Powers of Attorney and Wishes for Medical Treatment- A comparison of the law in Germany and Australia

I. Introduction

Almost all western industrialized nations are now experiencing the demographic phenomena of an increasingly ageing population. In Germany about a quarter of the population is older than 60 years[1]. In Australia, on the other hand, due to a high immigration rate, that figure is significantly lower. In Australia, around 13% of the population is older than 65 years, however, the proportion of older people is also increasing[2]. Due to this demographic change, it has now become more important than ever to have legally sound protection in place in the event of physical or mental incapacity. Also, the relentless advancement of medical technology requires young people to be more concerned about the use of life-sustaining medical procedures and make legally binding directions.

Another demographic fact that should not be overlooked in this context is the increasing number of people who live and work in other countries. Around 9,000 Australian nationals live in Germany[3] and more than 114,000 people who were born in Germany live in Australia[4]. These statistics do not take into account Germans who own assets in Australia. In most cases, immigrants maintain close economic and social ties to their home country and still own real estate or other assets in their home country.

In these situations, a purely national approach in relation to legal arrangements that provide for how decisions are made when, due to age or severe sickness, one loses the mental capacity to make decisions is not appropriate due to the different legal requirements in Australia and Germany.

Rather, there is a need to make legal arrangements which are effective across borders. Both countries have different tools available to provide a similar security in both countries. These are discussed in more detail below. In Germany, for example, these are:

- Patientenverfügung (Wishes for Medical Treatment)
- Vorsorgevollmacht (Power of Attorney)
- Betreuungsverfügung (Appointment of an Enduring Guardian)

From an Australian perspective and particularly in the state of New South Wales, we consider the following instruments:

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[1] Federal Centre for Political Education
http://www.bpb.de/wissen/1KNBKW,0,Bev%F6lkerungsentwicklung_und_Altersstruktur.html

[2] Australian Bureau of Statistics:
http://www.abs.gov.au/AUSSTATS/abs@.nsf/bb8db737e2af84b8ca2571780015701e/72097B9A70C71596CA2573D20010FD0A?opendocument

[3] German Bureau of Statistics:
http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/Bevoelkerung/MigrationIntegration/AuslaendischeBevoelkerung/Aktuell.psml

[4] Australian Bureau of Statistics:
http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/E0A79B147EA8E0B5CA2572AC001813E8/$File/34120_2005-06.pdf

- Enduring Power of Attorney
- Appointment of Enduring Guardian
- Wishes for Medical Treatment

II. The legal situation in Germany

German law provides for three types of instruments that can be used to make legal arrangements in relation to age and illness. These are the Vorsorgevollmacht, the Betreuungsverfügung and the Patientenverfügung.

Particularly, over the last few years, the Patientenverfügung has received significant media attention because of a politically and socially motivated debate about the extent to which passive euthanasia should be liberalized.
Until 2009, the Patientenverfügung - as it still the case, in Australia – was not codified and it was necessary to rely on court authorities (i.e. case law). When finally introduced, sections 1901a and 1901b of the German Civil Code were a compromise. These sections regulate the extent to which a person can determine whether medical measures are to be continued and when they are to cease. In this context, the German federal parliament introduced the requirement that this kind of instrument must be in writing (under discussion were more informal requirements, and also a requirement that such instruments should be notarized)[5]. As a result, the involvement of third parties (such as a notary) is not required. The creation of a Patientenverfügung under German law is much simpler than it is under Australian law in comparable situations. In the Patientenverfügung, the use or the omission of life-sustaining or life-prolonging measures may to be regulated. Ultimately it is up to the attending physician and the attorney to decide in each particular situation whether or not medical intervention would have been desired by the patient. In Germany, if there is a disagreement between the attorney and the attending physician then the court must decide pursuant to section 1904 of the German Civil Code. This decision needs to be based on the presumed will of the patient, as set out in the Patientenverfügung.
It was also a point of discussion for a long time, whether the statutory codification of the Patientenverfügung should also contain a limitation as to the extent to which the patient can determine matters in advance. One of the three proposals under discussion advocated for such a limitation[6]. Under this proposal, the discontinuation of life-sustaining measures would only be permitted if the patient's death was imminent. This was problematic, especially in cases of persistent vegetative state where choice about life prolonging measures would not be available on the basis that death is not imminent.
As this restriction was deliberately not included, German law has indirectly liberalized passive euthanasia, which is now within the scope of matters a patient may decide in the advance directive. In this context it should be noted too that medical instructions are to be expressed clearly and in plain language and should be reviewed regularly. A Patientenverfügung under German law does not expire[7], but it is recommended that it is reviewed regularly so that the patient's wishes are up to date. This also helps the attorney and the attending physician to determine the wishes of the patient in accordance with section 1901b BGB of the German Civil Code.

