A. Introduction

In an aging society whose citizens may expect to live 80 years or even longer, it is more likely than ever that an adult may become incapable of managing his or her own affairs due to old age or health problems. Traditionally, a guardianship court, or another public authority, will then issue an interdiction order rendering the adult legally incapable and appoint a legal guardian to act on his/her behalf. This approach has been severely criticised for, inter alia, violating the civil rights of the ward, disregarding his or her existing competences, and being too expensive to be applied to a large number of people. Consequently, governments and legislators have been looking for alternatives to the traditional system. This search lies at the very heart of the debate on how to reform legal guardianship.

Private law instruments appear especially attractive because they respect the autonomy of the individual, avoid state intervention, and must be funded by the citizens themselves. Today, I will thus explore the German “Vorsorgevollmacht” and its merits as an alternative to legal guardianship in private law.

B. Fundamental structure of the German Vorsorgevollmacht

(1) Philosophy

Germany fundamentally reformed its law on the legal protection of incapable adults at the beginning of the 1990s. The former guardianship system was completely abolished and replaced by a new system of custodianship (“gesetzliche Betreuung”). There is no incapacitation by court order anymore and, instead of a legal guardian who has control over all aspects of the life and the affairs of the ward, a court appointed custodian (“gesetzlicher Betreuer”) merely takes care of the specific matters assigned to it by the court in each individual case.

Even so, a person’s privacy and autonomy may be restricted by the court’s intervention and by the appointment of a custodian. Consequently, many people wish to take matters into their own hands to avoid an intervention by the court. The principal legal instrument for achieving this is the enduring or lasting power of attorney (“Vorsorgevollmacht”).

Generally speaking, the grantor of such a power of attorney pursues numerous aims. He appoints a trusted attorney to ensure that an unknown person does not manage his affairs.

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1 Background Paper for the Panel on “Alternatives to Legal Guardianship” on Friday 30 May 2014
He also seeks to prevent the custodianship court and other public authorities from interfering with his affairs. To achieve this, the attorney ought to be capable of managing all of the grantor’s affairs and should possess the same range of powers as a court appointed custodian. Another advantage of such an arrangement is that the attorney follows the directives and wishes of the grantor while fulfilling his functions.

On a comparative level, we may distinguish two main types of enduring powers of attorneys. One type is derived from legal guardianship. It enables an adult to nominate the person who should manage his affairs but the custodianship court or authorities retain ultimate control, e.g. via compulsory registration and/or court consent before it becomes operational. In other words, this is a more or less privatised form of legal custodianship. The German “Vorsorgevollmacht” does not fall under this category.

The second type of an enduring power of attorney is rooted in ordinary agency and powers of attorney in private law. The “enduring” power of attorney is therefore not very different from an ordinary one. It is merely the scope of application that is extended to cover also the situation where the granter loses his ability to manage his or her affairs. The German “Vorsorgevollmacht” is a good example for such an “extended” agency and power of attorney. It has been acknowledged since the introduction of the German Civil Code (Bürgerliches Gesetzbuch – BGB) in 1900, existing now for over a hundred years. Originally, it was used for property and financial matters, but it has since been extended to personal matters. It is highly popular and very frequently used. Today, there are more than (estimated) 3 mio enduring powers of attorney in Germany, either registered or unregistered, compared to 1,3 mio legal custodians, out of a population of 80 mio. (see below C.).

(2) Legal framework

(a) Principle of autonomy

The ability of an adult to grant another person a power of attorney (Vollmacht) forms part of his or her autonomy, which is, inter alia, protected by the German constitution as well as under international human rights law. In other words, under German law an adult has the right not only to make his own decisions, but also to delegate this power to a third party. This includes the right to make this power of attorney an enduring one (Vorsorgevollmacht).

Since the power of attorney is based on the autonomy of the adult, it has priority over the appointment of a custodian by the custodianship court. This priority is explicitly acknowledged by the German Civil Code (§ 1896 BGB) and complies with both the fundamental right of self-determination, as protected by the German constitution, and the relevant recommendations of the Council of Europe.
(b) Basic agreement and authority to represent

Under German law, the attorney's external powers and his internal rights and obligations vis-à-vis the grantor must be distinguished. The power of attorney (Vollmacht) endows the attorney with the right to represent the grantor externally towards third parties, but whether or not he is allowed to exercise this authority is determined by the basic agreement between the grantor and the attorney. The basic agreement, as a rule, endures even if the grantor becomes incapable (§ 672 BGB). The power of attorney also remains in force (§ 168 BGB).

