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THE SWISS 2013 GUARDIANSHIP LAW REFORM – A PRESENTATION AND A FIRST ASSESSMENT IN THE LIGHT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

ABSTRACT

The revised Swiss Adult Protection Law came into force on 1st January 2013, after a twenty-year long legislative process. It replaced the Guardianship Law that had been in effect since 1 January 1912 and without having incurred any significant change.

This paper outlines the main innovations and instruments of the new law, having regard to the principles that guided this reform process; being the same principles that have influenced revision in most countries over the two last decades. Namely: promotion of the autonomy and self-determination of the individual, reduction of State intervention, an increasing in relatives' rights, obligations and responsibility and the professionalization of the authorities in charge of the protection of impaired and vulnerable adults.

The *Anticipatory Measures*, the rather broad statutory powers of representation (a Swiss – and so far also Czech – distinctiveness) and the *State Protective Measures* are presented in details. Three years after this legislation was introduced, this paper provides an initial assessment of these different instruments. This article assesses the new Swiss law within the context of today's debate on supported/assisted and substitute decision-making and identifies the numerous ways in which this legislative reform safeguards the affected person's autonomy (at all stages of the protection process: before a Protective Measure is taken by the State, when tailoring the measure to the individual's needs, when respecting his or her choice of a trusted deputy and in giving the greatest weight possible to the person's self-determination in the exercise of the deputyship), whilst at the same time not renouncing the substitute-decision making.

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I INTRODUCTION

In 1898 legislative competence on Civil Law was transferred from the individual Federal States ('cantons') (25 at the time, now 26) to the Swiss Confederation of states ('the Confederation').

Accordingly, the Confederation enacted a codified and uniform Swiss Civil Code (CC) in 1907. Replacing the previous cantonal laws, it came into force on 1 January 1912.

Guardianship Law formed (and remains) a chapter of Swiss Family law. Having been elaborated in the 19th century, it proved to be very revision-resistant: with the exception of new provisions pertaining to the civil commitment of persons suffering from a psychological disorder or mental disability to an appropriate institution (enacted in 1981, as a consequence of Switzerland becoming a State Member to the European Convention on Human Rights in 1974), the 'old' guardianship law remained unchanged until 31 December 2012.

However, one should not infer from this lack of legislative reform that Swiss society and its approach to the protection of vulnerable adults, as a duty of the State, had remained static and unalterable for almost one century!

On the contrary: like many other European countries, Switzerland realised in the mid-fifties the increasing gap between its codification (based on values dating back one century) and the evolution of society. Thus, in 1957, the Federal Council (the Swiss Federal Government) decided upon a comprehensive revision of the Family Law, to be implemented step by step. For reasons too complicated for the purpose of this paper, the Swiss legislative process is traditionally a painfully lengthy one. The Family Law revision proves to be one of the worst instances of this inclination: the revised law on adoption became law in 1973, parentage law in 1978, matrimonial law (general effects of marriage, marital property) in 1988, divorce law in 2000, registered partnership law (only available to same-sex couples) in 2007. Since then, the rhythm has slightly improved (the same cannot necessarily be said of the quality of the most recent legislation): new rules on parental responsibility came into force in 2014, those on child maintenance are due in 2017, and a new law on adoption (taking into account the interests of same-sex registered partnerships and of *de facto* partners) is currently before the Swiss Parliament. Additionally, some voices are arguing for a new general reform of our Family Law.

Guardianship Law's fate was particular: although the Parliament urged for an immediate revision in 1963, the Federal Council decided to postpone it until after the revision of some more urgent (and somehow more 'politically expedient or glamorous') parts of the Swiss Family Law. The revision did not begin until 1993 and lasted until 2008, when the new Swiss Adult Protection Law (Arts. 360-456 of Swiss Civil Code, 'CC')¹ was adopted,

¹ Classified compilation, SR/RS 210. There are three official languages in Switzerland (German and Swiss German – around 63 % of the population, French, 23 % and Italian, 8 %). All federal legal texts are published in these three languages and all three versions have the same legal value. Some texts are also translated into English (<https://www.admin.ch/gov/en/start/federal-law/classified-compilation.html>). This version has no official value. The author will not necessarily use this governmental translation in this paper. He will however indicate, whenever appropriate, the German and French versions of the terms used. The abbreviations SR ('Systematische Sammlung des

but it was not promulgated before 1 January 2013. The reason for this is a very pragmatic one: the new law involved major organisational changes in many cantons (mostly in the German speaking part of the country). But the cantons were already implementing the new Federal Procedures (in civil and criminal matters – until then these procedural rules were different from one canton to another) to enter into force in 2011, which proved to be very resource-intensive. Thus, they asked for a ‘rest’ and were granted it.

For the sake of clarity, the author will use the term ‘deputyship’ for the State Protection Measure that may be issued by the Protection Authority and the term ‘deputy’ for the person appointed by the authority. Each deputy will have different duties and obligations depending upon the terms or scope of their appointment (more on this below Section II C.). With regard to the Protection Authority, it has to be stated that whereas Federal Law governs its composition, the Authority may be cantonal, regional or even municipal (and of administrative or judicial nature) depending upon the choice made by each canton (more on this below Section II D.).

II PRINCIPLES OF THE NEW SWISS ADULT PROTECTION LAW²

A *Autonomy and self-determination*

1 *In General*

These were undoubtedly the key words of the whole revision process. Under the 1907 text, there were three types of State Protective Measures: the Guardianship (‘Vormundschaft’/‘tutelle’), the Legal Cooperation (‘Beiratschaft’/‘conseil legal’) and the Deputyship (‘Beistandschaft’/‘curatelle’).

Most of the provisions were regulating the guardianship (the plenary measure), which was presumed to be the « ordinary » protection measure. But it was also the most restrictive. Over the course of time, authorities and courts tended to use the Deputyship options more and more (by creating at the same time « mixed-measures », which were not envisaged in the text, with the purpose of better adapting the protection to the individual needs), whose legal effects were less stringent. Text and practice were thus not in line any longer. Moreover, whatever the category they were falling in all State measures were very rigid: for example, once Legal Cooperation had been ordered, the effects were the same whatever the needs and actual situation of the person, and in particular his or her subsiding autonomy (the list of acts requiring the Legal Cooperator’s consent being thus in all cases identical). Should there exist a need for managing not only the ward’s assets without his or her consent but also his or her revenues, this could be achieved only through the strongest measure, the plenary

Bundesrechts’) and RS (‘recueil systématique du droit fédéral’) stand for the official compilation of Federal acts and ordinances.

² The principles outlined here are common to the vast majority of the recent revisions. See e.g. Shih-Ning Then, *Evolution and Innovation in Guardianship Laws: Assisted Decision-Making*, (2013) 35 *Sydney Law Review* 133, 140 et seq. For a comprehensive survey: Richard Frimston et al, *The International Protection of Adults* (Oxford University Press, 2015).

Guardianship, which was often disproportionate considering all further legal effects the measure had.

As I will show below (Section C), this led to a completely new conception of the State Protective Measures.

But the weight given to the autonomy and self-determination of the individual also resulted in introducing (partly) new protective instruments (thus following a general trend in all recent revisions): the Enduring Power of Attorney (EPA – ‘Vorsorgeauftrag’/‘mandat pour cause d’inaptitude’) and the Patient Decree (PD – ‘Patientenverfügung’/‘directive anticipée’). Both instruments have a common aim: to promote the affected person’s right to decide on his/her future protection when still capable and thus to avoid as much as possible the Protection Authority³ having to pass a State protective order.

2 *The Personal Anticipatory Measures*⁴

2.1 *Enduring Power of Attorney (EPA)*

An EPA determines who (a natural person or a legal entity, e.g. a bank) will care for the person in the event of a (durable) loss of judgement. It can include personal care (housing situation, health measures, social environment, etc.), financial care (for all or part of the person’s assets and revenues) and/or the legal representation toward third parties (Art. 360 [1] CC).