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[5] Federal Chamber of Physicians
http://www.baek.de/downloads/Synopse_Patientenverfügung_Dezember_2008.pdf
[6] Draft Bill: http://www.baek.de/downloads/15_PatVerfG_Bosbach_Roespel.pdf
[7] Iit was discussed to limit a Patientenverfügung to 5 years-
http://www.baek.de/downloads/Synopse_Patientenverfügung_Dezember_2008.pdf

As the extent of the Patientenverfügung is limited to medical measures, it is recommended that this instrument is complemented with a Vorsorgevollmacht to ensure that even after the incapacitation of the principal, legally binding declarations can be made.
With the Vorsorgevollmacht - which is often designed in the form of a general power of attorney, the attorney receives, pursuant to sections 164ff of the German Civil Code, a comprehensive authority to act for the patient in all matters, including court proceedings.
Under German law, a Vorsorgevollmacht can authorise an attorney to act on behalf of the principal in all or only in a limited number of legal matters. The principal can authorize one or more attorneys. It is also possible to appoint an additional attorney who controls the other appointed attorneys. To avoid conflicts, it is recommended that the document also regulate the internal relationships between the different attorneys as to when each attorney is authorized to make decisions.

The creation of the Vorsorgevollmacht only requires the principal's capacity to give consent.However, the Patientenverfügung requires the legal capacity of the principal (section 1901a of the German Civil Code). Unlike in Australia, the Vorsorgevollmacht in Germany does not require a certain form and can therefore also be given orally. However, a Vorsorgevollmacht should in any event be in writing and notarized so that transactions under section 311b of the German Civil Code can also be carried out. However, the authorization needs to be in writing if corporate transactions are to be undertaken.

The revocation of a Vorsorgevollmacht is possible at any time as long as the principal is legally competent (sections 168, 671 of the German Civil Code). If the principal is no longer legally competent, the revocation of the power of attorney is only possible by order of the court, which appoints a guardian for the principal. The court-appointed guardian can then revoke the power of attorney.
A Vorsorgevollmacht under German law constitutes a unilateral declaration of will. Unlike under Australian law, no action by the attorney is required.

The existence of a Vorsorgevollmacht makes the appointment of a guardian by the court usually redundant. However, in some situation it is nevertheless necessary to appoint a guardian because the Vorsorgevollmacht is not drafted widely enough, eg the wording of the law was not restated properly (so that an attorney has the same powers as a court appointed guardian). Sometimes an additional Betreuungsverfügung may be necessary. In a Betreuungsverfügung, it is possible to determine who should be the court appointed guardian and who should never be appointed as guardian. It is possible to address family specific circumstances in these cases.
In these situations, the court has to comply with the wishes of the person who is to be represented, unless the wishes are against his/her own interest. Unlike in Australia, in Germany, court proceedings are still necessary because the Betreuungsverfügung does not establish a Betreungsverhältnis. However, these proceedings are not required if the Vorsorgevollmacht provides the attorney with the powers of a guardian.