The law does not define or limit the situations that might be covered by a basic agreement or by the corresponding power of attorney. It is entirely up to the parties to define the circumstances under which the attorney should manage the affairs of the grantor. They might draw up specific provisions, or they could, as regularly is the case in family situations, state the relevant situations in very general terms, e.g. “If I am no longer able to manage my own affairs and need help...”.

Additionally, there is no statutory requirement as to the use of the power of attorney. It need not be publicly registered, nor is there a validation procedure before it can be used. It is legally possible to insert the purpose of the power of attorney or the conditions under which it should be exercised into the document in which it is contained. This does, however, give rise to severe practical problems. Namely, if the attorney wishes to make use of a conditional power of attorney, he must first prove that the conditions are met, e.g. that the grantor is in fact incapable. This is often either practically impossible or at least time-consuming, and thus renders the power of attorney ineffective and the appointment of a custodian necessary. For these practical reasons, it is generally recommended that grantors create unconditional powers of attorney. Conditions under which the attorney is allowed or obliged to make use of his power of attorney should instead be stated in the basic agreement. Thus, they will bind the attorney internally without limiting his external power to represent the grantor.

(c) The German Legal Services Act

The management of a person’s financial and personal affairs regularly includes legal services. Without going into detail, it can be said that due to the German Legal Services Act (Rechtsdienstleistungsgesetz), one has to be a registered “Rechtsanwalt” (attorney-at-law in the U.S.) to render legal services professionally. This effectively bars members of other professions from becoming attorneys under an enduring power of attorney. One may even doubt if there is a big market for this at all, since, to my knowledge, very few “Rechtsanwälte” offer these services.

The Legal Services Act stipulates that anybody who renders legal services must have a legal qualification, even if these services are offered for free, unless the advice comes from a family member or a friend. In effect, this means that, apart from a “Rechtsanwalt”, only
family members or friends can become attorneys under a Vorsorgevollmacht. In other words, the German Vorsorgevollmacht is mainly designed with family members or others persons close to the grantor in mind. Only under very limited circumstances can professionals offer legal services, i.e. only qualified “Rechtsanwälte”.

(d) Optional Registration

In Germany, registration is optional. Rather than safeguarding the validity of the enduring power of attorney, its purpose is to avoid custodianship by informing the custodianship court that an enduring power of attorney exists. Since 2005, there has been a Central Register for Advance Instruments at the German Federal Chamber of Public Notaries on a statutory basis (§§ 78a to 78c Bundesnotarordnung). Due to the purpose of the Central Register, only custodianship courts have access to it. Other public authorities and members of the public cannot access it, as there is no legal basis for this.

Apart from registration, each attorney is under an obligation to inform the custodianship court in writing about the Vorsorgevollmacht, and the custodianship court may request a copy thereof (§ 1901c BGB).

(3) Scope of the Vorsorgevollmacht

The attorney may assist and counsel the grantor, while the grantor is still able to legally act himself. In addition, the attorney may also act on behalf of the grantor. Under German law, a power of attorney can be granted for all matters unless the law states otherwise.

(a) Property and financial matters

In property and financial matters, powers of attorney concerning the financial affairs of the grantor have been in use since the 19th century. Due to their general character, they are termed general powers of attorney (“Generalvollmacht”). These general powers of attorney typically cover a wide range of cases, e.g. temporary incapability and incapability due to accident, disease or age related problems. As I pointed out earlier, German law, in contrast to other jurisdictions, has held these powers of attorney valid since 1900. Therefore, every general power of attorney has had the potential to become an enduring power of attorney. Thus, an enduring power of attorney in financial matters, in principle, is not a novelty for German law. What is novel, however, is its widespread use today to plan ahead for bad health and old age.
(b) Court Proceedings

Whether an attorney under a “Vorsorgevollmacht” can bring a lawsuit on behalf of the grantor has long been debated. In 2005, an amendment to the German Code of Civil Procedure (§ 51 ZPO) was enacted to end this controversy. Now, an attorney acting under a “Vorsorgevollmacht” is able to act in court proceedings if he has been authorised expressly and in writing as a legal representative for court proceedings by the grantor.

