

Preventive approach to incapacity issues

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Introduction

The COVID-19 pandemic has not only transformed society and the nature of social interactions, but has also placed issues of life and death at the forefront of people's minds. Many people of various ages and health conditions have required intensive medical care which may deprive them of their capacity of judgement and require others to take decisions for them.

This time of significant change is an opportune moment to consider the importance of taking preventive steps before a state of incapacity arises to ensure that individuals' wishes are respected, as well as the various means available to do so.

In Switzerland, by default, the adult protection authority has a comprehensive set of *ex officio* protective measures in place, including a guardianship system to tackle issues of incapacity. That said, Swiss law also provides for two preventive measures to freely address issues of incapacity:

- advance directives; and
- mandates in case of incapacity.

Both of these measures were introduced through a modification of the Civil Code in 2013, although the advance directives had long existed in the medical sector and certain Swiss cantons. While seldom used in practice, the COVID-19 pandemic is likely to have an effect in this regard.⁽¹⁾

Capacity of judgement

Capacity of judgement must exist when taking preventive measures, but must be absent for preventive measures to enter into force.

Under Swiss law, an individual is considered capable of judgement unless they are unable to act reasonably due to their young age, a mental deficiency, a psychic disorder, intoxication or another similar cause (Article 16 of the Civil Code). Capacity to act reasonably comprises two elements:

- an intellectual element, whereby the person must be able to critically understand (ie, logically comprehend) and assess a certain situation (ie, perceive and weigh the various motivations calling for action); and
- an element of will, illustrated by such person's ability to act freely and to form their own opinion without excess influence, which can sometimes be difficult to distinguish from regular influence and a change of mind.

Incapacity to act reasonably must result from one of the scenarios specifically mentioned in the law:

- Young age does not relate to a specific age (contrary to legal capacity to act, for which the minimum age is 18 years) and the corresponding capacity to act reasonably must be assessed on a case-by-case basis, depending on the contemplated act and the child's maturity. For instance, a 12-year old unscrewing a pylon understands the creation of a risk without considering all aspects thereof. In some cases, the Federal Supreme Court has considered 14-year-olds as adults. Younger children can also make low-value purchases (contrary to, for example, real estate). In relation to medical treatment, excessively high requirements must be avoided to facilitate the admission of capacity of judgement.
- Mental deficiency as per Article 16 of the Civil Code is a murky concept which historically

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derives from what can be defined as insufficient intelligence or power of judgement resulting in difficulties of understanding and a high risk of influence. Certain afflictions caused by old age can correspond not only to mental deficiency, but also to a psychic disorder (see below).

- The notion of 'psychic disorders' in Article 16 of the Civil Code refers to permanent and clear psychic disorders and covers all recognised mental pathologies in psychiatry, including senile dementia and Alzheimer's. That said, any diagnosed psychic disorder is insufficient to prove a lack of judgement as it must further support the inability to act reasonably. For example, this is not the case for a patient who suffers from severe depression but whose understanding of the situation is unaffected.

People are capable of judgement by default until their inability to act reasonably is demonstrated (Article 8 of the Civil Code). A person considered incapable of judgement does not have capacity to act (Articles 13 and 17 of the Civil Code) or generally give legal effect to their actions (Article 18 of the Civil Code).

Capacity of judgement must be assessed on a case-by-case basis. As a result, an individual can lack judgement for a certain type of action but not all. Further, lack of judgement can be temporary or permanent.

Should a person become incapable of judgement due to a mental deficiency or psychic disorder and thus be prevented from safeguarding their interests, the adult protection authority must impose an adult protection measure and appoint a guardian (Article 390(1)(1) of the Civil Code). Even a temporary lack of judgement may result in the institution of a guardian if the person has not appointed a representative (Article 390(1)(2) of the Civil Code). Various forms of guardianship exist, as it must be tailored and proportionate to the specific need for protection with regard to personal assistance, wealth management and representation towards third parties (Articles 391 to 392 of the Civil Code).

Should a person be capable of judgement – in addition to being at least 18 years old and not the subject of a general guardianship – they may draft advance directives or a mandate in case of incapacity, allowing such measures to come into force if they become incapable of judgement.

Advance directives

Advance directives aim to formalise in advance the medical treatments to which a patient agrees in case they become incapable of judgement (Article 370(1) of the Civil Code). Only 10% to 20% of the Swiss population seem to have drafted advance directives; however, this number is increasing among the elderly and people suffering from long-term illnesses which require frequent medical treatment.⁽²⁾

Advance directives must be in writing, dated and signed (Article 371(1) of the Civil Code). They may be mentioned in one's insurance card (Article 371(2) of the Civil Code and Article 6(1)(i) of the Federal Ordinance of 14 February 2007 on the policyholder's card in the mandatory health insurance). Save for emergency cases, a physician must check the patient's insurance card to determine whether they have expressed advance directives (Article 372(1) of the Civil Code). In principle, a physician must comply with advance directives unless they are illegal⁽³⁾ or there are serious concerns that they do not express the patient's free will or correspond to their assumed will in a specific situation (Article 372(2) of the Civil Code).