Different individuals may be appointed for personal care and financial care. It is also possible (and advisable) to name substitutes in the event that the primary designated agent is not suitable, does not accept or resigns (Art. 360 [3] CC). The principal cannot delegate the appointment of the agent or of a substitute to a third party.

EPA’s must be either handwritten in full (the use of forms to sign is not sufficient), or publicly authenticated (notarized) (Art. 361 [1] & [2] CC). An EPA may be revoked at any time by the principal as long as still capable to act (Art. 362 [1] & [2] CC).

In spite of an ambiguous wording (Art. 360 [2] CC), the principal is not obliged to specify in detail the tasks entrusted to the appointed agent. He or she may entrust the agent with personal welfare, financial affairs and legal representation in general or with specific tasks (e.g. managing the immovable property or the business he or she owns). The principal may also issue instructions on how to perform these tasks (Art. 360 [2]

³ Since this authority is also in charge of child protection, its full name is ‘Child and Adult Protection Authority’ (‘Kindes- und Erwachsenenschutzbehörde’/‘autorité de protection de l’enfant et de l’adulte’). The author will use the shortened form in this article.

⁴ Thanks to its revised law, Switzerland now complies with both the Recommendation No. R (99) 4 to Member States on Principles concerning the legal protection of incapable adults adopted by the Committee of Ministers of the Council of Europe on 23 February 1999 and the Recommendation CM/Rec (2009)11 adopted by the same body on 9 December 2009 pursuant to Principles concerning continuing powers of attorney and advance directives for incapacity. These Recommendations strongly encourage the Member States to promote self-determination for capable adults by introducing legislation on continuing powers of attorney and advance directives or by amending existing legislation with a view to implementing the principles contained in the appendix to the 2009 Recommendation.

CC), for example by forbidding the agent to make certain investments or to sell specific immovable or moveable assets.

The agent's consent is not required upon establishing an EPA (it shall have to be given for the EPA to become effective). The registration of an EPA is not compulsory. However it is possible to register its existence and the place of its deposit (but not its content) with the electronic Swiss civil register ('Infostar') (Art. 361 [3] CC). In some cantons, a registration with the Protection Authority itself is also possible.

Should the principal lose his or her capacity of judgement (which the Authority has to determine by itself, usually basing the decision on a medical certificate), the Protection Authority shall inquire with the civil register and with the relatives or other close persons whether an EPA was established (Art. 363 [1] CC). Was it the case, it will review the material and formal validity of the mandate, assess the agent's suitability (the Authority's discretion being normally limited in this regard, so as to promote the self-determination of the principal), ask the agent whether he or she is ready to accept the engagement, set appropriate remuneration (Art. 366 CC) where not already foreseen by the principal in the EPA (e.g. free services where the agent is a close relative, fees for a bank or an attorney-at-law managing the assets and/or the legal affairs) and validate officially the agent's powers to act. The Authority shall also examine if additional Protective Measures are necessary, e.g. when the EPA covers only part of the assistance required. It shall then issue the agent with a deed outlining the powers conferred (Art. 363 [3] CC).

The designated agent is not under an obligation to accept the engagement. Moreover, even once the EPA has been validated, he or she can lay down the mandate subject to a two-month written notice to the Authority (Art. 367 [1] CC).

As soon as the principal regains his or her capacity of judgement, the mandate shall be invalidated by law (Art. 369 [1] CC).

The agent is not directly subject to the Authority's supervision. He or she is not obliged to report on the personal and financial administration of the mandate. However, should the principal's interests become endangered or no longer protected and the Authority be advised hereof (e.g. by relatives or third parties), the Authority is entitled (and obliged, otherwise it will be held liable for its omission) to take all necessary measures, from imposing a reporting duty up to revoking part or all agent's powers (Art. 368 CC). It should also be noted that in case of any conflict of interests, the powers of the agent do lapse by the law, i.e. even without the Authority being aware of the situation.

2.2 *The Living Will or Patient Decree (PD)*

Living Wills under Swiss Law, so-called Patient Decrees, ('PD') may take two forms (which can also be combined):

- a person may specify the medical procedures to which he or she consents or objects once he or she will have lost his or her judgement (Advance Decision on medical treatment, Art. 370 [1] CC). Typically this will cover rejection of futile and excessive therapy, DNR or no-CPR orders, rejection of artificial feeding, end-

of-life care or choice of passive euthanasia (which, as it is also the case for indirect active euthanasia, is permitted in Switzerland);

- a person may also appoint a person (contrary to an EPA, it has to be a natural person) to act as his or her representative for medical decisions (either based on specific instructions, or – in the absence of such instructions and as the law states by referring to Art. 378 [3] CC – according to his/her best interests and presumed will), thus granting a *Health Care Proxy* (Art. 370 [2] CC). Alternative dispositions (substitutes) may be made as well (Art. 370 [3] CC). As it is also the case for the Medical Statutory Rights of Representation (below section B 2), the law uses the ‘subjective’ and the ‘objective’ criteria in parallel, without prioritizing them. Despite this regrettable vagueness, legal opinion is that the best interests must be the deciding factor only where the presumed will cannot be sufficiently established.⁵

Even in the latter case, the form requirements (Art. 371 CC) are more relaxed compared to the ones governing an EPA. A Patient Decree must only be executed in writing and it need not be handwritten or notarized (several forms are made available by various voluntary organisations or associations).

Pursuant Art. 9 of the 1997 Oviedo Convention on Human Rights and Biomedicine,⁶ the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes *shall be taken into account*. Swiss law has opted for a more far-reaching solution: the wishes expressed in a PD are *binding* for the physicians, unless they violate statutory law (requesting e.g. an active euthanasia), or where there are serious doubts as to whether these wishes reflect the patient’s free will or continue to reflect his or her presumed will (taking into account changes occurred in his or her life or medical developments). Should he or she decide not to respect the living will upon one of these grounds, then the physician must document the reasons in the patient’s medical record.

No period of validity is set by the terms of a PD. However, the forms currently in use all recommend renewing the expressed wishes every two years (by simply ticking a box stating that they shall continue to apply and signing the form again). An out-dated PD may be more likely considered inconsistent with the presumed will of the patient at the time of treatment.

The role of the Protection Authority is of limited scope in the context of a PD: it may intervene in the event that a PD is not being complied with or where the patient’s interests are being endangered (Art. 373 CC), but usually these issues will be dealt with in-house within the hospital by a clinical ethics committee. Having such a committee is not mandatory but most of the large hospitals do have one (some smaller institutions having joined forces and sharing one). It must also be noted that the composition and procedural rules may vary significantly from one case to the other; furthermore,

⁵ See e.g. Andrea Buechler/Margot Michel, *Kommentar zum Familienrecht – Erwachsenenschutz* (Stämpfli Bern, 2013), art. 370 N 23 ; Philippe Meier, *Droit de la protection de l’adulte* (Schulthess Zurich, 2016), N 489.

⁶ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine opened to signature on 4 April 1997, effective since 1 December 1999 (for Switzerland since 1 November 2008) (Council of Europe, CETS No. 164).

contrary to proceedings before the Protection Authority, the safeguard of the patient's or his/her relatives' procedural rights remains questionable. However, in 2012, the Swiss Academy of Medical Sciences issued Recommendations on Ethics Support in Medicine,⁷ which address the composition of ethics structures and the consultation process; this soft law has not been enforced uniformly to date but provides a solid basis for further reflection.

