the system and its representatives which do this kind of work out of an altruistic impulse. This doubt stems from the very fact that in the cases at hand it seems as if legislation tried to change the nature of things, to work wonders, which, to us at least, is impossible, as Celsus already knew 2,000 years ago (Digest 50, 17, 188, 1): *Quae rerum natura prohibentur, nulla lege confirmata sunt.*