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ARTICLE

Continuing powers of attorney - different legal rules, similar problems and solutions: What can the Netherlands learn from Belgium, England and Wales, Germany and Switzerland?

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1. Introduction[1]

All over Europe, countries are searching for new measures and instruments allowing adults a greater role in the protection of their future interests when they are facing an impairment or insufficiency of their personal faculties. Among these instruments are so-called enduring documents: instruments enabling capable adults to make provisions for a future period of incapacity. Two instruments are generally distinguished: the continuing, enduring or lasting power of attorney (CPA) and the advance directive (AD). The CPA has been defined by the Council of Europe as 'a mandate given by a capable adult with the purpose that it shall remain in force or enter into force, in the event of the granter's incapacity'.[2] Advance directives, on the other hand, have been defined as 'instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity'.[3] As said, many European countries offer adults the opportunity to make one or both of these types of enduring documents. This is also the case in the Netherlands. Here, adults, since 1995, can make a so-called medical treatment advance directive, in which the adult specifies which medical treatment under certain conditions is desired or refused. Relatively new for the Netherlands is an instrument, which is called a *levenstestament*. As I will explain in more detail later on, a *levenstestament* can include a CPA, ADs or both of these instruments. The *levenstestament* is becoming increasingly popular as an alternative to the court-ordered adult guardianship measures and the number of adults who decide to make a *levenstestament* keeps increasing annually. However, despite its growing popularity, the *levenstestament* is currently not yet statutory regulated in the Netherlands. The instrument has been designed and conceptualised by the Dutch notariate within the framework of the existing law. Empirical research indicates

1 The author owes a huge debt of gratitude to Alzheimer Nederland for awarding her a Fellowshipgrant which has enabled her to visit all four countries as part of the comparative study central in this article. In addition, the author would like to express her thanks and gratitude to prof. Regina Aebi-Müller, prof. Volker Lipp, prof. Jens Scherpe and prof. Frederik Swennen.

2 Recommendation CM/Rec(2009)11, p. 9.

3 Recommendation CM/Rec(2009)11, p. 9.

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that the application of the *levenstestament*, in practice, does not in all cases run smoothly and, in some cases, leads to problems.[4]

Across Europe, there are countries where the possibility to make enduring documents has already been in place for quite some time and where such instruments are regulated by law. The Netherlands may well learn something from the regulation and the experiences with the application of enduring documents in these countries. The central research question in this article, therefore, is: 'What can the Netherlands learn from the regulation and application of enduring documents in Belgium, England and Wales, Germany and Switzerland?' To answer this research question a comparative study of the legal regulation and practical application of enduring documents in these four jurisdictions has been conducted. The aim of this comparative study has been to find solutions and best practices in the aforementioned jurisdictions, that might provide solutions to the problems identified in the regulation and application of the *levenstestament* in the Netherlands.

In the next section of this article, I will continue with a description of the methods that have been employed in this comparative study (section 2). Then in section 3, I will focus on the problems associated with the way the *levenstestament* is currently regulated in the Netherlands and explore the problems related to the application of the *levenstestament* in practice. In sections 4, 5, 6 and 7, I will provide an outline of the instruments that can be used by adults to make provisions for a future period of incapacity, in each of the four jurisdictions in question. The four jurisdictions will be discussed successively, according to the same scheme. In each section, I will first describe the regulatory framework on the enduring document and then focus on what is known about the application of the instrument, looking at the problems and solutions as well as at the best practices. In section 8, I will provide a comparative synthesis and assess the suitability of legal solutions and best practices delineated in these jurisdictions, for resolving the problems identified in the Netherlands. The conclusion will comprise recommendations on how the foreign solutions and best practices – rendered suitable for resolving problems identified in the Netherlands – can best be implemented in the Dutch legal system. Although, as the title of this article indicates, the article focuses on solutions and best practices of interest to the Netherlands, this article might be equally relevant to other jurisdictions. First of all, because it provides a rather detailed comparative overview of the regulation of enduring instruments in Belgium, England and Wales, Germany, Switzerland, and the Netherlands. Secondly, because the identified solutions and best practices for problems experienced in the Netherlands can also be useful for other jurisdictions experiencing similar problems.

4 H.N. Stelma-Roorda, *In anticipation of a future period of incapacity: the Dutch 'levenstestament' from a legal, empirical and comparative perspective*, forthcoming; H.N. Stelma-Roorda & V.E. Eichelsheim, 'Decision-making by and for adults with impaired capacity: the potential of the Dutch levenstestament', *International Journal of Law and Psychiatry* 2023, vol. 86, no. 1, p. 1-11.

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2. Methods

To identify jurisdictions that might contain best practices and workable solutions to the problems identified in the Netherlands, a quick scan was conducted. The report 'Enabling citizens to plan for incapacity', a review of the follow-up action undertaken by member states of the Council of Europe on Recommendation CM/Rec(2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity, conducted by Adrian Ward, formed the basis of this quick scan. This report provides information on the implementation of the aforementioned Recommendation in thirty jurisdictions. Based on this information, four jurisdictions were selected for in-depth comparative research: Belgium, England and Wales, Germany and Switzerland. Several criteria were used to select these jurisdictions. As it is possible to arrange both financial, medical and personal matters in a *levenstestament* in the Netherlands, I first of all selected jurisdictions where these matters can also be included in the enduring document. Secondly, I selected jurisdictions where, in contrast to the Netherlands, a specific regulatory framework for the enduring document has been adopted. In this regard, the timing of the regulation and, linked to this, the potential to identify best practices were considered. In both England and Wales and Germany, enduring documents are already regulated and applicated for quite some time.[5] The expectation was that these jurisdictions have gained a lot of experience with the regulation and application of enduring documents and, therefore, may have found solutions and developed best practices, that might be of interest to the Netherlands. In addition to the timing of regulation, the scope or extent of regulation – in terms of the involvement of the state – was considered. This led to the inclusion of Switzerland, where the state plays an important role in the execution of the enduring document. Finally, more practical considerations, such as access to legal sources, language barriers and the possibility to arrange a research visit, also played a role in the selection of jurisdictions. This resulted, for instance, in the inclusion of jurisdictions with legal sources available in the English, German and Dutch language.

The quick scan was followed by an in-depth study of the enduring documents in each of the four selected jurisdictions. A questionnaire consisting of 37 questions was used as a basis for this in-depth study. For the preparation of this questionnaire, I looked at previously conducted comparative studies – both in the field of adult capacity law and in the field of family law in general – to gain an impression of how

5 The possibility to set up an enduring power of attorney was introduced in England and Wales by means of the Enduring Powers of Attorney Act 1985, which came into force on the 10 March 1986.

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an in-depth comparative study could best be designed.[6] For the design of the questionnaire in this comparative study, Recommendation CM/Rec(2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity was used as a frame of reference. This recommendation contains a list of principles that states are recommended to implement in their country's legislation on enduring documents. Using these principles as a starting point, in this article I look at the regulation in each jurisdiction on the form, content, entry into force, registration and/or certification of enduring documents and the appointment and role of attorneys, the preservation of legal capacity, conflicts of interests and supervision.[7] The in-depth study of the situation in each jurisdiction commenced with a desk study of the relevant literature and case law. Each country was subsequently visited for a period of three weeks to finalise the study and to gain an impression of the law in action. During the research visits, I interviewed practitioners, including notaries, judges, government officials, lawyers and physicians. The aim of these interviews was to get an impression of the socio-legal context in which the relevant legal rules operate and to identify the strengths, weaknesses and best practices of the various systems.[8] As the above shows, in this comparative study I have adopted both a functional approach – looking at the functional equivalents in the four jurisdictions that allow adults to make their own provisions for a future period of incapacity – and a law-in-context approach – trying to get an impression of how these enduring documents function in practice.[9] Based on this research, country reports were made.[10] Sections 4, 5, 6 and 7 of this article provide a synopsis of these country reports, which means that a horizontal approach (by jurisdiction) has been chosen rather than an integrated, vertical approach (*e.g.* by principle included in Recommendation CM/Rec(2009)11). I chose this approach because I believe it provides more room to discuss the different particularities of each jurisdiction and possible interactions between the regulation and the application of the enduring document in practice.[11]

6 Examples of comparative studies in the field of adult capacity law include: A.D. Ward, *Enabling citizens to plan for incapacity. A review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity*, Strasbourg: Council of Europe 2018; A. van den Broeck, *Vermogensbescherming van kwetsbare meerderjarigen via lastgeving*, Antwerpen: Intersentia 2014; I. Doron, 'Elder Guardianship Kaleidoscope – A Comparative Perspective', *International Journal of Law, Policy and the Family* 2002, vol. 16, no. 3 p. 368-398.

7 The scope of the questionnaire was slightly broader and included, for instance, also questions on the termination and revocation of enduring documents. However, given the already substantive scope of this article, I decided to focus on the abovementioned aspects in this article.

8 M. Adams & J. Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences', in: M. Adams & J. Bomhoff, *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012, p. 279-301 (293-296).

9 M. van Hoecke, 'Methodology of Comparative Legal Research', *Law and Method* 2015, pp. 1-35.

10 These country reports are included in the appendices to the dissertation of Stelma-Roorda, *In anticipation of a future period of incapacity: the Dutch 'levenstestament' from a legal, empirical and comparative perspective*.

11 Some problems that arise in practice may, for example, be related to how the enduring document is regulated (*e.g.* in Switzerland, the strict entry into force of the *Vorsorgeauftrag* on paper may cause problems with the entry into force in practice).

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In presenting the findings of this study it is important to also address its limitations. This study has been conducted by one researcher in the timespan of one year as a part of her multidisciplinary PhD project on the Dutch *levenstestament*. This means that there were limitations regarding the amount of information that could be gathered, given the available time and the fact that the research was conducted by one person. As the Dutch say, the researcher had to 'row with the oars she had'.[12] This holds true in particular for the law in action aspect of the study. It is therefore fair to say that the findings in this regard provide an impression of the socio-legal context in which the enduring documents operate, but no more than that. The limitations on the amount of information that could be gathered also meant that a further delineation of the scope of the comparative study became necessary once the research had started. As noted in the introduction, internationally a distinction is made between two enduring documents: the continuing power of attorney (CPA) and advance directives (AD).[13] Some countries even make a subsequent distinction between various types of advance directives. In Germany, for example, a distinction is made between treatment advance directives (*Patientenverfügungen*) and directives addressed to the court in the event of an adult guardianship procedure (*Betreuungsverfügungen*). Although the initial objective was to include all enduring documents in this comparative study, answering all 37 questions of the questionnaire for each enduring document proved too big a task. In other words, a further delineation of the scope of the comparative study proved necessary. A clear demarcation was, however, not straightforward, as in practice there is frequently no clear distinction between the continuing power of attorney (the appointment of an attorney) and advance directives (a statement of the adult's wishes and instructions). In Belgium, for instance, a continuing power of attorney (*zorgvolmacht*) can also include the adult's wishes and instructions directed to the attorney. And in Switzerland, a treatment advance directive (*Patientenverfügung*) can also include the appointment of an attorney. In the end, I used the following interpretation, provided by Ward, to come to a clear delineation:

> 'The instructions and wishes in a CPA are directed to the attorney, who is responsible for implementing them. The instructions and wishes in an advance directive apply directly as "the voice of the granter", without being directed through another party such as an attorney.'[14]

According to this interpretation, wishes and instructions directed to the attorney are part of the CPA, whereas wishes and instructions addressed to a third party – for example, a physician or the court – are considered an advance directive. Using this interpretation, I focus – after a brief exploration of all enduring documents – in the country reports, and consequently in this article, on what is internationally referred to as a continuing power of attorney, including both the appointment of an attorney and the adult's wishes and instructions addressed to this attorney.

