

Update your Swiss Estate Planning – New Laws on Decision Making during Incapacity

July 18, 2013

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Most people are familiar with the primary component of Estate planning as having a will prepared to control the disposition of their wealth upon death with more advanced and detailed planning including various types of Trusts or other legal structures. However, wills only apply in case of death; but what happens if someone becomes temporarily or permanently incapacitated? Individuals may want to decide in advance on what will happen not only when they die, but also if they fall into coma, get Alzheimer disease, or lose their capacity for competent decision making for any other reason, be it temporarily or indefinitely. They may want to decide on who will take care of them, who will make financial decisions and what medical treatments they would accept or not if they were able to make the decision for themselves.

Until the end of 2012, Swiss law offered no definitive solutions to make such advanced decisions, but this has now changed. Starting on January 1st, 2013, two new legal tools became available: first, the **Power of Attorney in Case of Incapacity** (mandat pour cause d'inaptitude, Vorsorgeauftrag), in which an individual can give a trustworthy person the power to make the necessary decisions on their behalf in case they become incapable; second, the **Advanced Medical Directives** (directives anticipées du patient, Patientenverfügung), which aim at guiding hospital and other medical staff on what treatments the individual wishes or wishes not to receive if they are unable to directly communicate their wishes.

The **Power of Attorney in Case of Incapacity** can cover the following three areas:

1. Personal assistance

This can include taking care of the dwelling, opening and answering the mail, taking care of the usual bills, contacts with usual service providers, assisting the person in their daily life with respect to health and medical issues, and other private matters. Issues such as moving into a home for elderly people can also typically be included as part of this personal assistance.

A mandate that is limited to the personal assistance can optionally include the power to represent the individual with respect to medical issues (that is to act and make decisions on behalf of the individual).

2. Management of the assets

This can include managing the assets, defending and protecting the financial interests of the individual, paying debts and receiving payments on behalf of the individual. This area generally implies a power of attorney on the individual's financial / bank accounts.

3. Representation towards third parties

This area consists of representing the individual in front of legal authorities, courts and private parties, entering into contracts on behalf of the person (insurance companies, home for elderly people etc.), filing tax returns and collecting debts (in particular from insurance companies).

The individual may include some optional additional powers such as: the power to acquire or to dispose of immovable assets (for or without consideration), the power to bring lawsuits, and the power to delegate some of these powers to a third party who for example may have more expertise in a particular area.

Below are a few general principles that apply to all types of powers of attorney in case of incapacity:

- The Power of attorney can cover all three areas mentioned above, or be limited to only one or two of them. It is also possible for an individual to give a power of attorney covering one area to one person and to choose another person for a different area(s) (for instance, a power of attorney on personal assistance to a close relative and a power of attorney on the management of assets to a trusted professional).
- The power attorney can be referred to as a “springing power”, in that it only becomes active if and when the person is unable to make decisions.
- The representative executes the mandate under the supervision of the court. He or she may also seek instructions from the court anytime.
- In general, the power of attorney includes a provision that removes the professional secrecy of doctors, lawyers, bankers etc. so that the representative can be fully informed of the situation of the incapacitated individual.
- Fees can be paid to the representative.
- The power of attorney can be revoked anytime up until the person becomes incapacitated. From the moment that the person actually becomes incapable to act for themselves and the power of attorney enters into force, it can be revoked by the Court if there are serious reasons.
- If the individual who becomes incapacitated recovers their capacity, the mandate will automatically and immediately come to an end.
- It is possible to appoint a successor or substitute representative in case that the representative dies, becomes incapable before (or after) the mandate starts, or refuses to execute the mandate.
- The power of attorney can be registered with the Office d'état civil (Zivilstandsamt) in order to make sure that it will be effective.

With respect to **Advanced Medical Directives** the main options available:

- A capable individual may prepare early instructions for the doctors in case they become unable to make decisions for themselves with respect to the medical treatments that they accept or does not accept. For instance: if you suffer incredible pain, you want to receive medicines or treatment that will relieve your pain even if it could shorten your life; or if you suffer from an incurable disease you may not want the doctors to try and artificially extend your life. For example, you may request pain relief and water, but no other nourishment.
- The individual may also appoint a representative who will have the right and the duty to discuss the suitable treatments with the doctors and to decide on behalf of the individual who has become incapacitated. The individual may also give Advanced Directives to this representative.
- The individual may appoint a successor or substitute representative in case the representative cannot or refuses to perform their tasks.
- The existence of the directives can be mentioned in the electronic chip of the health insurance card. Doctors have the duty to check if an incapacitated person has prepared directives. As some doctors are not yet equipped with an electronic chip reader, it is advisable to keep a note in one's wallet mentioning that there are directives, where they can be found, and the contact details of a trusted person.

The relatives of the individual who has become incapacitated may initiate challenge in court if the instructions are not respected by the doctor, if the interests of the patient are or could be in danger, or if the instructions appear not to be the expression of the free will of the patient.

It is worth noting that there are relatively detailed new legal rules on what the doctors should do and how to proceed in case an incapacitated individual did not prepare advanced directives. To prepare comprehensive estate planning, these rules should be examined in order to check if these default rules match with the wishes of the individual. If not, **Advanced directives** are necessary.

Powers of attorney in case of incapacity and advanced medical directives can only be made by a person of legal age with full mental capacity. As there are some formal requirements it is safer to seek advice from a lawyer who is familiar with the current legislation.

There are a few other questions that individuals may want to consider when preparing their estate plans in Switzerland:

If I already had a power of attorney or advanced directives prepared in a foreign country before I took residence in Switzerland, are they still valid in Switzerland or do I have to prepare new ones according to Swiss law?

Two issues should be considered here. First, from a strictly legal standpoint, the documents may be valid in Switzerland or may not be valid, depending on various factors. The only way to find out for certain is to have them examined by a professional who can confirm if they conform with Swiss legal requirements. The second consideration, from a practical perspective, in order for these documents to serve their purpose, they need to be not only legally valid, but their validity and their content must be immediately and obviously recognizable by anyone in Switzerland. In particular in case of medical emergency, you don't want these documents to be questioned by the hospital and to wait for a Court decision on their validity. The only way to ensure this level of certainty is to prepare these documents according to Swiss legal standards and to use one of the recognized local languages.

Having a well organized estate plan can help to guide loved ones in a time of extreme difficulty. Having to make critical life and death decisions can be made easier if your wishes are clearly documented before a crises arrives; even if those wishes are to leave all critical decisions to someone else. The Swiss government has now made it easier for individuals to plan for the organization of their life in case they lose their mental ability, and for the medical decisions making around the end of their life or in a health crisis situation. As part of your comprehensive financial and estate planning, we strongly suggest that you consider whether the preparation of a power of attorney in case of incapacity or Advanced Medical Directives make sense for you.