(c) Health Care and Deprivation of Liberty

In contrast to financial matters where an enduring power of attorney has been in use for a long time, an enduring power of attorney in personal matters is a creation of the 1990s. In the beginning it was highly disputed but most of these issues have since been solved by legislation.

In 1999, the position was somewhat clarified as it was stated that the “Vorsorgevollmacht” could also cover medical treatment (§ 1904 BGB). Ten years later in 2009, the legislator explicitly acknowledged the long established practice that the “Vorsorgevollmacht” in health care allows the attorney to consent to or to withhold life-sustaining medical treatment (§ 1901a BGB).

Moreover, since 1999 the BGB has provided that an attorney may be granted the power, under certain circumstances and with the permission of the custodianship court, to place the grantor in a closed institution and consent to measures depriving him of his liberty (§ 1906 BGB).

And very recently, in February 2013, an amendment to § 1906 BGB opens up the possibility to grant the power to consent to compulsory treatment, again under specific conditions and with the permission of the custodianship court.

However, all these powers in personal matters must be granted explicitly and in writing, including the personal signature of the grantor. A general power of attorney “for all affairs” or “all personal matters” will therefore not be sufficient, even if it is done in writing and signed by the grantor. The power of attorney must specifically include medical treatment, compulsory treatment, or deprivation of liberty in its scope. Moreover, if an attorney wants to exercise these powers in personal matters, he is subject to the same controls as a court appointed custodian (“gesetzlicher Betreuer”). I will come back to this later on.

(4) Duties and Obligations of the Attorney

The duties and obligations of the attorney are laid down in the basic agreement, which is, in most cases, a non-remunerated mandate. In the absence of a special agreement, the general rules on mandates will apply.
These general rules on mandates are, however, construed according to the purpose of the enduring powers of attorney. Its main purpose is for the attorney to stand in the place of a court appointed custodian, rendering his appointment unnecessary. In order to attain this goal, the attorney must fulfil exactly the same functions as a court appointed custodian. Consequently, the duties and obligations of the attorney acting under a “Vorsorgevollmacht” are modelled on the duties of a court appointed custodian. Consequently, the fundamental reform of the German law by introducing custodianship instead of legal guardianship has had a main influence also on the tasks and duties of the attorney acting under an enduring power of attorney: The primary duties of the attorney are to assist and represent the grantor on the one hand, and to protect him from inflicting harm onto himself or his property on the other.

The attorney may counsel and advise the grantor to prevent him from inflicting harm onto himself. The obligation to protect the grantor arises from the basic agreement. Even if the basic agreement does not state this expressly, it can be so interpreted because otherwise the existence of the power of attorney would not exclude the appointment of a custodian.

Generally speaking, the instructions of the grantor will legally bind the attorney. However, if an instruction might prove harmful to the grantor, the grantor may allow the attorney to deviate from his instructions, if this would be in his best interest. According to § 665 BGB, the latter is presumed to have been agreed between the parties unless stated otherwise in the basic agreement. Therefore, the attorney does not act in breach of his duties under the basic agreement if he asks the grantor to clarify his wishes or ignores an instruction of the grantor to prevent harm.

However, the attorney can only provide limited protection against self-inflicted harm because the grantor has the right to withdraw the power of attorney and / or to terminate the basic agreement at any time. A waiver of these rights is invalid because nobody may waive his autonomy. If the grantor revokes the power of attorney, the attorney loses his powers. Since he can no longer act for and on behalf of the grantor, he can merely inform the court of the situation. The court may then appoint a custodian in order to protect the former grantor.

(5) Control and Remedies

Due to the purpose of an enduring power of attorney, the powers of the attorney are independent from the condition of the grantor. This may prove to be very dangerous for the grantor. If the grantor becomes incapable, nobody may control the attorney or exercise the safeguards in place under the basic agreement. Therefore, in most European countries, powers of attorney traditionally have ceased to have effect upon the incapacity of the grantor. Over the last decades, many countries, mainly of the Common Law tradition, introduced enduring powers of attorney by way of special legislation. Most of these statutes
contain sophisticated mechanisms which control the validity of the instrument and the attorney and his actions.

German law has followed a different path. Since 1900, the power of attorney remains valid if the basic agreement, together with the power of attorney, is intended to cover (also) the situation when the grantor loses his capability to manage his affairs. Like every other power of attorney, the “Vorsorgevollmacht” needs neither be registered nor approved by a public authority in order to be operational.