12 Adams & Griffiths 2012, p. 301.
13 Recommendation CM/Rec(2009)11, p. 9.
14 Ward 2018, p. 20-21.

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3. The Netherlands: an exploration of the existing problems

As noted above, adults in the Netherlands can provide for a future period of incapacity through a *levenstestament*. This instrument is not statutory regulated in the Netherlands; it has been designed and conceptualised by the Dutch notariate within the framework of the existing law. This way of regulating – or rather not regulating – the *levenstestament*, has not been without problems in practice. In the absence of a clear (statutory) definition of the term *levenstestament*, there are different interpretations as to what a *levenstestament* entails. In practice, the term *levenstestament* is used to refer to an enduring document which may encompass one or more of three components for which, for instance, in Germany, three separate instruments (*Vorsorgevollmacht*, *Patientenverfügung* and *Betreuungsverfügung*) exist. The use of the same term for these three components raises the question of whether Dutch adults are sufficiently aware of the various options they have to make provisions for the future. In addition to the ambiguity concerning the content of the *levenstestament*, there is no consensus on the legal nature of the *levenstestament*. This applies, in particular, to the appointment of the attorney. There are, on the one hand, notaries who model the *levenstestament* predominantly on the statutory provisions of the ordinary power of attorney (Arts. 3:60-3:79 of the Dutch Civil Code). Since a power of attorney only grants an authority to act on behalf of the adult and does not create an obligation for the attorney to act, there are, on the other hand, notaries who argue that the *levenstestament* should also encompass an underlying agreement between the adult and the attorney. Through such an agreement, arrangements can be made about the tasks the attorney is going to perform for and on behalf of the adult and the rights and duties of both the adult and the attorney. In this regard, the provisions on the service provision agreement (Arts. 7:400-7:413 of the Dutch Civil Code) and the mandate agreement (Arts. 7:414-7:424 of the Dutch Civil Code) are considered applicable. According to Autar, both the absence of a generally accepted definition and the unclear nature of the *levenstestament*, mean that adults are not entirely sure what they 'get' when they ask the assistance of a notary to make a *levenstestament*.[15] In other words, clarity and uniformity are needed to ensure that adults are aware of the various options available to them while making provisions for a future period of incapacity, and to ensure that the *levenstestament* has a solid legal basis. Such clarity and uniformity can be achieved through statutory regulation of the *levenstestament*.

There is, however, another, more important, reason to consider statutory regulation of the *levenstestament*. This second reason relates to the question of whether the way the *levenstestament* is currently (not) regulated is compliant with international human rights norms and principles. In the context of the *levenstestament*, Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and Recommendation CM/Rec(2009)11 are of particular importance.

15 A.R. Autar, 'Inleiding' in A.R. Autar, J.P.M. Stubbé & L.C.A. Verstappen, *Compendium Levenstestament*, Den Haag; Sdu 2021, p. 19-28 (25).

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Based on Article 12(4) UNCRPD, states are obliged to provide for appropriate and effective safeguards to prevent the misuse and abuse of the *levenstestament* by the attorney.[16] Such safeguards must ensure that the adult's rights, will and preferences are respected, that undue influence is avoided and that conflicts of interest are managed. In addition to safeguards preventing the misuse and abuse of the *levenstestament*, Article 12 UNCRPD emphasises the need for support that enables the adult to decide and act himself and, when this is no longer possible, support provided by the attorney that is based on the adult's wishes, preferences and instructions.[17] This is, for example, reflected in Recommendation CM/Rec(2009)11 Principle 10, which stipulates that attorneys should be obliged to ascertain and take account of the adult's past and present wishes and feelings and, in addition, should be obliged to inform and consult the adult on an ongoing basis.[18] The Dutch government has, with regard to the implementation of these and other human rights norms and principles, taken a passive role. In practice, it is left to professional actors – most importantly the notariate – to ensure compliance with these human rights norms and principles and, in the end, to both the adult and the attorney who can include certain norms and principles guiding the actions of the attorney, in the *levenstestament*.

Stelma-Roorda *et al*. argue that this passive role of the Dutch state is not in line with the obligation of states to ensure that international human rights norms and principles are implemented.[19] The regulatory framework on the ordinary power of attorney, the service provision agreement and the mandate agreement has not been designed with a setting of future incapacity of the adult in mind and does not provide sufficient safeguards to ensure the prevention of misuse or abuse of the *levenstestament* and the active involvement of the adult.[20] The Dutch notariate has taken several steps to fill this gap, such as the development of a register in which notarised *levenstestamenten* can be registered and the development of a guideline notaries can use to assess whether clients have the capacity to make a *levenstestament* and are not unduly influenced by the prospective attorney.[21] However, it is important to realise that the notariate does not have the same authority and options to ensure compliance with, for instance, Article 12 UNCRPD as the Dutch legislature. A notary can, for instance, not oblige the adult to register the *levenstestament* as there is no statutory basis for mandatory registration. A notary can motivate his client to include additional safeguards in the *levenstestament*, such as a supervisory mechanism to prevent misuse or abuse, or to include an obligation for the attorney to involve the adult in the execution of the *levenstestament*. However, other than ceasing cooperation, notaries have limited

16 R. Stelma-Roorda, 'The Misuse or Abuse of Continuing Powers of Attorney: What Are Appropriate Safeguards?', *International Journal of Law, Policy and the Family*, 2021, vol. 35, no. 1, p. 1-25.

17 Stelma-Roorda 2021, p. 11-12.

18 Recommendation CM/Rec(2009)11, p. 9.

19 H.N. Stelma-Roorda, C. Blankman & M.V. Antokolskaia, 'A changing paradigm of protection of vulnerable adults and its implications for the Netherlands, *Family & Law* 2019, p. 1-18.

20 Stelma-Roorda (forthcoming).

21 In Dutch the guideline is known as the 'Stappenplan beoordeling wilsbekwaamheid ten behoeve van notariële dienstverlening'.

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means to oblige the adult to include such safeguards in the *levenstestament*. Taking the aforementioned into account, a more active approach by the Dutch state is needed to ensure that minimum safeguards are put in place to prevent the misuse and abuse of the *levenstestament* and to promote the involvement of the adult in the execution of the *levenstestament*.

In addition to these problems associated with the way the *levenstestament* is currently regulated in the Netherlands, several exploratory studies show that the application of the *levenstestament* in practice does not run smoothly in all cases. Both a survey study among notaries and a study of court cases show that safeguards to prevent the misuse and abuse of the *levenstestament* are not only a theoretical but also a practical necessity.[22] There have been several cases where an attorney has been prosecuted for financial abuse using a *levenstestament*.[23] In addition, the court has in several cases considered the attorney unsuited to the task at hand, for example, because the attorney had acted against the wishes of the adult or had denied the adult the care and company of others.[24] Notwithstanding the risk of misuse or abuse of the *levenstestament*, several notaries in the survey study pointed out the difficulty of convincing clients to include a form of supervision in the *levenstestament*.[25] Besides the risk of misuse and abuse, there is the problem of family disputes. Several court cases show that a disturbed relationship between either the attorneys or between the attorney(s) and other family members – not appointed as an attorney – can hinder the execution of the *levenstestament* or even make it impossible.[26] In addition to family disputes, situations in which the *levenstestament* is not accepted by third parties, such as banks, can frustrate the execution of the *levenstestament* by the attorney.[27] As noted above, from a human rights perspective, the emphasis is put on support that enables the adult to decide and act himself and, when this is no longer possible, on support that takes into account the adult's wishes, preferences and instructions. Based on interviews with adults who had recently made a *levenstestament*, interviews with prospective attorneys and interviews with active attorneys, Stelma-Roorda and Eichelsheim observed that the *levenstestament* does not seem to fulfil its potential as an instrument providing this support. They observed, among other, that adults find it difficult to record their wishes and preferences as it is difficult to predict what the future holds in store. The authority of the attorney to act on behalf of the adult is,

22 Stelma-Roorda (forthcoming).

23 District Court of Noord-Nederland 29 June 2021, ECLI:NL:RBNNE:2021:2845; District Court of Limburg 26 March 2021, ECLI:NL:RBLIM:2021:2690; District Court of Rotterdam 17 February 2021, ECLI:NL:RBROT:2021:1390; District court Midden-Nederland 2 October 2020, ECLI:NL:RBMNE:2020:4216; District Court Overijssel 9 May 2017, ECLI:NL:RBOVE:2017:1932; District Court Noord-Nederland 8 April 2016, ECLI:NL:RBNNE:2016:1712.

24 District Court of Midden-Nederland 14 March 2019, ECLI:NL:RBMNE:2019:1113; District Court of Noord-Holland 12 October 2017, ECLI:NL:RBNHO:2017:8483, §2.3; District Court of Noord-Holland 12 October 2017, ECLI:NL:RBNHO:2017:8481, §2.3; Court of Appeal Amsterdam 2 February 2016, ECLI:NL:GHAMS:2016:346, §4.12.

25 Stelma-Roorda (forthcoming).

26 *Ibid*.

27 *Ibid*.

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therefore, often considerably broad, resulting in situations where, although there is a lot the attorney *can* do, he knows very little about what the adult *wants* him to do. Based on these observations, Stelma-Roorda and Eichelsheim conclude that the value of the *levenstestament* can be enhanced, when the *levenstestament* is embedded in and accompanied by ongoing conversations between adults and attorneys about the adult's (changing) wishes, preferences and instructions. This recommendation could, however, be extended in the context of this article by examining how other countries promote the involvement of the adult in the execution of enduring documents.

4. Belgium: the zorgvolmacht

4.1 Regulatory framework

With the Act 17 March 2013, which entered into force on 1 September 2013, adults in Belgium were given the opportunity to provide for a future period of incapacity through a specific mandate agreement, in practice better known as a *zorgvolmacht*.[28] Although before that time it was already possible to make provisions for the future using an ordinary mandate agreement (Art. 1984-2010 of the Belgian Civil Code (BCC)), the Belgian legislator deemed it necessary to adopt a specific regulatory framework. With this regulatory framework the Belgian legislator sought to achieve various objectives, such as: creating legal certainty (there was at the time uncertainty regarding the legal status of ordinary mandate agreements as instruments to provide for a future period of incapacity), creating awareness of the possibility to make a *zorgvolmacht*, preventing the misuse and abuse of *zorgvolmachten*, assigning a more significant role to the social network of the adult concerned and reducing the workload of the courts.[29] Provisions on the *zorgvolmacht* (Arts. 489-490/2 BCC) were included in Title IX, on the protection of adults, in the Belgian Civil Code. Article 490/2 §1 BCC makes clear that, unless otherwise stipulated by law, the provisions on the ordinary mandate agreement also apply. Adults can include provisions on their property and financial matters in the *zorgvolmacht* and – since March 2019 – also provisions on their personal affairs.[30] Article 14 of the Belgian Act on Patient's Rights makes clear that adults may also appoint an attorney for health and medical affairs. Wuyts notes that the appointment of such an attorney can be included in the *zorgvolmacht*. In this case, attention should, however, be paid to the requirements of the Act on Patient's Rights, which – as a *lex specialis* – takes precedence over the generic provisions of

28 T. Wuyts, 'Buitengerechtelijke bescherming', in: J.P. Bogaert, K. Rotthier, E. van den Eenden & T. Wuyts, *Handboek bescherming wilsonbekwamen. Zorgvolmacht en bewind na de wet van 21 december 2018*, Mechelen: Wolters Kluwer 2020a, §70. Adults, in addition, have the possibility to draw up an advance directive addressed to the court and a future court-appointed representative (Art. 496 BCC) and the possibility to draw up an advance directive for euthanasia (Art. 4 of the Belgian Law on Euthanasia).

29 Belgian House of Representatives, Parl. St. Kamer 2011-12, nr. 53-1009/10, p. 29-31; T. Wuyts, 'Zorgvolmachten: een zegen of een vloek?', in: W. Pintens & C. Declerck (eds.), *Patrimonium 2020*, Brugge: Die Keure 2020b, p. 235-323 (235).

30 The scope of affairs that can be included in the *zorgvolmacht* was extended with the Act 21 December 2018, which entered into force on the 1 March 2019.

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Arts. 489-490/2 BCC.[31] A *zorgvolmacht* must have the specific aim to provide for a future period of incapacity and must be registered.[32] Mandate agreements which do not fulfil these requirements terminate upon the incapacity of the adult.[33]

4.2 Form and registration

Adults can make the *zorgvolmacht* in the form of a private document or through a notarial deed. The second form is required when the adult authorises the attorney to perform acts – such as the sale of the house – for which, in principle, a notarial deed is required.[34] Both private and notarial *zorgvolmachten* must be registered.[35] The adult may request the clerk's office of the court in the district where the adult resides to register the *zorgvolmacht*. Alternatively, the adult may ask a notary to register the *zorgvolmacht*. Both the clerk's office and the notary are obliged to ensure that the *zorgvolmacht* is registered within fifteen days in the Central Register kept by the Royal Association of Belgian Notaries.[36] This register contains information such as the adult's name, domicile, date and place of birth, but does not provide access to the content of the *zorgvolmacht*. A request to consult the register may be submitted by notaries, courts, public prosecutors, the attorney and the adult. According to Article 1242 of the Belgian Judicial Code, the clerk's office is obliged to verify whether the adult has made a *zorgvolmacht* when the court is confronted with an application for an adult guardianship measure. If the clerk's office finds that a *zorgvolmacht* has been made, it subsequently asks the notary or the clerk's office of the court where the *zorgvolmacht* has been deposited, to forward a certified copy of the document.[37] Article 490 BCC makes clear that terminations of the *zorgvolmacht* must also be registered. With this obligation, the legislator wanted to enable the courts to check whether the *zorgvolmacht* presented by the attorney, concerns a valid *zorgvolmacht*.[38]

31 Wuyts 2020a, §72.

32 Art. 490 BCC.

33 Both Wylleman (p. 28-33) and Swennen (p. 622-623) note, however, that this does not apply to mandate agreements made before September 2014 with regard to financial affairs and mandate agreements made before March 2019 concerning personal affairs. A. Wylleman, 'Buitengerechtelijke bescherming', in: P. Senaeve, F. Swennen & G. Verschelden (eds.), *Meerderjarige beschermde personen*, Brugge: Die Keure 2014, p. 23-48; F. Swennen, 'De meerderjarige beschermde personen (Deel II)', *Rechtskundig Weekblad* 2013, no. 15, p. 602-623.