2.3 *A First Assessment*

2.3.1 Enduring Powers of Attorney

As it is the case in many other countries (with the notable exception of Quebec), the use of EPA's in Switzerland in the context of guardianship has not proved to be very successful so far. There are several reasons for this:

- People remain reluctant to consider not only their death, but also the loss of their capacity of judgement. Further, they believe that their relatives will be there and ready to act in their best interests.
- The use of an EPA has been badly advertised by the Swiss authorities. Some organisations supporting the elderly and disabled have promoted standard forms, but although large quantities hereof have been ordered, most of them have not been used! The situation looks however a little different in certain cantons, where notary-publics systematically seize the opportunity of testaments or real property deeds they are requested to notarize, to present the new instrument to their clients and urge them to appoint a private agent.
- The formal requirements (either notarization or handwriting of the full document) represent a disincentive (for the moment the lack of any compulsory registration of the EPA has not proved to be a problem, but it may change one day, when e.g. relatives might conceal an EPA seeking to prevent the intervention of an external trusted person).
- As an instrument an EPA is essentially a hybrid, namely a tool to protect the adult regulated in and provided by the adult protection law, but based on contract law and – in some aspects – also inspired by estate executorship. Thus it contains grey areas with regard to many technical issues (it is for example disputed as to whether an agent needs a special power to sell immovable property or whether a general appointment for managing the principal's assets will suffice).
- The provisions of 'ordinary' agency contracts govern liability on the part of the agent. Which means that he or she will be liable on his or her own personal assets in the event of a breach of obligations (Art. 456 CC). The situation is different where a deputy appointed by the Protection Authority cares for the personal and financial affairs of the affected person: the canton shall be liable for the deputy's unlawful acts and omissions (the cantons' right of redress being reserved, Art. 454 CC). A person would thus be well advised to renounce an EPA and to state instead the name of a trusted person in a written document to act as his or her future deputy. The Protection Authority will normally acquiesce in such a wish, provided the person proposed is suited to the office and is prepared to take up the appointment (Art. 401 [1] CC). The supervision by the Authority will indeed

⁷ Swiss Academy of Medical Sciences (SAMS) Currently Valid Guidelines, <http://www.samw.ch/en/Ethics/Guidelines/Currently-valid-guidelines.html>.

be closer than with an EPA, but it is the affected individual's person of choice who will care for his or her interests and this will be done under a kind of state guarantee! No statistics are available with regard to persons renouncing an EPA for this reason, but legal professionals are made aware of the situation and will advise their clients accordingly.

- The main reason for their limited success lies however in a legal structural problem. In order to be successful, an EPA as set forth in the adult protection law should have been granted a monopoly. Yet it is not the case: our Swiss Code of Obligations (CO)⁸ (contract law) still provides for *ordinary* agency contracts that may survive the loss of capacity where thus agreed (Art. 405 [1] CO; see also Art. 35 [1] CO with regard to proxies). A broad majority of scholars are of the opinion (and they may actually base it on the very legal text) that these contracts have not been discarded by the new EPAs. Since they are not subject to a special form requirement and – provided they were already effective while the principal was fully capable – they are deemed not to need any validation by the Protection Authority, these contracts are much easier to promote. Thanks to this legal construction (and perhaps legislative blunder), banks (major players in these matters) could simply continue to use their own proxies, which for years have already contained survival clauses. Admittedly, Art. 397a CO obliges the agent to notify the Protection Authority if it is anticipated that the principal will or has become permanently incapable of judgement and if such notification appears appropriate in order to safeguard the interests concerned. But not all agents (notably where banks are concerned) are willing to comply with this obligation. Moreover, when notified and in the absence of a genuine EPA, the Protection Authority will either consider that the agent can continue to act or appoint a deputy, whom it shall have to monitor. The first option may sound much more attractive to the Authority (most Protection Authorities are significantly overworked). Why then go through the complicated steps of an EPA?

2.3.2 Patient Decrees

PDs are more popular, indeed they already existed and were practiced before 2013 however, their binding effects are new. Although no empirical data are available so far, it appears that health practitioners tend to construe the exceptions to the rule in a broad manner (in particular the one stating that the PD shall not be binding any longer where there is a serious doubt that they correspond to the patient's presumed volition). In the author's opinion things have not notably changed in the practice: the step made is more of a symbolic nature. However, the new legal rules oblige the doctor to make a note in the patient records of the reasons why the PD was not complied with (Art. 372 [3]); furthermore the health practitioner will usually consult the ethics committee in this case, when such a structure exists in his/her institution (above 2.2), which he/she did not necessarily do in the past.

⁸ Classified Compilation, SR/RS 220.

B *Reduction of the State Intervention and Increased Responsibility for the Family*

No deputyship ordered by the State shall be necessary if an EPA or a PD exists that covers all the person's needs for protection and assistance when he or she loses the capacity of judgement.

But Swiss law (and this is one of its peculiarities) also grants statutory rights to certain relatives to act on behalf of the affected where there is no such EPA or PD.

1 *Spouse's and Registered Partner's Statutory Rights*

As long as spouses or registered partners live together (or at least assist and support each other personally, e.g. when one member of the couple is residing in an social healthcare institution), a spouse or registered partner automatically becomes entitled to represent his or her spouse or partner with respect to ongoing needs and the ordinary management of revenues and assets (Art. 374 CC). With regard to specific matters exceeding this limited scope of affairs, the spouse or partner will have to obtain the Protection Authority's approval. Where the spouse or partner refuses to act as a statutory representative, or is not deemed suitable or would require too often the Authority's approval due to the complexity of the matters to manage, a deputy shall be appointed by the Authority.

It is important to note that de-facto partners are not entrusted with the same powers, even when they have been living together for years. This may change in the near future, as the legal position of de-facto partners is presently being broadly discussed in Switzerland; they may become entitled to a kind of low-grade registration – similar to the French 'pacte civil de solidarité' (Art. 515-1 et seq. French Civil Code) –, with ascertained (though still different from the spouses' and registered partners') rights and obligations. If and when this occurs, they will certainly be granted these same statutory rights of representation.

The role of the Protection Authority here is three-fold (Art. 376 CC) namely to:

- Consent to legal acts beyond the limited scope set forth by the law.
- Decide in cases of doubt and issue the spouse or registered partner with a deed outlining the powers conferred.
- Revoke the powers, in part or in full, or appoint a deputy where the interests of the person lacking capacity of judgement are threatened or become compromised.

The liability of the representative is governed according to the laws governing ordinary agency contracts (Art. 456 CC), although no contract whatsoever has been concluded. The State's liability shall not be engaged for his or her acts.

2 *Medical Statutory Rights of Representation*

In the absence of a PD (no Health Proxy) and when no Deputyship comprising medical affairs is in place, Swiss law draws up a list of individuals who are authorised to represent the patient who lacks the capacity to consent (Art. 378 CC). Prior to 2013 (at that time this matter was governed by cantonal laws), family members were only entitled to be consulted by the health-practitioners, who then made their decision based on the best interests of the patient. The situation has (at least from a legal point of view) radically changed, since the relatives are now the ones who make the medical decision, after having been duly informed as to the purpose and nature of the intervention as well as to the relevant consequences and risks (Art. 377 CC).

In urgent cases, the physician may not have time to ask the relatives: he or she will perform the medical treatment in accordance with the presumed volition and the best interests of the person lacking capacity (Art. 379 CC). Special rules shall also apply (Art. 380 CC) to medical treatment of psychiatric disorders of persons committed to a psychiatric hospital.

The hierarchical list begins with the spouse/registered partner/de-facto partner (contrary to what is the case for statutory rights pertaining to administrative and financial matters)⁹ and continues with the relatives: children and grandchildren, then parents and finally siblings, provided (this does also apply to spouses and partners) that they have been regularly and personally assisting and supporting the affected person.

The Protection Authority will withdraw the right of representation should the interest of the person concerned become threatened or compromised. It shall appoint a deputy where no representative is available or prepared to exercise these powers (Art. 381 CC).

3 *A First Assessment*

3.1 *Marital Statutory Rights*

The spouse's and registered partner's statutory rights are new in the law, but were a reality in practice. In the vast majority of situations, the Protection Authority did not hear of the loss of judgement of persons married or officially registered, since they continued to be assisted and cared for by their spouses/partners (the fact that many commercial transactions are nowadays performed or accessible via the internet without requiring a person's attendance, makes things even easier). The law has clarified and officialised this de-facto situation.

This notwithstanding, not all commercial players are familiar with the new statutory powers and even banks are still reluctant to recognise their effects.

The differential treatment of mere de-facto partners is being vehemently criticized but this error should be remedied soon as stated above.