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Advance directives serve as a guide for medical professionals and generally concern incapacity and death – issues which are in turn linked to medical concepts with which most people are unfamiliar.

The Federation of Human Medicine and the Swiss Association of Medical Sciences have published freely available templates.⁽⁴⁾ These focus first on the person's values with regard to life and their relationship with death, rather than mere medical treatments. Everyone has a personal attitude towards life and assesses quality of life differently, which advance directives should reflect. Some individuals might wish to benefit from medical treatments which maximise their chance of living while others might prefer to focus on pain relief. Some would consider certain limitations and constraints of life unbearable, while others would not. People should also express their experiences with life and death events and their philosophical or religious beliefs, as these may be meaningful for the end of their life.

Once a person's values have been identified, the (un)approved medical treatments should be indicated in broad terms. While further details on (un)approved medical treatments may be contemplated, advance directives should focus on values to avoid a counterproductive focus on medical treatments, which people without a medical education may sometimes perceive with bias.

For that purpose, the abovementioned templates invite individuals to choose between:

- requesting any available medical procedure to be used, including resuscitation, to recover capacity of judgement;
- refusing resuscitation but requesting intensive medical care; or
- refusing resuscitation and intensive medical care treatment, including artificial respiration.

Similarly, but after a full medical diagnosis indicating the unlikelihood of judgement recovery and a likelihood of long-term dependence, individuals can choose between:

- all measures being taken to recover their capacity of judgement; or
- renouncing all measures to extend their life.

In both cases, it is possible to request active treatment of serious symptoms, such as fear, agitation, respiratory distress and nausea.

Writing advance directives may be difficult. The assistance of a physician, preferably one who already knows the patient and their medical history, may be extremely helpful for clarifying the patient's ideas and values in difficult circumstances and ensuring effective communication with medical professionals.

Therapeutic representatives

Advance directives can appoint a therapeutic representative, who will discuss any medical procedures with the attending physician and decide on the patient's behalf in case of their incapacity (Article 370(2) of the Civil Code). In such cases, Articles 377(1) to (2) of the Civil Code require the physician to discuss any treatment plan with the representative, including:

- the reasons behind the treatment;
- the nature of the treatment;
- the risks and collateral effects;
- the associated costs;
- the risks of not having treatment; and
- the alternatives.

In the absence of instructions in an advance directive, the therapeutic representative must make decisions regarding medical treatment based on the patient's presumed will and interests (Article 378(3) of the Civil Code).

A therapeutic representative can be any natural person appointed as such in an advance directive or a mandate in case of incapacity (Article 378(1)(1) of the Civil Code). If no therapeutic representative has been specifically appointed, Article 378(1) of the Civil Code dictates that the following persons, in descending order, can represent a person who is incapable of judgement and grant or refuse consent for the planned out-patient or in-patient measures:

- the patient's guardian (if any is appointed for therapeutic representation);
- the spouse or registered partner with whom the patient lives;
- the person with whom the patient lives;
- the patient's children;
- the patient's mother and father;
- the patient's brothers and sisters; or
- all of the above parties (minus the patient's guardian), if they provide regular personal assistance.

The appointment of a therapeutic representative can reduce tension among family members and help to clarify communications with medical professionals who must ultimately proceed with or refrain from providing certain medical treatments to the patient.

Compliance and practical considerations

Because they are made in advance, advance directives are always subject to the question of whether they are accurate and up to date. They can further be disregarded should there be serious doubts that they express the patient's free will or if they do not correspond with the patient's assumed will in a specific situation (see above).

Under Articles 373(1)(1) to (3) of the Civil Code, any close relation (interpreted extensively and not limited to family members) may submit a written request for the adult protection authority to intervene if:

- the advance directives are not respected;
- the patient's interests are (or are at risk of being) jeopardised; or
- the advance directives do not express the patient's free will.

In practice, advance directives can face resistance from relatives, family members or medical professionals who disagree with their content. To reduce such risks, the existence of advance directives should be made known to relatives and physicians to ensure their understanding thereof. They should also be reviewed regularly or after significant life events to reduce any potential questioning as to their relevance.

Mandate in case of incapacity

By way of a mandate in case of incapacity, a person with capacity to act may instruct a natural person or legal entity to take responsibility for their personal care or the management of their assets or to act as their legal agent in the event that they are no longer capable of judgement (Article 360 of the Civil Code). While advance directives are limited to preventive measures in the case of medical treatment, a mandate in case of incapacity covers most aspects of life, except for absolute strictly personal rights (eg, the right to marry, divorce, establish a will or recognise a child). A mandate in case of incapacity ensures continuity in one's personal affairs as incapacity can affect many legal relationships. Unless provided otherwise, representation and general mandates typically terminate when the principal becomes incapable of judgement (Articles 35(1) and 405(1) of the Code of Obligations). If they do not, they rarely address instructions should the principal become incapable of judgement, which can also bring its share of interpretation and validity issues.