Unlike a court appointed custodian, the attorney is not subject to the control of the custodianship court. He is neither accountable to the court nor does he need its approval for specific transactions or decisions. Instead, the attorney is subject to the control of the grantor. The law on agency and powers of attorney provides the necessary checks and balances. The grantor can give instructions, the attorney is accountable to him and must inform the grantor of everything that may be of importance for him, and the grantor may revoke the power of attorney and / or to terminate the basic agreement. If the attorney is in breach of these obligations, he may be liable under civil law as well as under criminal law.

Why does German law follow this approach? Is it blind to the fact that nobody controls the attorney if the grantor becomes incapable? Of course, the answer is “No”. The basic idea is that the court should only intervene if necessary. And when we seek to determine “necessity” we should keep two things in mind:

Firstly, the abilities of the grantor very often vary over time. At one time he may be active and alert, at another time he may be confused. Even if he needs somebody to manage his affairs, he may still be able to exercise control over his attorney.

Secondly, in Germany a “Vorsorgevollmacht” is mainly used within a family, where other, more informal forms of control are often effective.

If, however, external controls become necessary, the court will intervene. It will not, however, simply replace the attorney under the “Vorsorgevollmacht” with a custodian, since in most cases it is not necessary to replace the attorney altogether but rather to install effective control. The court therefore appoints a custodian who is given the special task of controlling the attorney and exercising the rights of the grantor under the basic agreement (§ 1896 subsection 3 BGB). This custodian is called a monitoring custodian (“Überwachungsbetreuer”). Like any other custodian, a monitoring custodian may only be appointed if this proves necessary. The court assesses necessity on the merits of the individual case. It must be established that there is real danger of the attorney not to fulfil his duties and obligations under the basic agreement. It is not necessary to prove abuse. Abuse is just an extreme example for an attorney who fails to do what he is obliged to under the basic agreement. It is the outcome for the grantor and not the ill intentions of the attorney that is of importance here.

So far, I have been describing the general regime of control. However, there are certain areas where the attorney under a “Vorsorgevollmacht” is subject not only to the control of
the grantor but also to the direct control of the court. For important health care decisions where there is a dispute over the patient’s will (§ 1904 BGB), and especially for compulsory treatment (§ 1906 BGB), the attorney needs to obtain the approval of the court. This is also necessary if he wants to place the grantor in a closed institution or otherwise deprive him of his liberty (§ 1906 BGB). These situations have two common factors. First, the grantor’s human rights are at stake. Second, in these situations the grantor is unable to give valid consent to the measures taken, which means that he can no longer control the attorney. These special provisions are ultimately based on the same principles that underpin the general regime of control, namely that the court should – and must – intervene if necessary.

C. Function and Popularity in Society

The German government and German legislators have been promoting the use of a “Vorsorgevollmacht” as an alternative to a court appointed custodian (“gesetzlicher Betreuer”). From their perspective, the “Vorsorgevollmacht” has two great advantages. Firstly, it avoids state intervention and respects the principle of autonomy. Secondly, as it is user-payed, it costs far less public money and court resources. From a political perspective, the financial benefit may even be seen as its most important advantage.

In 2013, there were 2.3 million Vorsorgevollmachten registered in Germany compared to 1.3 million custodianship proceedings in 2012 (these being the latest figures available) out of a population of 80 million.

Keeping in mind that registration is purely optional, it is safe to say that there are many more enduring powers of attorney out there than are listed in the German Central Register. They may reside with persons appointed as attorneys, i.e. with family and friends, packed away in desk drawers, and they might have been drawn up when moving into a retirement home and filed in the office of the home.

D. Noteworthy Cases

There have been quite a few cases on a Vorsorgevollmacht. I have selected some that highlight three aspects of this paper.

(1) Enduring power of attorney and monitoring custodian (Kontrollbetreuer): Federal Supreme Court (Bundesgerichtshof - BGH), Decision of 30 March 2011 (XII ZB 537/10)

A Vorsorgevollmacht, granted by a woman with advanced dementia, was notarised. The grantor decided to appoint her three sons as attorneys. One of her sons considered it necessary that his mother was placed in a nursing home. She, however, wanted to continue receiving care in her own home. She thus revoked this son’s Vorsorgevollmacht.
Consequently, she was called upon by her notary, who was convinced of her legal capacity. The son in question, once stripped of his power of attorney, requested that the court appointed a monitoring custodian.