34 Wuyts 2020a, §84; A. van Moerkercke, 'De zorgvolmacht: hoe gedetailleerd moet dat zijn?', *Vermogensplanning in de praktijk* 2019, no. 3, p. 14-19 (16); L. de Feyter & E. de Nolf, 'Enkele praktische aandachtspunten bij de redactie van een zorgvolmacht, in het bijzonder in relatie met een Belgische bancaire instelling', *Vermogensplanning in de praktijk* 2017, no. 3, p. 4-11 (6).

35 Wuys 2020a, §85; J. Verstraete, 'Krijtlijnen voor de zorgvolmacht', in: C. de Wulf, M. op de Beeck & J. Verstraete (eds.), *Liber Amicorum Aloïs Van den Bossche*, Brugge: die Keure 2019, p. 163-193 (182-183).

36 Wuyts 2020a, §86; Verstraete 2019, p. 182-183.

37 Wuyts 2020a, §116.

38 Belgian House of Representative, Parl. St. Kamer 2018-19, nr. 54-3303/001, p. 22; Wuyts 2020a, §112.

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4.3 Entry into force and appointment of the attorney

The *zorgvolmacht* can enter into force immediately or upon the incapacity of the adult. The adult can also combine these two options and determine, for instance, that the spouse – appointed as primary attorney – may act immediately, while the children – appointed as substitute attorneys – may only act after a formal assessment establishing the incapacity of the adult.[39] Such an assessment can be conducted by a physician. However, the adult can also require the attorney to ask the court to determine the moment of entry into force of the *zorgvolmacht*.[40] A person who has been placed under an adult guardianship measure cannot be appointed as an attorney.[41] In addition, the adult cannot appoint as attorney, persons or legal entities who, according to Article 496/6 BCC, may not be appointed by the court as guardians. This includes, for instance, the management or staff members of an institution, where the adult resides.[42] In line with Principle 4(2) of Council of Europe Recommendation CM/Rec(2009)11, the adult may appoint more than one attorney. The adult can require these attorneys to act jointly, concurrently, separately or as substitutes.[43] The risk of a conflict between attorneys has been addressed by the Belgian legislator in Article 490/2 §1 BCC, stipulating that the court shall settle disputes between attorneys based on what is considered in the adult's interests. Before taking a decision, the court must attempt to reconcile both parties.[44] Instead of leaving it to the court to reconcile both parties, the adult can also include in the *zorgvolmacht* provisions on a decision-making procedure, specifically aimed at dealing with a difference of opinion between the attorneys.[45] The adult cannot authorise the attorney to perform certain 'highly personal acts', such as making a will or getting married.[46] The adult may authorise the attorney to donate on his behalf. To do so, the adult must stipulate the object, the beneficiary and the terms and conditions of the donations.[47]

4.4 Rights and duties of the attorney

The adult retains legal capacity upon the entry into force of the *zorgvolmacht*.[48] According to Article 490 BCC, the adult can include his wishes and preferences in

39 De Feyter & De Nolf 2017, p. 6.
40 490/1 §2 BCC; Belgian House of Representatives, Parl. St. Kamer 2018-19, nr. 54-3303/11, p. 6; Wuyts 2020a, §82.
41 Art. 490/1 §1 BCC.
42 Wuyts 2020a, §96; Wylleman 2014, p. 34-37.
43 Wuyts 2020a, §96; Belgian House of Representatives, Parl. St. Kamer 2011-12, nr. 53-1009/10, p. 31. The explanatory memorandum attached to Recommendation CM/Rec(2009)11 makes clear that the adult may require the attorneys to act and decide together (jointly); may appoint attorneys for different affairs, *e.g.* an attorney for financial affairs and an attorney for health and medical affairs (concurrently); may authorise attorneys to act and decide independently (separately); and, may appoint one or more substitute attorneys who are to replace the first-mentioned attorney in case this person is unable or unwilling to take up the task of attorney (substitutes).
44 Verstraete 2019, p. 189.
45 Wuyts 2020a, §98.
46 Wuyts 2020a, §73 & §94; Verstraete 2019, p. 174-175.
47 Verstraete 2019, p. 175; Wylleman 2014, p. 35.
48 Wuyts 2020a, §77.

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the *zorgvolmacht*. Article 490/2 §1 BCC makes clear that the attorney must observe these wishes and preferences as much as possible.[49] Wuyts argues that the attorney can ask the court – when necessary – to deviate from the stipulated wishes and preferences in the event the adult is no longer able to indicate his current wishes and preferences due to incapacity.[50] In addition to observing the adult's wishes and preferences, the attorney is obliged to involve the adult as much as possible in the execution of the *zorgvolmacht*. In this regard, the attorney must consult the adult – and if applicable, a so-called 'trusted person' or supervisory attorney appointed by the adult – at regular intervals, but at least once a year.[51] The adult's assets must be separated from the attorney's assets and the adult's bank account must be registered in his own name.[52] Article 1993 BCC makes clear that the attorney is obliged to render account.[53] The attorney cannot act as the counterparty of the adult. In the event there is a conflict of interests, the court appoints a so-called 'attorney ad hoc'.[54] This attorney ad hoc temporarily acts instead of the attorney concerning those matters, involving a conflict of interests. The appointment of an attorney ad hoc can be left to the discretion of the court. The adult can, however, also include provisions on the appointment of an attorney ad hoc in the *zorgvolmacht*.[55]

4.5 Supervision

The adult may include supervisory mechanisms in the *zorgvolmacht*, such as the appointment of a supervisory attorney or 'trusted person', who supervises the actions of the attorney and initiates a so-called 'alarm bell procedure' upon signs that something is going wrong.[56] This 'alarm bell procedure' can be used by any person having an interest (family, neighbours, friends, etc.) to bring (potential) situations of misuse or abuse to the attention of the court.[57] When the court finds that the execution of the *zorgvolmacht* by the attorney adversely affects the interests of the adult concerned, the court may partially or completely terminate the *zorgvolmacht* and order an adult guardianship measure instead. The court can also subject the execution of the *zorgvolmacht* to the same procedural requirements

49 Art. 490 BCC uses the term 'principles', but discussion in Parliament has made clear that this term is to be understood as encompassing the adult's wishes and preferences concerning the execution of the *zorgvolmacht* – Belgian House of Representatives, Parl. St. Kamer 2011-12, nr. 53-1009/10, p. 39; see also T. Wuyts, 'Een kritische doorlichting van (modellen inzake) zorgvolmachten', in: G. Verschelden (ed.), *Rechtskroniek van het Notariaat*, Herentals: Knops Publishing 2020c, p. 91-131 (124).

50 There is no legal provision stipulating as such, Wuyts (2020c,p. 126-127) seems to indicate that the courts can apply Art. 499/1 §3 BCC by way of analogy. This legal provision concerns the wishes and preferences of the adult included in an advance directive addressed to the court and the court-appointed representative.

51 Wuyts 2020a, §98.

52 Art. 490/2 §1 BCC.

53 Wuyts 2020a, § 102; Verstraete 2019, p. 169.

54 Art. 490/2 §1 BCC.

55 Wuyts 2020a, §98.

56 See also Verstraete 2019, p. 173.

57 Wuyts 2020a, §107; Verstraete 2019, p. 191.

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that apply when an adult guardianship measure is ordered. Examples are an obligation for the attorney to obtain the authorisation of the court for certain actions (Art. 499/7 BCC) or an obligation to periodically render account to the court (Art. 499/14 BCC).[58]

4.6 Law in action

An evaluation of the Act 17 March 2013, including the provisions on the *zorgvolmacht*, is scheduled to take place in 2023. In anticipation of this evaluation, Wuyts conducted an exploratory study to examine whether the objectives of the legislator have been achieved in practice.[59] This study, conducted in 2020, consists of an analysis of published case law, an analysis of the information on *zorgvolmachten* registered in the Central Register and interviews with relevant stakeholders (lawyers, judges, notaries, financial institutions, social services) in the Belgian district of Limburg.[60] The study provides insight into the problems encountered with the *zorgvolmacht* in practice. Wuyts also presents recommendations to address the detected problems. An extensive discussion of this study falls beyond the scope of this article; I will confine myself to presenting what I consider the most significant observations and recommendations.[61] The study, first of all, indicates that mere statutory regulation of the *zorgvolmacht* has not automatically resulted in more general awareness of the possibility to make a *zorgvolmacht*. Although in Belgium the number of registered *zorgvolmachten* is still increasing annually, Wuyts argues that more can be done to make the general public aware of the possibility to make a *zorgvolmacht*, and, more specifically, to provide both the public and professionals with correct information about the benefits and consequences of making a *zorgvolmacht*.[62] Wuyts' study also signals the phenomenon of family disputes as a problem that can occur in the execution of the *zorgvolmacht*. Such disputes can arise, when the adult to the dismay of the other children, singles out one of the children as attorney. In some cases, this results in an application for an adult guardianship measure by family members who have not been appointed as attorneys.[63] However, the appointment of all children as attorneys can also lead to family disputes. For example, when the adult has authorised all children to act separately and one of the children starts to act – independently – without informing and consulting the other attorneys.[64] According to Wutys, the proposed solution to these problems is to oblige the attorney to execute his charge clearly and transparently, thus preventing suspicions of other attorneys and/or family

58 Wuyts 2020a, §107; D. Scheers, 'Rechtsplegingen', in: P. Senaeve, F. Swennen & G. Verschelden (eds.), *Meerderjarige beschermde personen*, Brugge: Die Keure 2014, p. 213-276 (214-216).

59 The results of this study were presented at a conference in December 2020 and in written form by means of the publication *Zorgvolmachten: een zegen of een vloek?*.

60 Wuyts 2020b, p. 240-244. These interviews were conducted by students at Hasselt University.

61 A more detailed discussion is included in the country report on Belgium, which can be found in the appendix section of the dissertation by Stelma-Roorda (forthcoming).

62 Wuyts 2020b, p. 244-265 & pp. 316-318; in 2017, 28.644 *zorgvolmachten* were registered; in 2018, 37.312 *zorgvolmachten* and in 2019, 54.955 *zorgvolmachten*.

63 Wuyts 2020b, p. 265-267 and p. 318-319.

64 *Ibid*.

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members.[65] Should a family dispute reach the court, the court may, as indicated, mediate in a conflict. In practice, in some cases the court also imposes an evaluation period during which the court monitors the actions of the attorney.[66]

As noted above, the Belgian legislator has through various provisions – such as the obligation for the attorney to involve the adult in the execution of the *zorgvolmacht* – tried to promote the adult's autonomy. Wuyts concludes, however, that in practice there is little attention to the execution of these provisions.[67] He notes in this respect that the belief in tailor-made protection and the workload it entails seems to play an important role in the promotion of the adult's autonomy when it comes to the execution of the *zorgvolmacht*.[68] Concerning the latter aspect (the workload), the task of providing adults with the assistance to formulate and include tailor-made wishes and instructions in the *zorgvolmacht* has in practice appeared a task too time-consuming for notaries. Several ideas are presented to mitigate this problem. Wuyts suggests, for instance, that adults can be encouraged to think about their wishes and instructions in advance – before the meeting with the notary – using a checklist or questionnaire which also contains examples of wishes and instructions that can be included in the *zorgvolmacht*.[69] New developments such as 'legal tech' and 'legal design' might, in addition, according to Wuyts, offer possibilities for clients to draft their own *zorgvolmacht* in advance. This *zorgvolmacht* can subsequently be sent to and discussed with the notary, enabling, according to Wuyts, a more targeted contribution by the notary to the process of making a *zorgvolmacht*.[70] Wuyts also addresses the impact of time, meaning that the adult's wishes and preferences might be subject to change. In this regard, Wuyts observes that adults do not always seem to be aware of the possibility to appoint another attorney or to amend their *zorgvolmacht*. In some cases, adults are afraid to oppose the decisions or actions of their attorney and therefore leave the *zorgvolmacht* unchanged.[71] In this respect, Wuyts recommends informing adults about the impact of time in terms of changing wishes and preferences and about the possibilities to amend or terminate the *zorgvolmacht*. He further recommends that adults include provisions in the *zorgvolmacht* that anticipate the scenario in which the adult's wishes and preferences change.[72] This can be done, for example, by stipulating in which circumstances the attorney may deviate from the adult's recorded wishes and preferences. Another possibility, according to Wuyts, is to appoint one or more 'trusted persons', who can assess whether circumstances indeed have changed and can assess the impact of these changes on the recorded wishes and preferences of the adult.[73]

65 *Ibid*.
66 Wuyts 2020b, p. 281-291 and p. 321-322.
67 Wuyts 2020b, p. 276-281 and p. 319-320.
68 Wuyts 2020b, p. 319-320.
69 Wuyts 2020c, p. 96-97. Wuyts refers in this regard to the checklists and information materials which have been made publicly available in the Netherlands by the Dutch notariate.
70 *Ibid*.
71 *Ibid*.
72 Wuyts 2020b, p. 323-324.
73 Wuyts 2020c, p. 126-127.