⁹ Above Section B.1.

3.2 Medical Statutory Rights

As far as the medical powers of representation are concerned, health practitioners were very concerned about new rules granting a power to decide (as compared with only a right to be consulted) to family members. In practice, nothing has really changed so far: the relatives are simply opting for the choice proposed by the physicians. Our law provides however for clear rules, which would probably settle quite quickly the world-famous case of the Frenchman Vincent Lambert¹⁰ who is being kept alive despite the opposition of his wife and of other members of his family, based on his parents' objection: according to the Swiss order of precedence, his spouse would retain the right to decide.

C Customising of Protective Measures

1 Introduction

Autonomy and self-determination are *leitmotivs* with respect to the State protective measures too.

Pursuant Art. 390 [1] CC, the Protection Authority must appoint a deputy where a person of age is *'unable or only partially able to care for his or her own affairs due to a mental disability, psychological disorder, or other similar impairment to his or her personal condition'* or is *'due to a temporary loss of the capacity of judgement or to absence, unable to act independently and has failed to appoint a person authorized to act as agent in a matter which must be attended to.'*

The obligation needs however to be read in the context of the two previous sections of the law.

It appears appropriate to reproduce here in full the provisions that open the chapter on deputyship in the Swiss Civil Code:

Art. 388 CC

'[1] Measures taken by the adult protection authority must ensure the welfare and protection of persons requiring assistance.

[2] To the greatest extent possible, such measures should preserve and promote the affected person's power of self-determination.'

Art. 389 CC

'[1] The adult protection authority must impose measures, where:

1. The support provided to the person requiring assistance by his or her family, other persons close to the affected person or the services provided by private or public sources have proven insufficient or offer little prospect of being adequate.

¹⁰ See *Lambert and Other v. France* (application no. 46043/14), Judgement of the Grand Chamber of the European Court of Human Rights of 5 June 2015 European Court of Human Rights, (5 June 2015) <[http://hudoc.echr.coe.int/eng?i=001-155352#{"itemid":\["001-155352"\]}](http://hudoc.echr.coe.int/eng?i=001-155352#{)>.

2. A person requiring assistance and lacking the capacity of judgement is not guaranteed any or adequate care and the measures imposed by law (statutory representation) are insufficient.

[2] Any measure imposed by the adult protection authority must be necessary and appropriate.'

The principle of proportionality (which is also a requisite of Art. 36 [3] Swiss Federal Constitution¹¹ for any restriction on fundamental rights) is thus both crucial and central. It has several consequences:

- Subject to Art. 389 [1] referred to above, State Protective Measures are subsidiary to Anticipatory Measures (EPAs, PDs) and to Statutory Rights of representation (where valid and effective), but also (when the person requires assistance but is not lacking the capacity of judgement) to any other kind of assistance provided by the family and by public or private services (informal assistance). This is what the author usually refers to as 'subsidiarity in principle'.
- But once such measure is deemed necessary, the so-called 'subsidiarity in measure' applies: the protection must be tailored to the specific needs of each particular individual and not exceed what is required to assist him or her (but on the other hand, it must be sufficiently intense so as to grant the protection which the vulnerable person is entitled to).

This customisation or tailoring is made possible by the range of measures available by the 'deputyship' provisions and their flexibility.

It is true that all measures ordered by the Protection Authority are labelled the same way as 'Deputyships', i.e. 'Beistandschaften' or 'curatelles' (sometimes also named 'conservatorship', 'welfare advocacy' or 'guardianship' in English, though one should avoid to use the latter, which is too much reminiscent of the 1907 law). However upon a closer examination the whole system is not so straightforward at all: it is much more reminiscent of the reputation of Switzerland for sophisticated watch mechanisms. As a matter of fact:

- There exist various sub-types of Deputyships and most of these sub-types can be combined with each other.
- Each single Deputyship shall be different, since expected to be tailored to the individual needs for assistance.
- The Deputyship may have an effect on the affected person's legal capacity – or not – depending on the decision made by the Protection Authority.

2 *How the customisation materialises*

The following is an elaboration of the customisation referred to above.

2.1 *The various sub-types of deputyship*

¹¹ Classified compilation, SR/RS 101. See also Art. 8 [2] of European Convention on Human Rights.

2.1.1 Assistance or Supporting Deputyship (Art. 393 CC)

The lightest protection is granted through an *Assistance Deputyship* ('Begleitungsbeistandschaft', 'curatelle d'accompagnement'), which is merely supportive in nature. The deputy does not become the legal representative of the affected person, rather the deputy provides accompanying support for specific matters such as a housing search, setting-up of a healthcare network or sorting out of tax issues. Unlike other Deputyships, this one necessarily requires the person's consent. Which means that it will not be suitable for a person already lacking the capacity of judgement.

2.1.2 Representative Deputyship (Art. 394/395 CC)

A *Representative Deputyship* (i.e. along with powers of representation; 'Vertretungsbeistandschaft', 'curatelle de representation') is created when the person requiring assistance is not able to attend to certain matters on their own behalf and therefore requires representation. The affected person will be bound by the deputy's acts.

The deputy can be appointed for a specific task (e.g. lodging an inheritance claim on behalf of the affected person) or for broader affairs, in particular with the duty of administering part or whole of the person's assets.

It ought be noted that some acts, although being part of the deputy's function, will require the consent of the Protection Authority's (such as the liquidation of a household, long-term contracts concerning the affected person's accommodation, the acquisition, sale and mortgage of land and borrowing or lending significant sums of money,). The law sets forth a list of risky or complex acts subject to this approval (Art. 416 CC), but the Protection Authority may decide to submit further acts to its consent. Furthermore some acts may never be performed by the deputy on behalf of the affected person being the provision of guarantees, establishing foundations or presenting any gifts from the person's assets, save for customary ordinary gifts (Art. 412 [1] CC).

2.1.3 Consenting Deputyship (sometimes: Advisory Deputyship) (Art. 396 CC)

A *Consenting Deputyship* ('Mitwirkungsbeistandschaft'/'curatelle de coopération'), is created to review certain acts made by the affected person and – if assessed to be in the latter's interest – to consent to these. Consent is required for the act to be legally valid and binding on the affected person.

2.1.4 General Deputyship (Art. 398 CC)

The 'strongest' level of intervention, typical of a substitute decision-making measure, is the *General Deputyship* ('umfassende Beistandschaft'/'curatelle de portée générale'; identical to the old 'Guardianship', or 'Vormundschaft'/'tutelle'). In this all-encompassing measure, the deputy assumes responsibility for all aspects of personal and financial care, along with legal representation. The affected person's capacity to act is thus void by law.

2.1.5 Combination of Deputyships (Art. 397 CC)

All sub-types of appointed Deputyships, save the General Deputyship, can be combined with each other. A deputy may thus be appointed to bring *accompanying support* for housing issues, *representation and administration* of financial assets and *consent* to an inheritance renunciation (it can be the same person but several deputies might also be appointed for each sub-type of deputyship).

2.1.6 Support Principles Embedded in the Various Forms of Deputyship

As it can be noted, the various forms of deputyship are mainly structured around the impact they will have on the autonomy and the capacity to act of the affected person (more on this below 2.3). The system was different in the 1998 draft legislation: each deputyship was first of all a “Personal Deputyship”, the deputy’s primary duty being to support and advise the affected person; where necessary, he or she could be entrusted with further powers, along with a possible limitation of the affected person’s capacity to act (so-called ‘Specific Deputyship’). In the course of the legislative process, it was decided to transform the general ‘Personal Deputyship’ into a specific measure (‘the Assistance Deputyship’, above 2.1.1), alongside the other types of deputyship. From a structural point of view, this is quite regrettable in the author’s opinion: this creates the false impression that outside an Assistance Deputyship, no personal support would be required from the deputy. As a matter of fact, it can be deducted from Art. 406 CC (below 2.3 and section III B 4.1) that supporting and promoting the affected person’s capacity and autonomy is a basic obligation in all types of Protective Measures whatever.