The Betreuungsverfügung can, as with the Vorsorgevorsorgevollmacht and the Patientenverfügung, also be combined in one document. A court appointed guardian must also comply with the wishes of the principal as expressed in the Patientenverfügung.

The retention and safekeeping of these legal documents is often problematic. It is possible to deposit them at a special register at the Federal Chamber of Notaries in Germany[8]. However, medical personnel are currently not provided with information from this register and only the court has a right to request information from it. Therefore, individuals are advised to carry some form of notification (eg a card that can be carried in one's wallet) regarding the existence of an enduring power of attorney.

II) The legal situation in Australia

For Australia, there is not a uniform national position. All Australian States and Territories are governed by different statutory laws and common law rules. Unless expressly stated otherwise, this article deals only with the legal situation in the most populous State of New South Wales.

The equivalent to the German Patientenverfügung under Australian law is the Advance Care Directive or Wishes for Medical Treatment. It can be made in each Australian state, although currently there are no laws that govern its content or extent. Accordingly, currently no legal prohibitions exists on terminating life-sustaining or prolonging measures in the context of passive or indirect euthanasia.
Due to a lack of legal requirements or limitations, the Australian Advance Care Directive can be drafted in accordance with the wishes of the person giving the directive. However, this means that strictly speaking such a declaration is not legally binding, but merely acts as an indicator of the person's wishes. Such declarations are usually addressed to the family as well as any other person concerned with the affairs of the patient; therefore also usually the guardian, attorneys, medical professionals, etc.

Nevertheless, certain formalities should be observed, eg the declaration should be in writing and signed by the principal and two independent witnesses. The declaration should also contain a provision that allows the principal to revoke the Advance Care Directive at any time.

In terms of content, it is sensible to indicate when the declaration should commence to have effect. Here, usually certain specific medical conditions are specified such as those which affect a person's state of mind. Furthermore, the directive usually requires that two experienced physicians must decide whether the patient has realistic prospects of recovery or whether his or her situation can improve.

The Australian Advance Directive can also be used to make arrangements and provide directions for care in a nursing home.

Although there are significant differences between the two legal instruments, the Power of Attorney under Australian law is largely the equivalent of the German Vorsorgevollmacht which is governed by sections 167 of the German Civil Code. The legal form of an Australian Power of Attorney is governed in New South Wales by the *Powers of Attorney Act (2003) (PAA).* An authorization may be granted in respect of all legal matters relating to the principal. Unlike in Germany, matters of a non-legal nature, i.e. lifestyle decisions, cannot be transferred to an attorney; rather it is necessary to appoint an Enduring Guardian[9].

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[8] Register of the Federal Chamber of Notaries
http://www.vorsorgeregister.de/Vorsorgevollmacht/Vorsorgevollmacht/index.php

[9] See below

A Power of Attorney will ordinarily terminate if the principal loses mental capacity. If the power of attorney is intended to continue to operate after the principal has lost mental capacity then it is necessary to grant an Enduring Power of Attorney. In the context of the management of financial affairs, the Enduring Power of Attorney is equivalent to the Vorsorgevollmacht under German law.

The Enduring Power of Attorney can also be drafted in a way that the power only takes effect from when the grantor becomes mentally incapacitated. However, in this case, it is also necessary for the Enduring Power of Attorney to provide a mechanism to determine legal incapacity. It could, for example, contain the requirement that the legal incapacity must be determined by two physicians who have at least 5 years' professional experience. Here lies a potential point for conflict if the grantor is of the opinion that he or she is not legally incapacitated.

While no further formal requirements exist in relation to the granting of a Power of Attorney, the Enduring Power of Attorney has additional formal requirements. The signature of the principal must be witnessed by a prescribed witness (e.g. a solicitor) who cannot be the attorney himself[10]. The prescribed witness must sign a certificate on the form stating that he explained the effect of the Enduring Power of Attorney to the principal and that the principal appeared to understand it[11]. Unlike the legal situation in Germany, the Enduring Power of Attorney does not operate to confer any authority on an attorney until the attorney has accepted the appointment by signing the instrument creating the power[12] or at some other time depending on the wording used in the document.