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Wuyts observes that in practice there seem to be few difficulties with the enforceability of the *zorgvolmacht*. That being said, according to Wuyts the privacy of the adult deserves special attention. Financial institutions, for example, require a copy of the entire *zorgvolmacht* and proof of its registration. However, these institutions do not have any interest in becoming acquainted with the adult's personal and medical preferences, which the adult may also have included in the *zorgvolmacht*. In this context, Wuyts proposes to introduce so-called 'certificates', which only include the information that is relevant for the third party in question.[74] To address (potential) situations of misuse or abuse, more attention is, according to Wuyts, needed for the 'alarm bell procedure'.[75] In addition, Wuyts recommends adopting an obligation for banks to report suspicious transactions; and to adopt an obligation for the adult to include at least one supervisory mechanism in the *zorgvolmacht*. The obligation for the attorney to keep the assets of the adult separate from his own assets should, according to Wuyts, be explicitly included in the *zorgvolmacht*, to ensure the attorney is aware of this obligation.[76]

5. England and Wales: the lasting power of attorney

5.1 Regulatory framework

In England and Wales, the opportunity for adults to make their own provisions for a future period of incapacity was introduced with the Enduring Powers of Attorney Act 1985. Until this act came into force in 1986, the only way to empower another person to act on behalf of the adult was to apply to what is referred to as the Court of Protection to be appointed as what is nowadays called a 'deputy'.[77] Ordinary powers of attorney could not be used to provide for a future period of incapacity as these are automatically revoked when the adult loses capacity.[78] The Enduring Powers of Attorney Act 1985, which introduced the *enduring power of attorney* (EPA), was replaced by the Mental Capacity Act 2005 (MCA 2005). This act, which entered into force on 1 October 2007, introduced the so-called *lasting power of attorney*. The difference between the EPA and the LPA is that EPAs became effective as soon as they were granted by the adult unless the EPA specifically stated that the instrument would enter into force upon the incapacity of the adult.[79] The requirement to register the EPA arose upon the incapacity of the adult and the EPA could function as an ordinary power of attorney in the meantime. As I will discuss in more detail below, the LPA must be registered before it can enter into force. Ward notes that problems with the registration of the EPA (registration in practice

74 Wuyts 2020b, p. 291-294 and p. 322-323; Wuyts 2020, p. 281-291 and p. 321-322.
75 Wuyts 2020b, p. 324-326.
76 *Ibid*.
77 D. Lush, 'Adult Guardianship and Powers of Attorney in England and Wales', in: L. Ho & R. Lee, *Special Needs Financial Planning. A Comparative Perspective*, Cambridge: Cambridge University Press 2019, p. 117-148 (133); C. Ward, *Lasting Powers of Attorney. A Practical Guide*, London: The Law Society 2016, p. 3-4.
78 D. Lush & C. Bielanska, *Cretney & Lush on Lasting and Enduring Powers of Attorney*, London: LexisNexis 2017, p. 3 referring to the case of *Drew v. Nunn* (1878) 4 QBD 661; Ward 2016, p. 3-4.
79 J. Thurston, *A Practitioner's Guide to Powers of Attorney*, London: Bloomsbury 2015, p. 4 and p. 33.

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frequently did not take place) and the widespread belief that EPAs were misused, were among the reasons for the introduction of the LPA.[80] With the introduction of the LPA, the scope of affairs that can be included in the LPA was expanded. According to section 9(1) of the MCA 2005, the adult can authorise the attorney to make decisions about property and financial affairs, personal welfare or both. Section 11(7) of the MCA 2005 makes clear that the authority to make decisions about the adult's personal welfare extends to decisions about the adult's health and medical affairs, unless otherwise stated by the adult in the LPA. If the adult wishes to authorise the attorney to make decisions on life-sustaining treatment, this must be explicitly stated in the LPA.[81]

5.2 Form and registration

Adults must use a prescribed form to create an LPA. Two different forms can be distinguished. The so-called LP1H form can be used for an LPA for health and care affairs and the LP1F form for an LPA for property and financial affairs.[82] Both forms can be completed online or downloaded from the website of the Office of the Public Guardian and completed on paper.[83] In England and Wales the Office of the Public Guardian (OPG) is responsible for maintaining a register of LPAs and EPAs and for investigating complaints about the manner in which an attorney is exercising his powers.[84] The LPA must be signed by both the adult, the attorney(s) and a so-called certificate provider. With his signature, the certificate provider confirms that the adult understands the purpose of the LPA, that no fraud or undue pressure has been used to induce the adult to make the LPA, and that the adult understands the scope of the authority conferred to the attorney.[85] The certificate provider can either be a person who has known the adult personally for the last two years or a professional, such as a care worker, a barrister, a lawyer or a social worker.[86] The attorney, family members of the adult or the attorney and, for instance, the staff of the care home where the adult is residing, cannot act as certificate providers.[87] The LPA may not be used until it has been registered with the OPG.[88] Both the adult and the attorney(s) may apply to register the LPA. When the adult has appointed two or more attorneys to act jointly, the application must

80 Ward 2016, p. 9-10; See for a more detailed discussion of the reasons to introduce the LPA, Lush & Bielanska 2017, p. 10-15.
81 Section 11(8) of the MCA 2005.
82 Ward 2016, p. 212.
83 www.gov.uk/government/publications/make-a-lasting-power-of-attorney (last accessed: 1 April 2022).
84 A. Stanyer, *Financial abuse of older clients: law, practice and prevention*, London: Bloomsbury 2017, p. 96.
85 See section 10 of the LP1H and LP1F forms, www.gov.uk/government/publications/make-a-lasting-power-of-attorney (last accessed: 1 April 2022); Schedule 1, section 2(1) under e of the MCA 2005; Lush & Bielanska 2017, p. 90-91 and p. 116-118; Ward 2016, p. 11-12.
86 Regulation 8 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; Lush & Bielanska 2017, p. 93-97.
87 Regulation 8(3) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; Lush & Bielanska 2017, p. 97-98.
88 Lush & Bielanska 2017, p. 125; Ward 2016, p. 232.

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be made by all attorneys.[89] The register provides access to the content of the LPA. A request to search the register can, in principle, be made by anyone as long as the person in question can provide the name of the adult, the date of birth and the address. Two different types of searches are distinguished, a so-called 'first tier' and 'second tier' search.[90] Information received after a 'first tier' search includes, among other, the name of the attorney(s), whether the LPA concerns property and financial affairs and/or personal welfare affairs, the date the LPA was made and, if applicable, the date the LPA was revoked. The information revealed in a 'second tier' search, varies according to the individual circumstances of the case. The OPG carefully considers each application before deciding on whether additional information is released.[91] Although nowhere stipulated as such, an obligation for the Court of Protection to check whether an LPA is in place can be inferred from section 1(6) of the MCA 2005 stipulating that the interests of the adult must be protected in a way that restricts the rights and freedom of action of the adult as little as possible. In addition to first-time registrations, the OPG is obliged to register changes and revocations of the LPA.[92]

5.3 Entry into force and appointment of the attorney

As noted above, the LPA may not be used until it has been registered with the OPG. The adult may name up to five persons who are to be notified when a request to register the LPA is made. These named persons may object to the registration and consequently the entry into force of the LPA. In this regard, a distinction is made between factual objections, such as the death of the adult or the attorney, and prescribed objections, such as an allegation that the adult lacked the capacity to make an LPA.[93] Enquiries made at the OPG revealed that, in practice, the majority of adults do not make use of the possibility to name persons.[94] In other words, this safeguard seems of little importance in practice. Once registered, the LPA for property and financial affairs can enter into force immediately or upon the incapacity of the adult. This is different from an LPA for health and care affairs. The attorney can only act on behalf of the adult regarding health and care affairs if the adult lacks the capacity to make a decision himself.[95] A person who is bankrupt or subject to a debt relief order cannot be appointed as an attorney for property and financial affairs.[96] The MCA 2005 Code of Practice – a further guide for people with duties and functions under the MCA 2005 – stipulates that a paid care worker, in

89 Lush & Bielanska 2017, p, 126.
90 Stanyer 2017, p. 99.
91 Stanyer 2017, p. 100.
92 Schedule 1, part 4, section 21-25 of the MCA 2005; Regulation 21 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; Lush & Bielanska 2017, p. 171-172.
93 www.gov.uk/object-registration-power-attorney (last accessed: 1 April 2022).
94 According to internal research of the Office of the Public Guardian in 2017, 83% of the adults in the sample did not choose to name any persons, 13% of the adults only named one person and 4% of the adults named two persons.
95 Lush & Bielanska 2017, p. 61.
96 Section 10(2) of the MCA 2005; Lush & Bielanska 2017, p. 48.

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principle, should not agree to act as an attorney.[97] Section 10(3) of the MCA 2005 makes clear that the adult may appoint more than one attorney. The adult can appoint the attorneys to act jointly, jointly and severally, or a combination of the two aforementioned. Jointly means that the attorneys are obliged to make all decisions together. If the attorneys are to act jointly and severally, decisions may be taken both together and independently of each other. The adult can also appoint a replacement attorney. The attorneys cannot be authorised to perform 'highly personal acts', such as consenting to a marriage or civil partnership or voting on behalf of the adult.[98] The adult may authorise the attorney to donate on his behalf subject to the conditions of section 12(2) of the MCA 2005. This provision makes clear that donations may only be made on customary occasions – such as a birthday – to persons related to or connected to the adult or to any charity to which the adult would be expected to donate.[99] Section 12(2) of the MCA 2005, in addition, stipulates that the value of such a donation may not be unreasonable considering all circumstances and, in particular, the size of the adult's estate.

5.4 Rights and duties of the attorney

The adult retains legal capacity upon the entry into force of the LPA.[100] Section 9(4) of the MCA 2005 requires the attorney to act in accordance with the adult's preferences and instructions as recorded in the LPA. The attorney must, in addition, act in accordance with the provisions of the MCA 2005, in particular section 1 – which lists the foundational principles of the act – and section 4 on best interests.[101] Section 1(3) of the MCA 2005 stipulates that 'a person is not to be treated as unable to make a decision unless all practical steps to help him do so have been taken without success'. The attorney is, in other words, obliged to provide the adult with the support to make his own decisions.[102] Chapter 3 of the MCA 2005 Code of Practice provides information on the steps the attorney can take in this respect. Lush and Bielanska note that the attorney should, for instance, consider whether the adult has received the relevant information to make a decision, whether the information has been presented in such a way as to make it easier for the adult to understand it and whether the aspects of time and place have been considered in enabling the adult to make a decision.[103] If the adult lacks the capacity to decide himself, the attorney may decide on behalf of the adult.[104] Section 1(5) of the MCA 2005 makes clear that the attorney must act in the best interests of the adult. Section 4 of the MCA 2005 sets out how the attorney can determine what is in the adult's best interests. The attorney is, for instance, obliged to consider the adult's

97 Section 7.10 of the MCA 2005 Code of Practice.
98 Section 27(1) and section 29(1) of the MCA 2005; Lush & Bielanska 2017, p. 223-224.
99 Section 12(3) of the MCA 2005.
100 This follows from section 1 of the MCA 2005 which sets out five principles upon which the act is built. According to the first principle 'a person must be assumed to have capacity unless it is established that he lacks capacity'.
101 Lush & Bielanska 2017, p. 233.
102 Lush & Bielanska 2017, p. 236-237.
103 Lush & Bielanska 2017, p. 237; see also the MCA 2005 Code of Practice, chapter 3.
104 *Ibid*.