2.2 *The Tailoring, Shaping or Customising of the selected Deputyship*

Pursuant to Art. 391 [1] CC, in each case (with the exception of the all-encompassing General Deputyship) the Protection Authority must determine the deputy’s scope of responsibility and tasks in accordance with the needs of the affected person. The law does not provide any list of such tasks; rather it reiterates three classical fields of responsibility, namely personal care, management of assets and representation in legal matters.

It is an established principle that the tasks entrusted need not be specified individually although exceptions are reserved, such as when the task is mainly or exclusively to plead in court on behalf of the affected person. ‘Bundles of tasks’ are admitted and current practice, (accommodation, medical care, settlement of invoices, sorting out of tax and social insurance matters, managing of moveable or/and immovable assets, liquidation of an estate the affected person is part of, legal proceedings, etc.) and thus individual tasks belonging to each of the bundle are also implicitly entrusted.

Standard measures have been developed in practice (the individual needs of persons suffering from Alzheimer’s disease or dementia appear very similar), but the principle remains absolutely central to the new law: the Protection Authority is expected to review each case individually and to design the scope and content of the measure accordingly. Some examples:

- Under *Assistance Deputyship*, the deputy may be in one case appointed only for a housing search and in another one only to give some support and advice with regard to the administration of land property.
- Under *Representative Deputyship* with powers of representation for financial affairs, the deputy's tasks may be limited to the management of land property and certain bank accounts (the affected person remaining autonomous with respect to his or her wages or social security benefits and checking accounts), or could be of general scope.
- With *Consenting Deputyship*, the Protection Authority may for example rule that the deputy's consent will only be required for the liquidation of an estate (the affected person being under pressure from members of his or her family) or for donations and loans.

During the legislative revision process, there were advocates who urged not keeping an all-encompassing measure like the General Deputyship, which seemed to contradict the spirit of the new law and the necessary tailoring of each State Protective Measure. This measure was nevertheless retained. It is of course inherently unsuitable for any kind of tailoring whatsoever. But in the light of the proportionality principle, the Protection Authorities are urged to renounce such a measure as much as possible (it has become a mere 'ultima ratio')¹² and to favour Representative Deputyship with a wide scope of tasks and partial limitation of legal capacity instead.

2.3 *Capacity to act*

The individual capacity to act may be limited or constrained depending on the type of deputyship applicable to the affected person. As stated below (section III B 4.1), the general rules governing the exercise of any kind of deputyship oblige the deputy to have due regard to the extent practicable to the affected person's opinion and to afford due respect to the affected person's desire to organize matters in accordance with his or her own abilities and wishes (Art. 406 [1] CC); he/she shall also endeavour to mitigate the affected person's impaired condition (Art. 406 [2] CC). It will thus be the deputy's duty, whatever the scope of the limitation to the capacity, to take all necessary measures in order to increase and promote the person's own capacity to act in line with their will and preferences (e.g. by consulting the person before taking decisions on his or her behalf and preparing him/her to decide on their own in the future, or by providing medical, psychological and/or social assistance to support him/her in this respect).

2.3.1 *Assistance Deputyship*

As explained above, the Assistance Deputyship does not affect the person's capacity to act (Art. 393 [2] CC). It is only a supportive or accompanying measure.

¹² See e.g. Decision of the Federal Supreme Court 5A_617/2014 of 1 December 2014, para. 4.4 (not published in the Court's Official Reports).

2.3.2 Consenting Deputyship

Under Consenting Deputyship, the affected person's capacity to act is automatically restricted accordingly (the person requires the deputy's consent to enter into legally binding commitments, but only with regard to the acts or categories of act expressly listed by the Protection Authority in the protective order).

2.3.3 Representative Deputyship

As far as this Deputyship is concerned, the Protection Authority *may* limit the affected person's capacity to act for some or all tasks entrusted to the deputy (Art. 394 [2] CC). Where the Protection Authority determines such limitation(s), the deputy retains an *exclusive* power to act.

When no such restriction has been decided, both the affected person and the deputy may enter into legally binding commitments (*parallel* powers to act). The affected person shall be bound by the deputy's act even where his or her capacity to act has not been limited (Art. 394 [3] CC).

In the latter case, the affected person has the right to cancel or to undo the contracts made by the deputy. Therefore, a measure without limitation of capacity requires either that the affected person's mental state does not allow him or her to act, or that he or she cooperates with the deputy and tolerates what has been done on his or her behalf.

The whole system is made even more complicated by a further option that the Protection Authority may elect (Art. 395 [3] & [4] CC) to remove certain assets (notably bank accounts) from the affected person's power to dispose, *without limiting the latter's capacity to act*.

2.3.4 General Deputyship

The situation appears to be simpler here: the affected person's capacity to act is void by law (Art. 398 [3] CC).

a) The Affected Person is Capable of Judgement (Discernment)

But this is actually not always the case: under the Swiss law of capacity, every person is able to make reasonable judgments (under the conditions set out in Art. 16 CC)¹³ and retains the right to exercise strictly personal rights, to acquire benefits that are free of charge (gifts, bequests) and to attend to minor affairs of daily life (Art. 19 [2] CC and Art. 19c [1] CC). Only in very few cases does the law require the deputy's additional consent.

Therefore, a person subject to a General Deputyship may validly consent to medical treatment, make a will or marry, without the deputy's consent being required, subject to the person's reasonable judgment with respect to the matter at hand (this discernment is not acquired or lost once for ever: it is both time and task-specific, which means that

¹³ 'A person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances.'

whether or not a person is capable of discernment must be assessed on a case-by-case basis, with regard to the specific act in question). Yet this person will require the deputy's consent to acknowledge his paternity or to enter into a marital agreement pertaining to matrimonial assets, being expressly required in Arts. 260[2] and 183[2] CC.

b) The Affected Person Lacks the Capacity of Judgement

Where the affected person lacks the requisite discernment, a deputy will also represent him or her with regard to *strictly personal acts* such as consent to medical treatment or a surgical operation. However, some exceptions are reserved because certain strictly personal rights are of *such* a personal nature ('highly strictly personal rights') that they preclude any legal representation and may not be validly exercised by either the affected person (by reason of lack of reasonable judgement) or by the deputy. Examples would include the making and revoking of wills (the making of a will is considered a strictly and absolutely personal act in Switzerland and Swiss law does not recognise the statutory will which England and the Australian States and Territories are familiar with), entering into a marriage or a registered partnership, or exercising political rights. As to some further acts, such as medical trials and sterilization¹⁴ the provisions set forth in specific statutes shall apply.

3 A First Assessment

The new system appears to be highly complex for the Swiss authorities, the deputies and in general for the contractual partners of the protected adults. It is however premised upon a genuine attempt to provide the affected persons with an individually balanced protection while respecting their residual autonomy. The entire legislative reform process was notably influenced by experts from social work fields, self-evidently 'empowerment-oriented', rather than by lawyers (although of course this does not imply that lawyers would have necessarily made a more accessible law).

In practice, the spirit of the law appears well ensured, with the General Deputyship being rarely ordered and the Representative Deputyship with powers becoming the 'flagship measure' since 2013.

There are however several negative aspects:

- The only genuine, exclusively supported decision-making measure - the *Assistance Deputyship*- remains rarely ordered (more on this below Section III);
- The *Representative Deputyship* is too often associated with a limitation of the capacity to act and/or with a restriction of the power to dispose of financial assets. The Protection Authorities are on the defensive and fear any eventual liability, should the affected person enter into commitments contrary to his or her interests. They are unwilling to 'take the risk of autonomy', even though a limitation can be decided at any later stage where the person does not show enough cooperation and engages in legally risky behaviour;

¹⁴ Art. 24 of Human Research Act of 30 September 2011 (Classified Compilation, SR/RS 810.30); Art. 7-9 of Sterilisation Act of 17 December 2004 (Classified Compilation, SR/RS 211.111.1).