The BGH took this opportunity to clarify the conditions surrounding the appointment of a custodian by the court, agreeing with the largely unified jurisprudence of the higher regional courts (Oberlandesgerichte).

According to §1896 paragraph 3 BGB, a custodian can be appointed to enforce the rights of the adult against his attorneys. However, the adult’s illness alone does not justify the appointment of a so-called monitoring custodian. For this, additional conditions must be fulfilled: a concrete suspicion - based on sufficient factual evidence - that the attorney no longer acts in the best interests of the grantor or according to the agreement between them is necessary.

In the present case, the appointment of a monitoring custodian was not necessary. Even though the mother suffered from advanced dementia, her general practitioner confirmed that she could receive sufficient medical treatment in her own home. In addition, the actions of the son could be monitored by the other sons who still possessed their powers of attorney. The existence of other attorneys, who could play a supervisory role and who may have varying opinions, regularly eliminates the need for a monitoring custodian.

(2) Enduring Power of Attorney and Autonomy: Three Decisions of the Bundesverfassungsgericht (German Constitutional Court)

In the first case, the husband of a Jehovah’s Witness was appointed as custodian when his wife became unconscious after an operation, and a blood transfusion unexpectedly became necessary. He agreed to the blood transfusion. However, his wife had previously told the doctor that she would refuse a blood transfusion and that she had appointed a fellow Jehovah’s Witness as attorney under a Vorsorgevollmacht. The constitutional court considered that the appointment of the husband as custodian interfered with the patient’s general freedom of action. However, as the court was not aware of the power of attorney, the appointment of the custodian did not violate the human rights of the patient.

In the second case, the grantor appointed his lawyer as attorney in respect of his assets and his general practitioner as attorney, inter alia, for matters concerning health care, in separate (enduring) powers of attorney. At the insistence of his relatives, the custodianship court appointed a monitoring custodian, who immediately revoked both powers of attorney. The constitutional court considered the appointment of the monitoring custodian to be a violation of the right of autonomy (article 2.1 German Constitution in conjunction with

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3 Bundesverfassungsgericht, Decision of 10.10.2008 (1 BvR 1415/08), Zeitschrift für das gesamte Familienrecht (FamRZ) 2008, pp. 2260 ff.
article 1.1 thereof) in two respects. First of all, the appointment of a custodian restricted the adult’s freedom of choice per se because the custodian is able to act against the will of the adult (§ 1901.3 BGB). Secondly, the adult had already exercised his autonomy by granting the powers of attorney. Since a monitoring custodian is able to revoke the power of attorney the appointment also limits the autonomy of the adult in this respect. Therefore the constitutional court ruled that, in this case, effective legal protection against the appointment of a custodian by the court must be available to the adult.

The third case\(^4\) deals with the obligation of the attorney to obtain the court’s consent before he deprives the grantor’s liberty. The constitutional court clearly stated that, since the obligation of the attorney to obtain court consent does not restrict the adult’s autonomy but rather protects the grantor and his human rights.

E. Future Reform

German law is very liberal towards the appointment of family and friends as attorneys under an enduring power of attorney. Conversely, it highly restricts the possibility of professionals to be appointed as attorneys. All in all, it is very popular and prevalent in practice. Over 1,6 million registered instruments and perhaps the same number of unregistered ones prove this.

The “Vorsorgevollmacht” is also very popular with the German government and legislator, as it helps to avoid court appointed custodians and saves public resources. The interest in cutting down public expenses fuels the debate on how we can further promote the use of a Vorsorgevollmacht.

A 2011 report made by an expert group on adult custodianship set up by the Federal Ministry of Justice provides a good example. Whereas it suggests a significant law reform with respect to court appointed custodians, it does not so with respect to enduring powers of attorney: Here the focus is entirely on its promotion.\(^5\)

\(^4\) Bundesverfassungsgericht, Decision of 7.1.2009 (1 BvL 2/05), Neue Juristische Wochenschrift (NJW) 2009, pp. 1803 ff.

\(^5\) The report („Abschlussbericht der interdisziplinären Arbeitsgruppe zum Betreuungsrecht“) is available online via the German Ministry of Justice at http://www.bmj.de/DE/Recht/BeuerlicheresRecht/BetreuungsrechtFrauenpolitik/_doc/artikel.html (in German)