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past and present wishes and feelings and the beliefs and values that would likely influence the adult's decision if the adult would have had capacity.[105] In addition to adhering to the provisions of the MCA 2005, the attorney is obliged to take into account the provisions of the MCA 2005 Code of Practice.[106] Section 7.58 of the MCA 2005 Code of Practice outlines the duties that the attorney has under the law of agency. These include the fiduciary duty of the attorney not to take advantage of his position and benefit himself, but to benefit the adult; the duty not to give up the position of attorney without informing the adult and the court, the duty to keep accounts and the duty to keep the adult's money and property separate from his own.

5.5 Supervision

The adult may include supervisory mechanisms in the LPA, such as the appointment of more than one attorney or the appointment of a person to periodically audit the accounts of the adult.[107] Passive supervision – supervision upon grounds for concern – is carried out by the Office of the Public Guardian and the Court of Protection. Any party of interest can report concerns with the OPG. The OPG may require the attorney to provide information or produce specified documents when it suspects that the attorney has behaved or may be having in a way that contravenes with the attorney's mandate or is not in the best interests of the adult.[108] The OPG can also direct a so-called Court of Protection Visitor to visit the attorney and subsequently report to the OPG.[109] If the Office of the Public Guardian finds that there are grounds for concern, it may apply to the Court of Protection and require the revocation of the LPA and the appointment of a court-appointed deputy instead of the attorney.[110]

5.6 Law in action

Several studies have been conducted in England and Wales, looking at how the LPA operates in practice. In 2014 a study exploring the potential customer base of the LPA was conducted by Beckett *et al*. at the behest of the Office of the Public Guardian. Beckett *et al*. found a lack of awareness of the LPA among potential customers; 45% of the respondents in their survey had never heard of the LPA or knew nothing about it.[111] Upon being informed of the possibility to make an LPA, only 34% of the respondents were interested in making an LPA at some stage in the future.[112] Several reasons for adults not to make an LPA were distinguished,

105 Section 4(6) of the MCA 2005. Chapter 5 of the MCA 2005 Code of Practice provides further guidance on best interests decision-making.

106 Lush & Bielanska 2017, p. 241.

107 Thurston 2015, p. 277 referring to section 7.39 of the MCA 2005 Code of Practice.

108 Regulation 46 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; Stanyer 2017, p. 277.

109 Regulation 44 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007; Lush & Bielanska 2017, p. 174-175.

110 Stanyer 2017, p. 106; Section 22 of the MCA 2005.

111 A. Beckett, K. Leary, L. Cumming & G. Davies, *The Future of Lasting Power of Attorney. A research report for the Office of the Public Guardian*, London: Ipsos MORI2014, p. 5.

112 *Ibid*.

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including so-called 'attitudinal and emotional barriers', such as the adult's belief that they would not lose capacity, and so-called 'relevance barriers', such as the belief that their relatives would be able to manage without an LPA.[113] Other barriers included 'practical barriers' such as not having someone to appoint as an attorney; 'information barriers,' reflecting a lack of awareness of the LPA; and, 'process barriers' such as the costs of registering an LPA.[114]

In 2013, a committee of the House of Lords conducted a so-called post-legislative scrutiny of the Mental Capacity Act 2005 to examine whether the act was working as parliament intended.[115] In March 2014, the final report was presented based on fifteen public evidence hearings and 216 written submissions from both organisations and individuals with experience with the MCA 2005.[116] Concerning LPAs, the Committee, among other, expressed its concern that LPAs are in practice not always recognised or understood.[117] In this context problems with the acceptance of the LPA by banks were mentioned, but also a lack of knowledge and awareness of LPAs in the medical and care sector. Several experts heard by the committee also expressed their concern about attorneys' lack of awareness and knowledge of their rights and duties.[118] The committee recommended, among other, that the government – together with the OPG – should address the poor understanding of LPAs among professional groups and consider how attorneys, faced with non-compliance by public authorities or private companies, such as banks, could be supported in the absence of specific remedies.[119]

In a study on the financial abuse of adults lacking capacity, Daley *et al*. looked at a sample of 34 cases heard in the Court of Protection between 1 January and 9 November 2015, to study the characteristics of financial abuse by both attorneys and deputies.[120] In eighteen of these 34 cases, the court was confronted with a situation in which the attorney allegedly had breached his authority or had failed to act in the bests interests of the adult concerned.[121] Examples of situations raising suspicions or indicating misbehaviour by the attorney included: co-mingling of the adult's and attorney's assets; a failure to pay the adult's care home fees; donations exceeding the permissible amount and chaotic management of the adult's assets.[122] In addition, to situations of abuse or misuse of the LPA, Daley *et al*. found indications of family disputes in 23 cases, such as disputes about who should act as

113 Ibid., p. 6-7.
114 *Ibid*.
115 House of Lords, Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post legislative scrutiny*, 2014, p. 22.
116 *Ibid*.
117 House of Lords, Select Committee on the Mental Capacity Act 2005 2014, p. 72.
118 *Ibid*., p. 73.
119 *Ibid*., p. 74-75; see also Lush & Bielanska 2017, p. 21-22.
120 G. Daley, M. Gilhooly, K. Gilhooly, P. Harries & M. Levi, *Financial Abuse of People Lacking Mental Capacity. A Report to the Dawes Trust*, London: Brunel University London 2017, p. 70. Important to note here, is that the 32 of the 34 cases had been dealt with by the same judge (Daley *et al*. 2017, p. 73).
121 Daley *et al*. 2017, p. 72.
122 *Ibid*, p. 73.

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attorney or disputes about the way the attorney had handled the affairs of the adult.[123] Daley *et al*. note in this regard that the role of attorney can have a negative side-effect, namely that it further exacerbates a bad relationship or that it creates suspicions or conflicts where none existed in the past.[124] In addition to the phenomenon of family disputes, Daley *et al*. also found that in some cases attorneys are insufficiently aware of their rights and duties. In this regard, they note:

> 'Individuals do not always remember the information that has been provided to them, but there seems to be too little information provided to them about their role as attorneys when LPAs are first registered. Better information – including warnings about the implications of failing to exercise their duties properly – might head off difficulties that crop up when LPAs are put into effect.'[125]

6. Germany: the Vorsorgevollmacht

6.1 Regulatory framework

In Germany, the opportunity for adults to make their own provisions for a future period of incapacity using a *Vorsorgevollmacht* already exists for quite some time. The *Vorsorgevollmacht* is rooted in the ordinary power of attorney (*Vollmacht*) and the mandate or agency agreement (*Auftrag* or *Geschäftsbesorgungsvertrag*), which means that adults in Germany have been able to make their own provisions for the future since the introduction of the German Civil Code (GCC) in 1900.[126] In 1990, the German legislator with the *Betreuungsgesetz* – a law fundamentally reshaping the system of adult protection in Germany – acknowledged that instruments such as the *Vorsorgevollmacht* take precedence over the appointment of a *Betreuer* or representative by the court.[127] The *Betreuungsgesetz* has been amended and complemented four times (1999, 2005, 2009 and 2013). Important changes and additions concerning the *Vorsorgevollmacht* were the adoption of §1904 and §1906 GCC in 1999, which will be discussed in more detail below. Another major reform act – the *Gesetz zur Reform des Vormundschafts- und Betreuungsrechts* – will enter into force on 1 January 2023. However, this act changes the regulation of the *Vorsorgevollmacht* only on minor points.[128] With a *Vorsorgevollmacht*, adults can

123 *Ibid*, p. 82.
124 *Ibid*, p. 85.
125 *Ibid*, p. 97.
126 V. Lipp, *Going Private: "Vorsorgevollmacht" as an Alternative to Legal Guardianship for Adults*, revised version (11 January 2016) of a lecture held at the University of Leuven on 10 February 2015, p. 2, via: www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Vorsolgevollmacht_as_an_Alternative.pdf (last accessed: 1 May 2022); V. Lipp, 'Germany', in: R. Frimston, A. Ruck Keene, C. van Overdijk & A. Ward, *The international protection of adults*, Oxford: Oxford University Press 2015, p. 375-385 (379). This holds true in particular for *Vorsorgevollmachten* for financial and property matters. Until 1999, it was unclear and debated whether personal matters could also be included in the *Vorsorgevollmacht*.
127 *Ibid*.
128 Where relevant changes will be noted in this article.

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make provisions for financial, medical and personal matters. Although the term at first glance seems to indicate otherwise, the *Vorsorgevollmacht* consists of two legally separate components. A distinction is made between the *Vollmacht* or ordinary power of attorney, *i.e.* a conferral of authority to the attorney to act on behalf of the adult, and the so-called *Vorsorgeverhältnis*, a basic agreement between the adult and the attorney stipulating how the *Vollmacht* should be used.[129] Lipp notes that the basic agreement or *Vorsorgeverhältnis* will in most cases be based on the legal construct of the non-remunerated mandate (*Auftrag*) or the remunerated agency agreement (*Geschäftsbesorgungsvertrag*).[130] The foregoing means that to determine the provisions applicable to the *Vorsorgevollmacht*, it is necessary to look at various sections of the German Civil Code. These include the legal provisions on the ordinary power of attorney (§164-181 GCC) and the mandate and agency agreement (§662-675b GCC). In addition, section 3, title 2 of the GCC, titled 'Legal Custodianship' (*Rechtliche Betreuung*) contains several provisions which apply to the *Vorsorgevollmacht*.

6.2 Form and registration

Based on Article 167 GCC on the *Vollmacht*, there are, in general, no specific requirements concerning the form of the *Vorsorgevollmacht*. This means that the *Vorsorgevollmacht* can, in theory, be granted orally. However, Zimmerman notes that this is not advisable because in practice such a *Vorsorgevollmacht* will generally not be accepted by third parties.[131] In other words, the written form is recommended. In some cases, the written form is also required. Article 1904 GCC, for instance, makes clear that when the adult wants to authorise the attorney to take medical decisions on his behalf, this authority must be granted explicitly and in writing. In addition to the written form, in some cases, an authentication or *Beglaubigung* of the *Vorsorgevollmacht* is required. This is for example the case when the adult wants to authorise the attorney to sell the family home. With a *Beglaubigung*, a notary or *Betreuungsbehörde* – an authority responsible at the local level for certain matters regarding the protection of adults – verifies the identity of the adult and confirms that the signature on the *Vorsorgevollmacht* is that of the adult concerned.[132] The adult can register the *Vorsorgevollmacht* in a register kept by the Federal Chamber of Notaries (the *Bundesnotarkammer*).[133] This register contains information such as the name of the adult and the attorney(s) but does not provide access to the content of the *Vorsorgevollmacht*. Registration is voluntary, the adult is not obliged to

129 V. Lipp, 'Instrumente privater Vorsorge', in: V. Lipp, *Handbuch der Vorsorgeverfügungen*, München: Verlag Franz Vahlen 2009, p. 51-60 (56); J. Spalckhaver, 'Die Vorsorgevollmacht und das ihr zugrunde liegende Rechtsverhältnis als umfassende Vorsorgeregelung', in: V. Lipp, *Handbuch der Vorsorgeverfügungen*, München: Verlag Franz Vahlen 2009, p. 95-105 (96-97).

130 Lipp 2016, p. 3; Lipp 2009, p. 56; see also W. Zimmerman, *Vorsorgevollmacht, Betreuungsverfügung, Patientenverfügung für die Beratungspraxis*, Berlin: Erich Schmidt Verlag 2017, p. 108-109.

131 Zimmerman 2017, p. 50-51. See also D. Kurze, *Vorsorgerecht. Vollmacht, Patientenverfügung, lebzeitige Verfügungen*, München: C.H. Beck 2017, p. 91 and p. 96-97.

132 Kurze 2017, p. 92-93.

133 §78a of the Federal Code for Notaries.

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register the *Vorsorgevollmacht*, nor any changes or terminations thereof.[134] Currently, only the court (*Betreuungsgericht*) has access to the information included in the register.[135] An obligation for the court to check whether a *Vorsorgevollmacht* is in place can be inferred from Article 1896(2) GCC stipulating that legal representation by a court-appointed representative (*Betreuung*) may only be ordered when necessary.