- The customisation of the measure has already become rather theoretical. Too many Protection Authorities use standard orders for various categories of vulnerable adults and do not necessarily verify their adequateness in each individual case.
- Some deputies working for public guardianship offices criticize the complexity of the system and regret the good old days when they were appointed as guardians, with a comprehensive legal power to act and a full deprivation of legal capacity to act for the ward. The same critics are also heard in the business community.

D Re-organization and Professionalization of the Protection Authorities

The landscape of protection authorities under the former law was highly diverse and complex (cantons being competent to decide on their organisation, composition and structure): mostly judicial civil courts in the French-speaking part of the country and administrative bodies in the German-speaking one. And their territorial jurisdiction was also incredibly dissimilar: the canton of Geneva (480,000 inhabitants) had one single (judicial) authority for its whole territory; the canton of Bern (1 million inhabitants) comprised 337 such authorities. In many cantons, the utmost complex and sensitive protection tasks (both for children and adults) were under the responsibility of the municipal council, which showed less experience and expertise in these matters and too often a lack of neutrality and independence.

The adult protection experts argued for an utterly *judicial* model. For political reasons (defending federalism and consequently the cantons' right to choose their organisational model), the Federal Council did not follow these recommendations and left it in the cantons' hands to opt for a judicial model (6 cantons) or for an administrative authority (20 cantons). However, in accordance with Art. 6 of the European Convention on Human Rights (right to a fair trial), which guarantees the right to an independent and impartial tribunal established by law, all decisions made by the Protection Authority may be appealed to a cantonal court (Art. 450 CC) and ultimately to the Federal Supreme Court (Art. 72 [2] [b] [6] BGG/LTF).¹⁵

In addition, the revised law requires the Protection Authority to be a collegial and professional (in the sense of 'interdisciplinary') authority, by which it implies that the authority must be composed of lawyers, social workers, psychologists, accountants and/or physicians. Every single village cannot afford such a professional structure. This revision led to a drastic reduction in the number of authorities and to a significant regionalisation: on 1 January 2013, less than 150 new authorities replaced the previous 1,415 authorities (for around 8 million people living in Switzerland). In the canton of Berne for example there are only 12 authorities in charge, as compared to the over 300 that were active prior to the new law coming into force.

Currently there is strong criticism for the way certain new authorities are performing their tasks, based on a few cases (related to child protection) that ended in tragedy (e.g. the so-called 'Flaach case' in the canton of Zurich, where a mother killed her two children just before having to return them to their foster home¹⁶). Sensationalistic media

¹⁵ Supreme Court Federal Act of 17 June 2005 (Classified Compilation, SR/RS 173.110).

¹⁶ Kritik an KESB nach Tötung zweier Kinder, (4.1.2015), <<http://www.nzz.ch/zuerich/region/kritik-an-kesb-nach-toetung-zweier-kinder-1.18454538>>.

reports and populist political parties claim that the situation was much more satisfactory when lay authorities were in place. But these critics are actually driven by another motive: in the German-speaking part of Switzerland, the authority ordering Protective Measures (henceforth a regional one) and the one financing the measure (still at a municipal level) are not the same any longer. This loss of financial control is hard to accept and critics use the whole new system as a scapegoat for this.

E A Few Other Principles in Brief

The law reform was also aimed at:

- i)* suppressing some old-fashioned and depreciative vocabulary (particularly in the German version of the Swiss Civil Code),
- ii)* regulating medical treatment without or against the will of a patient committed to an appropriate institution and thus deprived of his or her liberty (under the previous law, only the civil commitment order was governed at a federal level, what occurred afterwards in the institution was – or precisely was not – regulated by the cantonal laws), and
- iii)* setting forth a few minimal rules for (elderly) patients residing in a social-healthcare institution, in particular pertaining to limitations which restrict the affected person's freedom of movement.

The new law also abolished the publication of protective orders restraining the capacity to act, in the cantonal official gazette, as well as the so-called 'extended parental responsibility' for parents continuing to take care of their mentally or physically disabled child, after he or she reached 18 years of age (they will now be appointed as deputies by the Protection Authority).

III COMPATIBILITY OF SWISS LAW WITH THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD)

A General

Switzerland ratified the UNCRPD in 2014.¹⁷ It submitted its initial report to the UN Committee on the Rights of Persons with Disabilities on 29 June 2016.¹⁸

Unlike e.g. Australia and Canada, it did not make any declaration with regard to Art. 12 of the Convention, which provides for equal protection of the persons with disabilities before the Law. The Federal Council Dispatch on the Convention merely states that the new Adult Protection legislation (which was already adopted at the time, but not in force yet) does comply with this provision and that the same could not necessarily be said of the 1907 law.¹⁹

¹⁷ See the report drafted by Walter Kälin et alii, *Mögliche Konsequenzen einer Ratifizierung der UN-Konvention über die Rechte von Menschen mit Behinderungen durch die Schweiz*, Bern 2008, as well as the Federal Council Dispatch of 19 December 2012 (Official Journal – BBl 2013 661/FF 2013 601).

¹⁸ See Initial Report, <<https://www.edi.admin.ch/edi/fr/home/fachstellen/bfeh/droit/international/cdph/rapport.html>>. The Report (N 57 et seq.) does not address the General Comment No. 1 (2014) to Art. 12, but only outlines the Swiss system of the State Protective Measures and its utmost flexibility.

¹⁹ Federal Council Dispatch, above n 15, ad. Art. 12.

No doubt the UN committee will not share this opinion.

In its General Comment No. 1 (2014), para. 26-28,²⁰ the committee ruled as follows:

26. In its concluding observations on States parties' initial reports, in relation to article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that States parties must 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences'.

27. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective 'best interests' of the person concerned, as opposed to being based on the person's own will and preferences.

28. States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

In its Concluding Observations on the initial report of Australia (issued on 21 October 2013),²¹ the Committee did already recommend (para. 25) *'that the State party effectively use the current inquiry to take immediate steps to replace substitute decision-making with supported decision-making and that it provide a wide range of measures which respect a person's autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to a person's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work'.*

B Swiss Law and the UNCRPD²²

The author has outlined above the importance of the principles of autonomy and self-determination in the new Swiss legislation under certain aspects. Although it may not

²⁰ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>.

²¹ In its initial report dated 3 December 2010, para. 55-63 United Nations Human Rights Office of the High Commissioner, CRPD/C/AUS/1 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2f1&Lang=en>, Australia insisted on using substitute decision-making only as a measure of last resort where such arrangements are considered necessary and these being subject to safeguards in accordance with Art. 12 [4] and on general acceptance in Australia of the value of supported decision-making frameworks in relation to persons with a decision-making disabilities.

²² See Walter Boente, *Behindertenrechtskonvention und Erwachsenenschutzrecht – ein Zwischenruf*, FamPra.ch 2016 111; Philippe Meier, *CDPH et droit suisse de la protection de l'adulte – une coexistence pacifique ou un infranchissable fossé?*, Liber Amicorum for Barbara Wilson, Schulthess Zurich 2016, 337.

change the recommendations that the Committee will issue if it maintains its present (extreme and not in any case required by the convention text) condemnation of any kind of substitute decision-making, the author has highlighted below the extent to which the new Swiss Adult Protection Law reforms integrate the principles of Art. 12 of the Convention at the highest level, whilst retaining both supported and substitute decision-making instruments.

Before addressing the State Protective Measures, it has to be noted that under Swiss capacity law (as in force since 1912 and in line with the UNCRPD enacted 100 years later), mental disability *per se* does not deprive the individual from his/her capacity to act. This will only be the case where the disability prevents the person from making an independent and reasonable judgement ('intellectual capability') and from acting in accordance with this judgement (including resisting undue influence). Discernment or capacity to judge is presumed for an adult; deciding on its absence will always be time-specific and task-specific: depending on the act considered or the time of action, the mentally impaired person may or may not act validly on his/her own (subject to the limitation of the capacity to act entailed by a State Protective Measure). Moreover where discernment exists, many legal rights (in particular of personal nature) can only be exercised by the affected person, this notwithstanding any type of deputyship in place (below 4).