Any person capable of judgement – in addition to being at least 18 years old and not the subject of a general guardianship – can appoint any natural or legal person for that purpose (Article 360(1) of the Civil Code). Strict requirements apply; a mandate in case of incapacity must be fully handwritten, dated and signed or authenticated (Articles 361(1) to (2) of the Civil Code). The Civil Registry Office may be informed of the existence and location of a mandate in case of incapacity (Article 361(3) of the Civil Code and Article 8(k)(1) of the Federal Ordinance of 28 April 2004 on the Civil Registry Office). The adult protection authority will verify a mandate before its entry into force (Articles 363(2) to (3) of the Civil Code).

Where no mandate in case of incapacity exists, the spouse or registered partner with whom the person lives or the person who provides personal assistance to them can ensure legal representation (Article 374(1) of the Civil Code). These acts are limited to necessary usual acts of personal assistance, ordinary asset management and perusal of correspondence, if necessary (Articles 374(2) (a) to (c) of the Civil Code); for extraordinary acts, the spouse must seek consent from the adult protection authority (Article 374(3) of the Civil Code).

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A mandate in case of incapacity can assign broad tasks regarding personal assistance, wealth management and legal representation (Article 360(1) of the Civil Code). Unless specified otherwise, the mandate will cover all of the above. However, two particular issues should be distinguished – namely:

- personal and medical assistance; and
- wealth management and administrative affairs.

Personal and medical assistance may be partially covered in advance directives, whereby the appointee is also the therapeutic representative (see above). That said, the mandate may extend the appointee's tasks relating to personal and health matters, such as:

- taking care of the individual's personal affairs;
- providing daily assistance to the extent required; and
- deciding on hospital stays, travel for medical purposes and home treatments.

Management of wealth and administrative affairs may include representation towards authorities and any relationship other than those which are health related. For example, as regards banking matters, the mandate should include the power to open or close bank accounts and request any measure necessary to preserve and manage the individual's assets. The mandate should also provide instructions to the appointee with respect to investment strategies (eg, to reduce a portfolio's risk profile). In addition, certain authorised acts must or should be mentioned for the appointee's corresponding powers to be effective, such as the right to acquire or alienate real estate. Certain prohibited acts should also be specified, such as the making of unusual gifts.

One or more persons may be appointed to carry out a mandate in case of incapacity depending on the assigned tasks; substitutes can also be provided for should the primary principal refuse, terminate or be incapable of performing the mandate (Article 360(3) of the Civil Code). While appointees are not required to reside in Switzerland, the principal should carefully consider the appointment of a person abroad as this could cause practical issues, including potential reluctance on the part of the adult protection authority when assessing the appointee's ability to carry out their tasks.

Remuneration, if any, should also be specified, as well the appointee's right to be assisted in their tasks. There are no strict rules on remuneration; it may be based on the appointee's professional training and own billing policy. If no remuneration is indicated or it is excessive, the adult protection authority will set an appropriate indemnity if justified given the tasks assigned or if the appointee's services are generally at cost (Article 366(1) of the Civil Code).

Compliance and practical considerations

Upon incapacity and if a mandate in case of incapacity exists, such mandate will enter into force subject to the adult protection authority verifying:

- that the mandate's formal requirements have been met;
- that the conditions of its entry into force have been fulfilled;
- that the appointee can carry out the mandate; and
- whether any other legal protective measures are necessary.

A mandate in case of incapacity should be as broad as possible to avoid the authorities deciding any additional protective measures, such as the appointment of a third-party guardian to meet additional needs.

By accepting such a mandate, the appointee must carry out their tasks as per the general mandate's rules (Article 394 *et seq* of the Code of Obligations), particularly their duties of diligence and loyalty (Article 398 of the Code of Obligations). The adult protection authority will issue a document confirming the appointee's powers.

If the interests of the person incapable of judgement are (or are at risk of being) jeopardised, the adult protection authority may – upon written request of a principal's close relationship (interpreted extensively and not limited to family members) – take any necessary steps to execute the mandate (Article 368(1) of the Civil Code). This includes giving instructions to the appointee, requesting regular reports or inventories of the principal's assets from the appointee and withdrawing the appointee's powers, if necessary (Article 368(2) of the Civil Code).

Further, the adult protection authority can interpret and fill in the gaps in a mandate at the appointee's request (Article 364 of the Civil Code). This is a useful tool to ensure efficiency and clarification of the mandate should difficulties arise in determining the principal's instructions.