6.3 Entry into force and appointment of the attorney

It is for the adult to decide when the *Vorsorgevollmacht* enters into force. The adult can decide that the *Vorsorgevollmacht* enters into force immediately or at a specified time in the future (*e.g.* the incapacity of the adult). Both Zimmerman and Müller and Renner note that adults who choose the second option are well advised to include a provision stipulating when the attorney may make use of the authority granted to him, in the basic agreement between the adult and the attorney.[136] Including such a provision in the *Vollmacht* – using a conditional power of attorney – may cause problems with the acceptance of the *Vorsorgevollmacht* by third parties such as banks, as these could require proof that the condition for the entry into force of the *Vollmacht* has been met.[137] Although the adult is free to decide whom to appoint as an attorney, the German legislator has tried to discourage the appointment of certain persons as attorney. According to §1896(2) in conjunction with §1897(3) GCC, the principle of subsidiarity – according to which the *Vorsorgevollmacht* should take precedence over the *Betreuung* – does not apply when the adult has appointed as attorney the management or staff of the institution in which he resides.[138] In addition to this discouragement, there is a restriction with regard to the appointment of so-called professional attorneys. Under the German Legal Services Act (*Rechtsdienstleistungsgesetz*), only a solicitor (*Rechtsanwalt*) may act as a professional attorney.[139] The adult may appoint more than one person to act as attorney and may direct these attorneys to act jointly, concurrently, separately or as substitutes. Although in theory possible, not all these options seem feasible in practice. Both Zimmerman and Müller and Renner note that practical difficulties can, for instance, arise when attorneys have to act jointly, meaning that all decisions must be taken together.[140] The attorney's task

134 Zimmerman 2017, p. 143.

135 *Ibid*.

136 G. Müller & T. Renner, *Betreuungsrecht und Vorsorgeverfügungen in der Praxis*, München: Carl Heymanns Verlag 2018, p. 94-97 and p. 100-101; Zimmerman 2017, p. 56-57.

137 *Ibid*.

138 By means of a new section 1816(6) of the German Civil Code which will enter into force on 1 January 2023, the German legislator has widened the range of persons who are considered unsuited to act as attorney. Section 1816(6) GCC-new stipulates that 'a person who is in a relationship of dependency or in another close relationship with an institution or service provider involved in the care of the adult cannot be appointed as *Betreuer* [court-appointed support person]'. Such a person can consequently also not be appointed as attorney. This includes, for example, persons employed by organisations that provide outpatient care.

139 Kurze 2017, p. 239-241; Lipp 2016, p. 4. See, however, also Müller & Renner 2018, p. 91-93 who provide a more nuanced view.

140 Müller & Renner 2018, p. 227; Zimmerman 2017, p. 87-88.

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can then quickly become cumbersome, as every bank transfer – even for a small amount – requires the signature of both attorneys. Problems may also arise in the event of a conflict between the attorneys, in which case the attorneys might block each other's actions.[141] The German notariate, therefore, recommends adults to grant an unlimited *Vollmacht* (power of attorney) to each attorney and to include restrictions – for instance, that certain important, clearly defined decisions must be taken together – in the basic agreement between the adult and the attorney.[142] The adult cannot authorise the attorney to perform certain 'highly personal acts', such as making a will or entering into a marriage or a divorce.[143] A power of attorney (*Vollmacht*), in principle, includes the power to donate on behalf of the adult, unless this is expressly excluded by the adult.[144] Once again, adults are advised to include more detailed arrangements and restrictions concerning, for example, the extent to which the attorney can donate in the basic agreement between the adult and the attorney.[145]

6.4 Rights and duties of the attorney

The adult retains legal capacity upon the entry into force of the *Vorsorgevollmacht*.[146] According to Lipp, the duties and obligations of the attorney are modelled upon the duties and obligations of the court-appointed *Betreuer*. Lipp seems to deduce this from §1896(2) GCC – the principle of subsidiarity discussed above – according to which the appointment of a *Betreuer* is unnecessary when an attorney can take the place of the *Betreuer*.[147] Consequently, the task of the attorney is, according to Lipp, 'to assist and represent the grantor [adult] on the one hand and to protect him from inflicting harm onto himself or his property on the other'.[148] The adult can make this general duty more concrete by including specific provisions in the basic agreement between the adult and the attorney. In addition, the general provisions on the *Auftrag* (mandate) apply.[149] The adult can, for example, stipulate in the basic agreement that the attorney is obliged to consult the adult or another person before making certain important decisions, such as the sale of the house.[150] In addition, the adult can include wishes and instructions in the *Vorsorgevollmacht*. The attorney is, according to §665 GCC, obliged to follow these instructions. Under §666 GCC the attorney is – upon request – also obliged to keep the adult informed about the management of his affairs and to render account. However, the adult and the attorney can derogate from this statutory provision through the basic agreement and organise the duties included in §666 GCC differently or waive these

141 Zimmerman 2017, p. 87-88.
142 Müller & Renner 2018, p. 227; Zimmerman 2017, p. 87-88.
143 Müller & Renner 2018, p. 127 & pp. 143-144; Zimmerman 2017, p. 75.
144 Kurze 2017, p. 65; Müller & Renner 2018, p. 125-126.
145 Kurze 2017, p. 65.
146 Zimmerman 2017, p. 109; Lipp 2016, p. 8.
147 Lipp 2016, p. 7-8.
148 *Ibid*.
149 Müller & Renner 2018, p. 215-219; Lipp 2016, p. 7. See for an extensive overview of the provisions that can be included in the basic agreement, Spalckhaver 2009, p. 267-313.
150 Müller & Renner 2018, p. 216; Spalckhaver 2009, p. 275-276.

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altogether.[151] According to §181 GCC, the legal starting point is that the attorney cannot act as a counterparty of the adult. Kurze notes that this statutory provision is intended to prevent conflicts of interest.[152] However, here too, the adult and the attorney can derogate from this statutory provision and the adult can exempt the attorney from the prohibition to self-contract.

6.5 Supervision

Adults can include a form of supervision in the *Vorsorgevollmacht*. Examples are the appointment of multiple attorneys to act jointly in important matters or an obligation for the attorney to obtain the consent of others who have not been appointed attorney – for example, the attorney's siblings – for important decisions, such as the sale of the house.[153] Adults can also appoint a supervisory attorney to supervise the actions of the attorney. According to §1896(3) GCC – as of 1 January 2023 §1820 GCC-new – the court can also appoint a supervisor or so-called *Kontrollbetreuer*. A *Kontrollbetreuer* is assigned the task of supervising the attorney and enforcing the adult's rights as agreed in the basic agreement.[154] The court appoints a *Kontrollbetreuer* when it finds that the adult is no longer capable of supervising the attorney himself and when it establishes that there is a concrete need to monitor the attorney's actions.[155] Furthermore, the appointment of the *Kontrollbetreuer* must be a sufficient and appropriate intervention. If this is not the case, the court may also appoint an ordinary *Betreuer* to take over the handling of the adult's affairs from the attorney.[156]

6.6 Law in action

Little empirical information is available on how the *Vorsorgevollmacht* functions in practice. Indeed in their opinion on the bill of the new act entering into force on 1 January 2023, the organisation *VorsorgeAnwalt* noted that the government's strong focus on the *Betreuung* had led to a neglect of the problems with the *Vorsorgevollmacht*. The organisation, therefore, recommended the government to further address the problems with the *Vorsorgevollmacht*, for instance, by promoting (empirical) research into the misuse and abuse and the acceptance of *Vorsorgevollmachten*.[157] Annually, the *Bundesnotarkammer* publishes reports containing information on, for example, the number of registered *Vorsorgevollmachten* and the number of cases in which a request to consult the register has been received from the courts.[158] Apart from these annual reports, the

151 Spalckhaver 2009, p. 287-290.
152 Kurze 2017, p. 130.
153 Zimmerman 2017, p. 170-172.
154 Zimmerman 2017, p. 173-174; Lipp 2016, p. 9.
155 §1820 GCC-new; Müller & Renner 2018, p. 229-232; Zimmerman 2017, p. 174-175.
156 Müller & Renner 2018, p. 229-232
157 VorsorgeAnwalt e.V., *Stellungnahme des VorsorgeAnwalt e.V. zum Entwurf eines Gesetzes zur Reform des Vormundschafts- und Betreuungsrechts*, 10 August 2020, via www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Reform_Betreuungsrecht_Vormundschaft.html (last accessed: 1 May 2022).
158 See *e.g.* Bundesnotarkammer Zentrales Vorsorgeregister, *Jahresbericht 2020*, via www.vorsorgeregister.de/footer/jahresbericht-und-statistik (last accessed: 8 April 2022).

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most recent empirical study seems to be an evaluation study carried out by Köller and Engels in 2009 on the effects of a law amending the *Betreuungsgesetz* of 1990. One of the aims of this amendment act – which entered into force in 2005 – was to strengthen the *Vorsorgevollmacht* to avoid the necessity of a *Betreuung*.[159] Most of the information presented by Köller and Engels, concerning for instance information on the number of registered *Vorsorgevollmachten*, seems outdated. This seems different for the part of the study that looks at the reasons for the court to appoint a *Kontrollbetreuer*, an ordinary *Betreuer* or a replacement of the attorney, notwithstanding the presence of a *Vorsorgevollmacht*. When asked how often problems with asset management or problems within the family are the reason to appoint a *Kontrollbetreuer*, 56% of the courts (N=170) in a survey study conducted by Köller and Engels, indicated that problems with asset management are often a reason to order a *Kontrollbetreuung*. Thirty-two per cent of the courts indicated that problems within the family are often a reason to order a *Kontrollbetreuung*.[160] The courts were also asked about the reasons to order a *Betreuung* despite the adult's *Vorsorgevollmacht*. Reasons mentioned in this regard included: the *Vorsorgevollmacht* not covering all affairs for which assistance was considered necessary, problems with the acceptance of the *Vorsorgevollmacht*, the factual or legal inability of the attorney to act on behalf of the adult or the court not being aware of the *Vorsorgevollmacht* in the context of the proceedings.[161] Finally, Köller and Engels also inquired about the reasons for replacing an attorney with a *Betreuer*. In this respect, the courts indicated that problems with the asset management of the adult, the attorney being overburdened, the factual or legal inability of the attorney to act for the adult and problems within the family were reasons to replace an attorney.[162]

Apart from this one empirical study, observations by practitioners – both in the literature on the *Vorsorgevollmacht* and in the interviews conducted as part of the law in action components of this comparative study – can shed some light on how the *Vorsorgevollmacht* functions in practice. Kurze discusses the risk of abuse or misuse of *Vorsorgevollmachten* and possible solutions to address this problem, from a solicitor's perspective. Misuse or abuse occurs, according to Kurze, frequently within a setting of familial conflicts.[163] As possible factors causing conflict and abuse, he points to attorneys underestimating their task (resulting in non-transparent actions by the attorney causing distrust among other family members) and poorly drafted *Vorsorgevollmachten*, which fail to include a basic agreement between the adult and the attorney.[164] The latter can, for instance, result in a situation in which the (extensive) statutory provisions on rendering account

159 R. Köller & D. Engels, *Rechtlichen Betreuung in Deutschland. Evaluation des Zweiten Betreuungsrechtsänderungsgesetzes*, Köln: Bundesanzeiger Verlag 2009, p. 42-43.
160 *Ibid*., p. 233-235.
161 *Ibid*., p. 235-236.
162 *Ibid*., p. 236-237.
163 D. Kurze, 'Tätigkeit des Vorsorgebevollmächtigten aus anwaltlicher Sicht', *BtPrax* 2018, no. 2, p. 47-53 (48-49).
164 Kurze 2018, p. 50.