An important difference to the power under German law is that both the general Power of Attorney and the Enduring Power of Attorney under New South Wales terminate if the principal dies. The Irrevocable Power of Attorney, a special form of an attorney, is granted rarely and mostly only if the power is granted to fulfill a special purpose.

If real property transactions are also meant to be authorised by the Power of Attorney then the Power of Attorney must be registered with the Department of Lands. The revocation of such a power of attorney also needs to be registered.

The Australian equivalent of the German Betreungsverfügung is the Appointment of an Enduring Guardian. The appointment of an Enduring Guardian is the appropriate instrument to have someone appointed to take care of personal affairs of the grantor in the case of mental incapacity. The appointment of an Enduring Guardian is regulated by the Guardianship Act 1997.

While their names are similar, the legal position of the German Betreuer and the Australian Enduring Guardian is fundamentally different. The Betreuer is, pursuant to section 1896 of the German Civil Code, appointed to take care of all financial and personal affairs of the principal, whereas the Enduring Guardian can only be appointed to take care of the principal's personal affairs. As described above, only financial and legal matters can be dealt with by an attorney.

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[10] s 19 Abs. 1 (b) *PAA*
[11] s 19 Abs. 1 (c) *PAA*
[12] s 20 *PAA*

While in Germany, notwithstanding the appointment of a Betreuer, formal appointment proceedings are required and the Betreuer needs to be appointed by the court, this is not necessary in Australia as long as the Enduring Guardian has been appointed validly by the principal. The appointment of the Enduring Guardian becomes effective when the principal becomes incapacitated.

In Australia, it is therefore recommended to appoint an Enduring Guardian so the principal can elect which person will take care of his or her personal affairs if he or she becomes incapacitated. If the principal has not appointed an Enduring Guardian, then the Guardianship Tribunal will appoint a Guardian if the principal becomes incapacitated. The Guardianship Tribunal is free to make its own decision as to who should be appointed Guardian.

The principal, the attorney and an eligible witness (i.e. solicitor or Court) need to execute the instrument creating the Enduring Guardianship, for the appointment of the Enduring Guardian to be valid[13]. The Enduring Guardian must formally accept his or her appointment. Any person who is above the age of 18 years is eligible to be appointed as an enduring guardian[14]. The signature of the guardian must also be witnessed by a prescribed witness.

Often such documents are held by a solicitor who is familiar with the principal's personal situation.

IV. German clients with residence in New South Wales or with assets in New South Wales – what do you need to consider?

People who live in Australia and have assets in Germany, but do not intend to return to Germany permanently, probably do not need to make arrangements in relation their care in Germany. They should however, make arrangements by way of general power of attorney (i.e. a Vorsorgevollmacht) for their financial affairs in Germany.

People who have assets in other countries or want to invest funds in other countries should be aware that arrangements made for their financial affairs in Australia or Germany do not automatically have effect in other countries. We therefore recommend to always obtain local advice. In the case of a German in Australia, therefore, the financial arrangements need to be made in Australia

While in Germany it is possible to combine all of the instruments described above into one document, in New South Wales a number of separate instruments are required and each of these instruments has different formal requirements and legal consequences.

Depending on your individual circumstances, it may be difficult to find a trusted person for appointment as Enduring Guardian and/or Attorney in each country. However, in the context of these instruments, it is recommended to only appoint persons who reside in the relevant country. It is therefore not recommended to appoint a person who lives in Germany as attorney for assets in New South Wales.

[13] s. 6C des *Guardianship Act 1987*
[14] s. 6B Abs. 1 des *Guardianship Act 1987*

An attorney may accept the appointment at the time the instrument creating the Enduring Power of Attorney is executed, or at any time after it is executed. If the form does not meet your needs, you may wish to contact your legal advisor who can prepare a form for you.

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