It is a fact that Art. 390 [1] CC (Requirements for a Deputyship) expressly refers to 'mental disorder' as one of the possible causes for establishing a deputyship. But the disability is not sufficient: the Protective Measure requires additionally that due to this mental disorder, the person is wholly or partially unable to manage his or her own affairs (meaning by him or herself, or with the assistance of his or her family or close related persons or public and private services) and needs the support and/or representation by a deputy.

1 *Autonomy and Subsidiarity of State Protective Measures*²³

As long as he or she is capable of judgement, any individual may grant powers of care, administration and representation to a trusted person, through an EPA or a PD. These Anticipatory Measures take precedence over State Protective Measures, provided they cover the affected person's needs and the designated person is deemed suitable. In the absence of such an instrument, one's first resort is the informal assistance granted by the family, friends and private or public services²⁴ or – where legal representation is needed – to the Statutory Powers set forth in the law. In the latter case, the process is a substitute decision-making one, but it is assumed that the affected person would prefer the intervention of spouses, partners or relatives, should he or she still be capable to decide²⁵.

²³ See above Section II C.

²⁴ For an example: Decisions of the Federal Supreme Court (BGE/ATF) 140 III 49, where the Court ruled that no Representative Deputyship was required for an elderly person in this particular case (even with a scope of tasks already reduced by the cantonal Appellate Court), the necessary assistance being wholly provided by the residential community which the person was living in (along with a monitoring – should the accommodation rate be increased – by the Protection Authority under Art. 392 CC).

²⁵ See above Section II A 3.

2 *Autonomy in the Choice and Shaping of the State Protective Measure*

As explained above, the choice of the appropriate subtype of deputyship, the list of tasks and (where financial management is concerned) of assets entrusted to the deputy and whether the person shall be limited or not (and to what extent) in his or her capacity to act are all governed by the principle of proportionality, which materialises the respect of the individual's autonomy.²⁶

Moreover, the deputyship which should always be considered in the first place²⁷ is the *Assistance Deputyship*, which is most compliant with the principle of autonomy from two perspectives namely this deputyship cannot be imposed (the person's consent is required) and it is merely supportive and accompanying in its nature, without any powers of representation (exclusive or parallel) being granted to the deputy (the affected person being however free to appoint the deputy as his or her private agent).

Whatever the form of deputyship, it is the deputy's duty to take all necessary measures in order to increase and promote the person's own capacity to act in line with his/her will and preferences, or at least to express them where a decision has to be made on his/her behalf (above section II C 2.3 and below section III B 4.1).

3 *Autonomy in the Choice of the Deputy and Privileges for Deputies of the Affected Person's Family Circle*

Deputyship may be entrusted either to private persons (relatives, attorneys, health practitioners) or to public services. The Swiss Civil Code does not prioritize either of these two options (although several cantonal laws do however stipulate that members of the family should be designated first).

It has to be noted that under Swiss law, in the absence of compelling reasons for refusing to do so, the private person so appointed is *required* to accept the appointment. This obligation has been subject of considerable criticism: not only do some scholars consider it violates Art. 4 of the European convention on Human Rights (Prohibition of Forced Labour), but such an imposed deputyship does not encourage or promote the prospect of a relationship of trust with the affected person. Fortunately this obligation is currently still enforced only in one canton and is likely to be abolished in the next two years.

Reliable statistics are lacking, but it is assumed that about 70% of all deputyships are carried out by official services, the rest by private persons.

The organisation and funding of official services are different from one canton to the other, and while overwork is commonplace in almost all areas of social service assistance, the employees are nevertheless qualified and well trained, they benefit from on-going training and are correctly remunerated. Prior to the reforms, the appointed

²⁶ Decisions of the Federal Supreme Court (BGE/ATF) 140 III 49, 51.

²⁷ See also in this regard the Decision of the Federal Supreme Court 5A_795/2014 of 14.04.2014, para. 4.3 (not published in the Court's Official Reports), where the Supreme Court insists on not jumping to fast to the Representative Deputyship, without having assessed thoroughly whether a mere Assistance Deputyship would suffice

guardian was more often than not the public service (as a governmental body), which then delegated the specific tasks to its personnel. By contrast the new laws require in each case, an *individual person* to be appointed as deputy -whether a private individual or employed by an official service. This serves to build a closer relationship and ensure a personal follow-up of the affected person's needs.

Prior to appointing a deputy, the Protection Authority must in any event, enquire about the affected person's wishes or objections with regard to the person to be designated as his or her deputy (Art. 401[1] & [3] CC). Should the person proposed by the affected person be suitable and ready to take up the appointment, the Protection Authority shall have to appoint him or her.²⁸ Furthermore, '*to the extent practicable*', the Authority is to take into account the wishes expressed by relatives or other persons close to the affected person (Art. 401[2] CC). But the latter's own wishes must be given priority.

The private deputy and the deputy employed by a public service are subject to the same obligations when performing their tasks and in both cases State liability shall be incurred in the event of a violation of their legal duties (Art. 454 CC). Furthermore, the revised law obliges the Protection Authority to ensure the deputy is personally and professionally qualified, but also in a position to dedicate the necessary time to perform his or her tasks (which usually sounds like wishful thinking as far as public services are concerned!) (Art. 400[1]). The Protection Authority must also ensure that the deputy receives the requisite instruction, advice and support (Art. 400 [3] CC): such as by public services for their employees and by special 'help desks' (usually serviced by the official deputyship services) for the private deputies.

However, the law makes one difference with regard to the monitoring by the Protection Authority; spouses, registered partners, parents, descendants, siblings and *de facto* partners may be exempted from certain obligations (drawing up of an inventory of the assets to be managed, obtaining the Authority's approval for certain complex or risky legal transactions as listed in Art. 416 CC, providing periodical reports and financial statements to the Authority) (Art. 420 CC). The aim of these provisions is to 'facilitate' the deputyship for close relatives, so as to induce them to accept the office. However, the legislation stipulates that this is a discretionary option for the protection authority only where 'justified under the circumstances'. And legal opinion is unanimous on this point: the exemption should only be granted under very special circumstances (e.g. to parents being appointed as deputies for their disabled child turning 18 years of age) and not as a whole but in an adjusted way (an inventory should always be requested, otherwise no monitoring would be possible; simplified reporting – e.g. in the form of banking account statements and tax returns handed to the Authority– should normally be required if the deputy is released from the obligation to remit full financial statements) in order to ward off possible abuses committed 'behind closed doors'.

4 *Autonomy in the Exercise of Deputyship*

The previous law was almost entirely focused on the safeguarding of the ward's financial interests. The approach of the revised legislation is significantly different. Several new

²⁸ See Decisions of the Federal Supreme Court (BGE/ATF) 140 III 1, 3 et seq.

provisions remind the appointed deputy of his or her *personal* duties towards the affected person.

Central provisions here are Arts. 406 and 407 CC, which are arguably the threshold obligations in the chapter dedicated to the deputy's duties, before any provision is set out pursuant to his or her financial obligations.

4.1 *Respecting the Affected Person's Will, Preferences and Privacy*

Art. 406 CC

'[1] The deputy must perform the assigned tasks in the interests of the affected person, having due regard to the extent practicable to the affected person's opinion, and shall afford due respect to the affected person's desire to organize matters in accordance with his or own abilities and wishes. [2] The deputy shall endeavour to build a relationship of trust with the affected person and to mitigate his or her impaired condition or prevent any further deterioration hereof.'

Although not stated clearly in the text, scholars argue that this provision gives precedence to the will and preferences of the affected person *over* the safeguarding of his or her objective 'best interests', whenever this will and these preferences are not biased by his or her mental disorder.²⁹ This construction is in line with Art. 12[4] UNCRDP.

This does not only apply to personal decisions, but to financial affairs as well. Pursuant to Art. 5 of the Federal Council Investment Ordinance,³⁰ when opting for an investment, the deputy in charge of the affected person's assets will take his or her personal situation into account (namely with regard to his/her age, health status, ongoing needs, income, assets and insurance cover), but also – as far as practicable – the person's will and wishes.