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apply, while the attorney is unaware of these obligations. Kurze notes that the lack of clear provisions on donations and reimbursement for the attorney in a basic agreement can also lead to conflicts and may advance the misuse or abuse of the *Vorsorgevollmacht*.[165] The avoidance of (extensive) basic agreements was also confirmed by the experts interviewed in the framework of this comparative study, although not all experts agreed on the need to include such basic agreements in the *Vorsorgevollmacht*. Kurze also notes that current actions and instruments – such as the intervention of the court – seem insufficient and inadequate to resolve conflicts.[166] In this regard, he notes that it is not easy for the adult, a new representative – such as a *Betreuer* or new attorney – or the adult's heirs to ensure that justice is done when misuse or abuse occurs. It is, for instance, difficult for the adult or his heirs to obtain the necessary information (*e.g.* bank statements) to build a case against the (former) attorney.[167]

Several directions are suggested by Kurze as possible solutions to the above-mentioned problems. First of all, he notes that attorneys should be advised by professionals to act transparently. This can be done, for example, by allowing others (*e.g.* siblings) who have not been appointed as attorney to view the online banking environment to check the attorney's transactions. This can prevent distrust.[168] Secondly, attention should be paid to a better design of *Vorsorgevollmachten*.[169] In this regard, Kurze notes that the involvement of a legal professional ensures that the *Vorsorgevollmacht* is tailored to the specific situation of the adult and includes details on the rights and obligations of the attorney. Such a *Vorsorgevollmacht* should also include clear instructions on the appointment of multiple attorneys, of which one supports and supervises the actions of the other. Kurze also highlights the importance of notaries keeping an eye on the adult's capacity to make a *Vorsorgevollmacht*, particularly in certain situations in which there is a risk the adult might be unduly influenced (*e.g.* when the attorney approaches the notary with a request to make a *Vorsorgevollmacht*).[170] Thirdly, Kurze notes that mediation – so-called *Vorsorgemediation* – might be a potential way forward to solve conflicts between the attorney and other family members.[171]

7. Switzerland: the Vorsorgeauftrag

7.1 Regulatory framework

With the entry into force of a new adult protection law in 2013, adults in Switzerland were given the opportunity to provide for a future period of incapacity using the *Vorsorgeauftrag* and the *Patientenverfügung*. The former allows adults to appoint an attorney for financial and personal matters, while the latter allows adults to

165 *Ibid.*
166 *Ibid.*, pp. 50-51.
167 *Ibid.*, p. 49.
168 *Ibid.*, p. 51.
169 *Ibid.*, p. 52.
170 *Ibid.*
171 *Ibid.*

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appoint an attorney for health and medical matters.[172] Both instruments can be combined in the same document when the adult appoints a 'natural person' to act as attorney.[173] Although before the entry into force of the new act, it was already possible to make provisions for the future using an ordinary power of attorney (*Vollmacht*), an agency contract (*Auftrag*) and using *Patientenverfügungen* subject to regional (cantonal) legislation, the Swiss legislator deemed it necessary to adopt a specific regulatory framework. First, to create legal certainty since there was no consensus regarding the validity of the *Vollmacht* and *Auftrag* as instruments to provide for a future period of incapacity. Second, to create uniformity concerning the status of *Patientenverfügungen*, since the range and scope of this instrument were judged differently because of differences in regional (cantonal) legislation.[174] Provisions on the *Vorsorgeauftrag* (Art. 360-369) and the *Patientenverfügung* (Art. 370-373) were included in Title X of the Swiss Civil Code (SCC), titled 'Own Arrangements for Care'. Article 365 SCC makes clear that, unless otherwise stipulated by law, the provisions on the *Auftrag* also apply. Notwithstanding the introduction of the *Vorsorgeauftrag*, the *Vollmacht* and the *Auftrag* can still be used to some extent to make provisions for the future. This is the case when the adult uses the *Vollmacht* and the *Auftrag* to make an enduring document that *remains* in force upon the incapacity of the adult. Enduring documents that *enter* into force upon the incapacity of the adult are subject to the new legal regime of the *Vorsorgeauftrag*.[175]

7.2 Form and registration

Adults have two options when it comes to the form of the *Vorsorgeauftrag*. The adult can make the *Vorsorgeauftrag* in the form of a private document, in which case it must be handwritten from beginning to end.[176] With this requirement, the Swiss legislator hoped to avoid situations where the adult would simply sign a document drafted by a third person, without being aware of the content.[177] The adult can also choose to make a *Vorsorgeauftrag*, which is publicly authenticated by a so-called *Urkundsperson*. Who may act as *Urkundsperson* is determined by cantonal

172 Art. 360(1) of the Swiss Civil Code; Art. 370(1) and (2) of the Swiss Civil Code.

173 A. Jungo, 'Art. 360', in: T. Geiser & C. Fountoulakis (eds.), *Basler Kommentar. Zivilgesetzbuch I*, Basel: Helbing Lichtenhahn Verlag 2018a, p. 2109-2129 (2127); E. Langenegger, 'Art. 360', in: D. Rosch, A. Büchler & D. Jakob (eds.), *Erwachsenenschutzrecht. Einführung und Kommentar zu Art. 360ff. ZGB und VBVV*, Basel: Helbing Lichtenhahn Verlag 2015, p. 43-58 (57). The adult can by means of a *Patientenverfügung* only appoint a 'natural person' to act on his behalf for health and medical matters.

174 *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenschutz, Personenrecht und Kindesrecht)* 2006, p. 7012; Jungo 2018a, p. 2111.

175 Y. Biderbost, 'Erwachsenenschutz: Subsidiarität über alles?!', in: R. Arnet, P. Eitel, A. Jungo & H.R. Künzle (eds.), *Der Mensch als Mass. Festschrift für Peter Breitschmid*, Zürich: Schulthess Juristische Medien 2019, p. 91-111 (106-107); Jungo 2018a, p. 2115-2116; Langenegger 2015, p. 49.

176 Art. 361 SCC.

177 *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenschutz, Personenrecht und Kindesrecht)* 2006, p. 7026.

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law, in most cases this person will be a notary.[178] The *Urkundsperson* has to advise the adult, establish the identity of the adult and assess whether the content of the *Vorsorgeauftrag* truly reflects the wishes of the adult.[179] The adult can register both the fact that a *Vorsorgeauftrag* has been made and the place where it is kept, in a register kept by the Swiss Civil Register Office.[180] Registration is, however, voluntary. Changes and terminations of the *Vorsorgeaufrag* can also be registered, but, once again, the adult is not obliged to do so.[181] The register can be checked by the Swiss adult protection authorities. Adult protection authorities play a key role in Switzerland when it comes to the protection of adults. As discussed in more detail later on, they are with respect to the *Vorsorgeauftrag*, for instance, responsible for the entry into force of the *Vorsorgeauftrag*. Upon receiving a notification that the adult is no longer capable of judgement, the adult protection authority must initiate proceedings to examine the necessity of an adult protection measure. In the context of these proceedings, the adult protection authority is obliged to check whether the adult has made a *Vorsorgeauftrag* according to Article 363(1) SCC.

7.3 Entry into force and appointment of the attorney

As noted above, the adult protection authorities in Switzerland play an important role when it comes to the entry into force of the *Vorsorgeauftrag*. Through a so-called validation process the adult protection authority must confirm that the *Vorsorgeauftrag* can enter into force. This validation process consists of four steps.[182] The adult protection authority must, first of all, verify whether the *Vorsorgeauftrag* has been validly drawn up, *i.e.* whether the requirements concerning the form of the *Vorsorgeauftrag* have been met, whether the adult had the capacity to make the *Vorsorgeauftrag* and whether the content of the *Vorsorgeauftrag* is not contrary to the law.[183] Secondly, the adult protection authority must assess whether the conditions for the entry into force of the *Vorsorgeauftrag* are met. In Switzerland, the *Vorsorgeauftrag* can only enter into force when the adult concerned is no longer capable of judgement (*Urteilsunfähig*) concerning the matters included in the *Vorsorgeauftrag*.[184] There is no prescribed course of action to assess the adult's capacity. Büttner and Fountoulakis note that in practice an assessment by a physician is often requested.[185] Thirdly, the adult protection authority must assess

178 H. Hausheer, T. Geiser & R.E. Aebi-Müller, *Das Familienrecht des Schweizerischen Zivilgesetzbuches*, Bern: Stämpfli Verlag 2018, p. 494-495; *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenschutz, Personenrecht und Kindesrecht)* 2006, p. 7026.

179 Hausheer, Geiser & Aebi-Müller 2018, p. 494-495; J. Schmid, *'Vollmachten und Vorsorgeauftrag'*, in: *Stiftung Schweizerisches Notariat, Nachlassplanung und Nachlassteilung*, Zürich: Schultess Juristische Medien 2014, p. 259-300 (285-287).

180 Art. 361(2) SCC.

181 Art. 23a of the Civil Status Decree (*Zivilstandsverordnung*).

182 Art. 363(2) SCC.

183 A. Jungo, 'Art. 363', in: T. Geiser & C. Fountoulakis (eds.), *Basler Kommentar. Zivilgesetzbuch I*, Basel: Helbing Lichtenhahn Verlag 2018b, p. 2137-2150 (2141-2142).

184 Hausheer, Geiser & Aebi-Müller 2018, p. 497; Jungo 2018b, p. 2143.

185 J. Büttner & C. Fountoulakis, 'Der *Vorsorgeauftrag*: erste Erfahrungen aus der Praxis – Zahlen und Fallbeispiele von den Berner Erwachsenenschutzbehörden', *FamPra* 2015, no. 2, p. 507-535 (517); see also Jungo 2018b, p. 2144.

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whether the attorney is suited to the task at hand. The attorney must have the capacity to act on behalf of the adult and must be willing and able (in terms of time and place) to act on behalf of the adult.[186] The attorney must also be a reliable and honest person. To assess this, in practice, the adult protection authority checks whether the attorney has any criminal records and whether the attorney appears in the bankruptcy and insolvency register.[187] The adult protection authority is also obliged to inform the attorney about his rights and obligations. The fourth and final step of the validation proves concerns an assessment by the adult protection authority whether an (additional) protection measure is necessary. This can, for example, be the case when the attorney only accepts part of the responsibility conferred to him by the adult.[188] The adult can appoint both a natural person or a legal entity to act as an attorney for financial and personal matters. However, only a natural person can be appointed for medical matters.[189] The adult may appoint multiple attorneys to act either jointly or concurrently. Article 360(3) SCC makes clear that the adult can also appoint a substitute attorney. The adult cannot authorise the attorney to perform highly personal acts on his behalf.[190] Opinions differ in the literature as to the extent to which the adult can authorise the attorney to donate on his behalf. Hopf argues that the adult must explicitly authorise the attorney to donate on his behalf by clearly specifying the amount and the beneficiary of the donation.[191] Millauer and Jaussi note that under Article 240(2) of the Swiss Code of Obligations, the attorney may only make customary occasional donations on behalf of the adult.[192]

7.4 Rights and duties of the attorney

Although full deprivation of legal capacity cannot be assumed, the entry into force of the *Vorsorgeauftrag* does have certain consequences for the adult. If the adult is no longer capable of judgement (*Urteilsunfähig*), the adult cannot revoke the *Vorsorgeauftrag*. Under Article 2 of the Federal Act on Political Rights, the adult is – when *Urteilsunfähig* – also considered ineligible to vote.[193] Article 365(1) SCC makes clear that the attorney must represent the adult in accordance with the adult's wishes, preferences and instructions as recorded in the *Vorsorgeauftrag*.[194] According to Hrubesch-Millauer and Jaussi, the attorney is obliged to contact the adult protection authority in the event of ambiguities or uncertainties concerning

186 Jungo 2018b, p. 2145; Büttner & Fountoulakis 2015, p. 514-515.
187 Büttner & Fountoulakis 2015, p. 515.
188 Jungo 2018b, p. 2146.
189 Jungo 2018a, p. 2123; *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personenrecht und Kindesrecht)* 2006, p. 7025-7026.
190 Jungo 2018a, p. 2128; Langenegger 2015, p. 59
191 M. Hopf, 'Neues Erwachsenenschutzrecht und *Vorsorgeauftrag*. Regelungsmöglichkeiten und Wirkungen für die Vorsorgebeauftragten', *Der Schweizer Treuhänder* 2013, no. 3, p. 145-150 (146).
192 S. Hrubesch-Millauer & M. Jaussi, 'Vorsorgeauftrag – Pflichten und Haftung des Beauftragten', *Plädoyer* 2013, no. 1, p. 33-39 (35).
193 *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personenrecht und Kindesrecht)* 2006, p. 7082.
194 Hausheer, Geiser & Aebi-Müller 2018, p. 498-450.