In case of more than one appointee, particular attention should be paid to coordination and task delimitation issues. In this regard, individuals typically choose:

- a professional who is familiar with their financial and administrative affairs; and
- a close relative who is aware of their personal beliefs and medical history, who can provide personal and medical assistance.

The scope of activity should further be discussed and agreed in advance with the contemplated appointees. Those close to the concerned person should also be informed of the measures taken and the roles assigned.

The opportunity to draft a mandate in case of incapacity allows individuals to not only ensure the continuity of their affairs, but also limit any investigation of the adult protection authority and the appointment of guardians. A mandate in case of incapacity has the advantage of being more flexible and less invasive than a guardianship order – particularly because it reflects the individual's will.

Anticipating litigation risks

Unfortunately, preventive measures can have negative side effects. For example, in family circles, they can give rise to a risk of control or influence. Pressure may be exercised on an elderly person who has less energy to manage their financial affairs. Similarly, should a person suffer from an illness which is likely to place them in a state of incapacity, relatives may want to be appointed as their appointee or therapeutic representative for various reasons – both good and bad.

Timing is therefore crucial. Preventive measures should be implemented early enough to avoid possible external influences. All measures should also be communicated and explained to, and understood by, all relevant persons to prevent subsequent conflicts to the extent possible. That said, the aim of preventive measures is to reduce this risk in case of one's incapacity by clarifying a person's presumed will and removing the scope for interpretation by interested parties.

The COVID-19 pandemic also presents its own specific risks. In principle, Swiss law requires the adult protection authority to personally hear a person before they take any *ex officio* protective measure, such as imposing a guardian, or assess a preventive measure (ie, a mandate in case of incapacity or advance directives) (Article 447(1) of the Civil Code). This general obligation aims to

guarantee, from a procedural standpoint, the person's wellbeing and protection and maintain or support their autonomy. However, in view of the current situation, the Swiss government has temporarily modified some provisions of the Civil Code by virtue of its power to unilaterally enact regulation in urgent and serious situations. Accordingly, hearings in adult protection proceedings may now be held by teleconference or videoconference in derogation from, among other things, the person's right to be personally heard (Article 6 of the Federal Ordinance of 16 April 2020 implementing measures relating to coronavirus in the field of justice and procedural law). Under Article 4 of the ordinance, such virtual hearings must comply with the following requirements:

- Audio and video must be accessible to all hearing participants.
- Audio and video recordings must be made of witness and expert testimony.
- Data protection and security must be guaranteed.

Although this regulation primarily applies to urgent proceedings in the field of placement for assistance purposes,⁽⁵⁾ it also extends to all adult protection proceedings. This raises particular procedural issues which counsel must carefully address.

Finally, not all preventive measures travel easily. While Switzerland is party to the Hague Convention on the International Protection of Adults 2000, this convention is in force in only 12 countries and does not cover all issues addressed by a mandate in case of incapacity or non-Swiss equivalent. As such, uncertainty remains as to the effectiveness and recognition abroad of preventive measures taken in case of incapacity, which calls for careful and professional guidance.

Comment

A preventive approach to issues of incapacity will:

- ensure that an individual's wishes are respected in case of incapacity;
- reduce issues of interpretation of presumed will; and
- prevent the intervention of guardians appointed by the competent authorities.

Advance directives and mandates of incapacity can provide comfort when considering the difficult issue of incapacity. However, timing and professional advice are essential when drafting such measures. The sooner they are formalised, the smaller the risk of abuse of powers or undue influence. Professionals can also help to navigate the complexity of the medical and business world to ensure that an individual's interests are fully addressed.

For further information on this topic please contact [Werner Jahnel](#), [Sandrine Giroud](#) or [Sébastien Zulian](#) at LALIVE by telephone (+41 58 105 2000) or email (wjahnel@lalive.law, sgiroud@lalive.law or szulian@lalive.law). The LALIVE website can be accessed at www.lalive.ch.

Endnotes

(1) On 24 March 2020 the Swiss Society of Intensive Medicine issued a reminder that people vulnerable to COVID-19 should draft their advance directives to clarify their wishes regarding potential medical treatment. Further information is available [here](#).

(2) Swiss National Advisory Commission on Biomedical Ethics, *Les directives anticipées, Prise de position n° 17/2011*, Berne 2011, p10 (see [here](#)); the same numbers were recently mentioned in the 4 March 2020 TV episode of '36,9°', which focused on medical questions.

(3) For instance, if the advance directives request direct active euthanasia, subject to Articles 111, 113 or 114 of the Criminal Code.

(4) Available in French, German and Italian [here](#).

(5) Federal Office of Justice, *Commentaire des dispositions de l'Ordonnance COVID-19 justice et droit procédural*, 16 April 2020, art 6, p7, available [here](#).

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