A few further provisions are relevant to this discussion relating to autonomy:

- According to Art. 412 [2] CC, the deputy shall, wherever possible, not dispose of assets that have special value (meaning: financial or emotional significance) for the affected person or the family³¹.
- The deputy must explain his/her periodical financial statements and report to the affected person and supply him or her with a copy thereof on request (Art. 410[2] CC and Art. 411 [2] CC). To the extent possible (Art. 411[2] CC), the deputy has to involve the affected person in the preparation of the report.
- The deputy must place reasonable amounts from the affected person's assets to that person's free disposal (Art. 409 CC). Provided the affected person is capable

²⁹ See e.g. Philippe Meier, *Droit de la protection de l'adulte* (Schulthess Zurich, 2016), N 995-996.

³⁰ Verordnung über die Vermögensverwaltung im Rahmen einer Beistandschaft oder Vormundschaft/Ordonnance sur la gestion du patrimoine dans le cadre d'une curatelle ou d'une tutelle, of 4 July 2012, Classified Compilation, SR/RS 211.223.11. This Ordinance is currently under review; a new text – which will not amend Art. 5 – is to be enacted probably in 2017, or 2018 at the latest.

³¹ This provides me with the opportunity to state that despite this equivocal text the relatives' interests can never alone justify a Protective Measure, which is aimed at the protection of the affected person's interests only (this is also how case law and scholars construe Art. 390 [2] CC, which stipulates that '*the burden the affected persons imposes on relatives and others, and their need for protection, are to be taken into account*').

of judgement, he or she is entitled to use these amounts outside any control by the deputy or authority (the importance and periodicity of the amounts entrusted to the affected person depending of course on his/her personal and financial situation and on his/her ability to manage them³²).

Pursuant Art. 391 [3] CC, without the affected person's consent, the deputy may only open his or her correspondence or enter his or her lodgings if the Protection Authority has explicitly empowered the deputy to do so. This provision is seeking to give effect to the constitutional protection of any citizen's right to privacy.³³

Finally the affected person under a non-General Deputyship can exercise his or her political rights without any restriction due to the Protective Measure; this is also the case of the person under General Deputyship as long as he or she is capable of judgement³⁴. This will comply with Art. 29 UNCRPD (Participation in Political and Public Life).

4.2 *The Residual Legal Capacity of Persons under Deputyship*

Art. 407 CC includes a reminder of some rules already provided for by Swiss law relating to capacity:

'Even when the affected person's capacity to act has been revoked, such person having capacity of judgement may, with the limits of the law of persons, establish rights and obligations through his or her own actions, and exercise those rights that are of a strictly personal nature'.

As mentioned above, this applies in particular to entering into a marriage or a registered partnership and to consenting to medical and dental care.

Where the person has lost the capacity of judgement, the deputy will represent him or her, save for highly personal acts. Making a will belongs to this category (Art. 19c [2] CC and Art. 467 CC).³⁵

This is consistent with prescribed respect for the affected person's autonomy (no one may decide on his or her estate on his or her behalf). However, in certain circumstances, the impossibility of amending or revoking an existing will (or establishing a will in order to override intestacy) may contradict the person's presumed will or even wishes expressed but not materialised in a valid will. Inspiration might be taken here from the

³² See also in this regard the Decision of the Federal Supreme Court 5A_540/2013 of 3 December 2013 para. 5.1.2 (para. not published in the Court's Official Reports).

³³ Art. 13 of Swiss Federal Constitution (above n 9); see also Art. 8 of European Convention on Human Rights. Legal doctrine is of the opinion that this provision applies only to private correspondence and the deputy can access to the affected person's administrative correspondence without any consent where this is necessary to exercise his or her office (e.g. to settle the affected person's bills). But in practice the Protection Authorities go much further and systematically empower the deputy with full rights of access (to the correspondence and to the lodgings) in the initial Protective Measure order, without any real individual assessment. This goes clearly against the spirit of the law.

³⁴ Art. 2 of Federal Act on Political Rights of 17 December 1976, Classified Compilation, SR/RS 161.1.

³⁵ Above Section II. C. 2.3.4.

statutory wills of English and Australian state laws, which are unfamiliar to European continental legislations.

5 Autonomy and Review of Protective Measures and Deputy's Decisions

All orders made by the Protection Authority are subject to review by a judicial cantonal court. The affected person and any third person close to the affected person are eligible to appeal (Art. 450 CC).

The affected person and any person close to him/her and defending his or her interests can furthermore challenge decisions or omissions by the deputy (with the Protection Authority and eventually with the judicial cantonal court, and finally with the Federal Supreme Court).

In both instances, the appeals can be lodged not only for infringement of law, denial of justice or undue delay, but also for an incomplete statement of facts and for inappropriateness of the decisions made. (Art. 450a CC allows for a full review of the decisions by the higher authority however this rule does not apply at the Federal Supreme Court level).

In Switzerland Protective Measures are not ordinarily subject to time limitations. However, although the law does not expressly require it, whenever approving the deputy's periodical report and financial statements (at least every two years, but some cantonal laws require annual reporting and the Protection Authority may also request reporting at shorter intervals), the Protection Authority must also ensure that the measure, in its existing form and scope, is maintained.

Moreover, regardless of this approval process, the Protection Authority must rescind the measure at the request of the affected person, of persons close to the affected person or *ex officio* as soon as the grounds justifying the deputyship no longer exist (Art. 399 [2] CC).

In the meantime, the deputy is under a fundamental obligation to advise the Protection Authority immediately with regard to circumstances which would necessitate changes to the measure or which would or may require its cancellation (Art. 414 CC).

III CONCLUDING REMARKS

Like other countries having recently revised their Adult Protection Law, Switzerland has not dropped the substitute-decision making model. It has however implemented numerous safeguards in order to respect the autonomy and self-determination of the affected person at the highest level.

The practice is not always as rosy as it ought be. Despite the legal provisions in effect, paternalist attitudes toward vulnerable adults as well as self-defensive reflexes have not vanished:

- Protection Authorities still tend to be overprotective when deciding on a deputyship and shaping it; they also too often delay the amending or revoking of an 'over-reaching' protection.
- The typically supported/assisted decision-making measure (the *Assistance Deputyship*) is still neglected by the Protection Authorities and its potential ignored. The causes are structural because it remains very difficult in practice to draw a clear demarcation between the accompanying support provided by a deputy and the one supplied by social services and welfare agencies (which are supposed to grant not only financial but also personal support).
- Private deputies (be they members of the family or non-social work professionals, e.g. lawyers or trustees) still lack the knowledge, awareness and education with respect to the necessary empowerment of the affected person and to the promoting of his or her self-determination.
- Deputies employed in official deputyship services are much better educated in this respect. However, by reason of overwork they lack the time needed to discuss thoroughly the affected person's wishes, to meet regularly with him or her and to assess more often than every two years the necessity of keeping the protective measure in place.

As for Anticipatory Measures, they have not been sufficiently promoted to date and would probably need some amendments to become really effective.

But despite (or thanks to) its complexity, it can be stated that the new Swiss legislation is complying with most of the modern principles of Adult Protection and thus also with the UNCRPD. It is all the more surprising that the Convention was actually never mentioned during the lengthy (1993-2008) national reform process.

By contrast the closing remarks of the Human Rights Conference in Vienna in 1993 had already underlined the universal character of human rights and their application to persons with disabilities and moreover the UN General Assembly had established in 2001 an ad-hoc committee mandated with the drafting of an international convention. On 25 August 2006 the draft was completed and the General Assembly adopted it on 13 December 2006.

But regrettably in Switzerland this work was ignored - neither the Federal Council Dispatch to the Parliament on new Adult Protection Law (June 2006)³⁶ nor the subsequent parliamentary works (2007 and 2008) mention the existence of this then proposed Convention.

³⁶ Official Journal - BBl 2006 7001/FF 2006 6635.

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