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the content of the *Vorsorgeauftrag*.[195] The adult protection authority can in these instances interpret the *Vorsorgeauftrag* and add clarifications on minor points.[196] Article 365(1) SCC stipulates that, in addition to the provisions on the *Vorsorgeauftrag* included in Title X of the Swiss Civil Code, the attorney is obliged to act in accordance with the provisions on the *Auftrag* included in the Swiss Code of Obligations. Article 397 of the Code of Obligations reaffirms that the attorney must act in accordance with the adult's instructions.[197] The attorney has a duty of care and must put the interests of the adult first and refrain from doing anything that might harm the adult.[198] According to Hrubesch-Millauer and Jaussi, higher standards apply to professional attorneys, such as notaries and lawyers, when it comes to their duty of care.[199] According to Article 398(3) of the Code of Obligations, the attorney is, in principle, obliged to act himself. Article 400 of the Code of Obligations stipulates that the attorney must render account. Article 365(2) and (3) SCC make clear that the authority of the attorney is restricted when there is a conflict of interests unless the adult has explicitly authorised the attorney to perform the transaction concerned.[200] If the latter is not the case, the attorney is obliged to inform the adult protection authority, which will then order an adult protection measure – a so-called *Beistandschaft* – for the affair in question.[201]

7.5 Supervision

The adult may include supervisory mechanisms in the *Vorsorgeauftrag*, such as the appointment of a supervisory attorney.[202] The adult may also require the attorney to submit periodic reports to an auditor – a so-called *Revisionsstelle* – who must inform the adult protection authority in the event of abuse by the attorney.[203] Passive supervision is carried out by the adult protection authority, which is obliged to intervene when the adult's interests are endangered in accordance with Article 368 SCC.[204] This is the case when the attorney abuses the authority vested in him, but also when the interests of the adult are no longer adequately safeguarded because the attorney remains passive, negligent or inattentive.[205] The adult protection authority has several options when it finds the conditions of

195 Hrubesch-Millauer & Jaussi 2013, p. 34.
196 Art. 364 SCC.
197 Hrubesch-Millauer & Jaussi 2013, p. 35.
198 Art. 398(1) and (2) of the Code of Obligations – English translation of the Swiss Code of Obligations via: www.fedlex.admin.ch/eli/cc/27/317_321_377/en (last accessed: 23 March 2022); Hausheer, Geiser & Aebi-Müller 2018, p. 499; Hrubesch-Millauer & Jaussi 2013, p. 35.
199 Hrubesch-Millauer & Jaussi 2013, p. 35.
200 *Ibid*.
201 Hausheer, Geiser & Aebi-Müller 2018, p. 498; *Botschaft zur Änderung des Schweizerischen Zivilgesetzbuches (Erwachsenenschutz, Personenrecht und Kindesrecht)* 2006, p. 7028.
202 Langenegger 2015, p. 54; Schmid 2014, p. 285. See also Hrubesch-Millauer & Jaussi 2013, p. 37.
203 Langenegger 2015, p. 54
204 A. Jungo, 'Art. 368', in: T. Geiser & C. Fountoulakis (eds.), *Basler Kommentar. Zivilgesetzbuch I*, Basel: Helbing Lichtenhahn Verlag 2018c, pp. 2170-2173 (2170); Hrubesch-Millauer & Jaussi 2013, p. 36.
205 Jungo 2018c, p. 2170-2171; S. Hotz, 'Zum Selbstbestimmungsrecht des Vorsorgenden de lege lata und de lege ferenda – Die Vorsorgevollmacht de lege ferenda', *Zeitschrift für Kindes- und Erwachsenenschutz* 2011, vol. 66, no. 2, p. 102-115 (112).

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Article 368(1) SCC are met. Under Article 368(2) SCC, the adult protection authority can oblige the attorney to submit an inventory and periodical (financial) reports. The adult protection authority can also give certain instructions regarding the execution of the *Vorsorgeauftrag*. If the interests of the adult are no longer (sufficiently) protected through the *Vorsorgeauftrag*, the adult protection authority can order an (additional) adult protection measure.[206] Finally, the adult protection authority can – wholly or partially – terminate the *Vorsorgeauftrag*.[207] Although not included in Article 368(2) SCC, both Hausheer *et al*. and Jungo note that the adult protection authority can also oblige the attorney to ask for the consent of the adult protection authority for certain acts.[208]

7.6 Law in action

At the behest of the Swiss organisation Pro Senectute, a survey study was conducted by the GFS-Zürich research institute in 2017.[209] The survey focused on the awareness of the *Vorsorgeauftrag* and the *Patientenverfügung* among the Swiss population and the number of people who had made a *Vorsorgeauftrag* or *Patientenverfügung*. The survey was completed by 1,200 people through computer-assisted telephone interviewing (CATI) and the study was considered representative for the Swiss population. Only half (48%) of the respondents were familiar with the possibility to make a *Vorsorgeauftrag*; 65% of the respondents were aware of the possibility to make a *Patientenverfügung*. Twelve per cent of the respondents indicated they had made a *Vorsorgeauftrag*, compared to 22% who had made a *Patientenverfügung*.[210] The study was repeated in 2021 and a significant increase in awareness of enduring documents was found; 65% of the respondents were familiar with the possibility to make a *Vorsorgeauftrag*, compared to 82% of the respondents who were aware of the possibility to make a *Patientenverfügung*.[211] The COVID-19 pandemic was presented as a potential reason for this increased awareness. However, respondents indicated that they did not feel increased pressure to make a *Vorsorgeauftrag* or a *Patientenverfügung* because of the pandemic. The reasons given by respondents for making a *Vorsorgeauftrag* or *Patientenverfügung* included maintaining a sense of autonomy and easing the burden of care for family members.[212] Besides these two survey studies, few empirical studies have dealt with the question of how the *Vorsorgeauftrag* functions in practice. In a study

206 Hausheer, Geiser & Aebi-Müller 2018, p. 502; Jungo 2018c, p. 2172.

207 Jungo 2018c, p. 2172-2173; Hrubesch-Millauer & Jaussi 2013, p. 36.

208 Hausheer, Geiser & Aebi-Müller 2018, p. 502 referring to Art. 416 SCC; Jungo 2018c, p. 2173.

209 Pro Senectute, *Selbstbestimmen bei Urteilsunfähigkeit – Zahlen und Fakten*, 2017; Pro Senectute, *Medienmitteilung 'Nur jede zehnte Person in der Schweiz hat bei Urteilsunfähigkeit vorgesorgt'*, 2017; A. Umbricht (GFS-Zürich, Markt- & Sozialforschung), *Telefonische Omnibus-Befragung zur persönliche Vorsorge*, 2017, accessible via: https://gfs-zh.ch/nur-jede-zehnte-person-in-der-schweiz-hat-bei-urteilsunfaehigkeit-vorgesorgt/ (last accessed: 23 March 2022).

210 *Ibid*.

211 Pro Senectute, *Medienmitteilung 'Wunsch nach Selbstbestimmung ist stärker als Druck durch Corona'*, 2021; A. Umbricht & J. Yin (GFS-Zürich, Markt- & Sozialforschung), *Telefonische Omnibus-Befragung zur persönliche Vorsorge*, 2021, accessible via: https://gfs-zh.ch/bekanntheitszunahme-bei-vorsorgedokumenten/ (last accessed: 23 March 2022).

212 *Ibid*.

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looking at the experiences of the adult protection authority Bern Mittelland Süd with the *Vorsorgeauftrag*, Büttner and Fountoulakis present examples of cases this adult protection authority had encountered.[213] These examples have in this comparative study been used – together with the experiences of the experts interviewed as part of the law in action component of this comparative study and the observations presented by both scholars and practitioners in the literature on the *Vorsorgeauftrag* – to get an impression of the experiences with the *Vorsorgeauftrag* in practice.

A first problem concerns *Vorsorgeaufträge* which have been made by adults, who at the time, lacked the capacity – *Urteilsfähigkeit* – to do so. Fassbind notes that it is not uncommon for adult protection authorities to be confronted with a request for validation quite soon after the adult has made the *Vorsorgeauftrag*.[214] Rather than abuse, a lack of information lies, according to Fassbind, at the root of this problem. He refers, in this regard, to situations in which relatives of the adult are concerned that without a *Vorsorgeauftrag* they will not be able to continue their care of the adult and subsequently urge the adult to make a *Vorsorgeauftrag* although the adult lacks the capacity to do so. These situations can be avoided by ensuring that both adults and relatives are informed in good time about how and when the *Vorsorgeauftrag* can be used to make provisions for the future.[215] A second problem concerns the adult's capacity – *Urteilsfähigkeit* – at the time the *Vorsorgeauftrag* enters into force. Several of the interviewed experts noted that the requirement that the adult must be *Urteilsunfähig* – or no longer capable of judgement – before the *Vorsorgeauftrag* can enter into force, is not always practicable. In this respect, it is pointed out that *Urteilsunfähigkeit* is often preceded by *Hilfsbedürftigkeit*, a phase whereby the adult is still able to act and decide, but requires the assistance of others to do so.[216] In practice, the adult protection authorities, therefore, adopt a pragmatic approach concerning the requirement that the adult must be *Urteilsunfähig* before the *Vorsorgeauftrag* may enter into force. Fassbind notes that the adult protection authority might, for instance, decide to validate the *Vorsorgeauftrag* somewhat prematurely, in a situation in which the adult – although still being *Urteilsfähig* to a certain extent – is no longer in a state of health that enables him to cope with day-to-day administrative and legal matters.[217] The alternative would be a partial entry into force of the *Vorsorgeauftrag*. Within the framework of this country report, three experts from different adult protection authorities have been interviewed. All three experts indicated that in their experience, the *Vorsorgeauftrag*

213 Büttner & Fountoulakis 2015.

214 P. Fassbind, '*Vorsorgeauftrag* in der Praxis. Risiken und Nebenwirkungen', in: R. Fankhauser, R.E. Reusser & I. Schwander (eds.), *Brennpunkt Familienrecht, Festschrift für Thomas Geiser zum 65. Geburtstag*, Zürich/St. Gallen: Dike Verlag 2017, p. 217-241 (224).

215 Fassbind 2017, p. 224-225; See also Büttner & Fountoulakis (2015, p. 525-527) who also address this problem but zoom in on the question whether there is merit in the argument that a person, on the one hand, no longer has the capacity to carry out certain affairs, but, on the other hand, does have the capacity to entrust the handling of these affairs to another person by means of the *Vorsorgeauftrag*.

216 Biderbost 2019, p. 101-102.

217 Fassbind 2017, p. 223.

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never partially enters into force. In some instances, adults are advised to use an ordinary power of attorney (*Vollmacht*) or agency contract (*Auftrag*) to make provisions for the phase preceding *Urteilsunfähigkeit*. Fassbind notes, however, that a *Vollmacht*/*Vorsorgeauftrag*-construction is not without problems because such constructions in some cases cause confusion in practice and meet with resistance from for example banks.[218] To avoid the aforementioned problems, the Swiss legislator could change the law to allow the entry into force of the *Vorsorgeauftrag* when the adult protection authority establishes that the adult is *Hilfsbedürftig*.[219]

A third area of interest to which several problems can be linked concerns the role and position of the attorney. A first problem, in this regard, concerns the absence of a suitable person to be appointed as attorney, which could prevent the adult from making a *Vorsorgeauftrag*.[220] A second problem concerns situations in which the adult's choice of attorney or attorneys in practice proves problematic. This can, for instance, occur when the adult appoints an older person as attorney – such as a brother or sister – who, when the *Vorsorgeauftrag* enters into force, is physically unable to take care of the adult's affairs.[221] The execution of the *Vorsorgeauftrag* can also become problematic when the adult appoints more than one attorney, but fails to clearly delineate the tasks of these attorneys resulting, for instance, in conflicts between the attorneys.[222] Fear of conflicts can also result in the attorney taking on only part of the authority conferred through the *Vorsorgeauftrag*.[223] A fourth point of interest concerns the involvement of the adult protection authority through, among other, the validation process. This involvement has both advantages and disadvantages. An advantage is that the adult protection authority has the authority to interpret the provisions of the *Vorsorgeauftrag* and add clarification or adjustments on minor points.[224] One of the interviewed experts, who works at an adult protection authority, noted that interpretation and clarification of the *Vorsorgeauftrag* often take place with the acceptance of the *Vorsorgeauftrag* with third parties in mind. The adult protection authority can, in other words, promote the acceptance of the *Vorsorgeauftrag* in practice. At the same time, the adult protection authority seems to have made itself indispensable in ensuring the acceptance of the *Vorsorgeauftrag* in practice. Fassbind notes in this regard:

> 'Enduring documents are not accepted, nor are representatives, without the state's approval in the form of an official stamp on a piece of paper – purely because of the existing liability risks. Not only the liability risks of the banks but also the tendency of the courts to interpret the banks' duty of care broadly

218 Fassbind 2017, p. 223-224; see also Biderbost 2019, p. 97 and p. 108-109.
219 Fassbind 2017, p. 223-224.
220 C. Walser Kessel, 'Der Vorsorgeauftrag. Einige praktische Überlegungen', *Der Schweizer Treuhänder* 2015, no. 5, p. 355-358 (357); see also Büttner & Fountoulakis 2015, p. 521.
221 Büttner & Fountoulakis 2015, p. 527-529; Walser Kessel 2015, p. 357.
222 Fassbind 2017, p. 229.
223 Büttner & Fountoulakis 2015, p. 529-530.
224 Fassbind 2017, p. 227; Büttner & Fountolakis 2015, p. 530-531.

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> (in dubio pro small savers) contributes to the necessary involvement of the state. Experience has shown that nothing works in practice without official documents. Banks cover their risks, no matter what the law says.'[225]

Fassbind goes on to note that a tendency to pass risks – in particular liability risks – to the state has emerged, which, in his opinion, cannot be considered the objective of an instrument that is intended to promote self-determination.[226] Another disadvantage of the involvement of the adult protection authority is that the process of validation takes time.[227] Jungo notes that this may result in a 'competency gap' between the onset of incapacity (*Urteilsunfähigkeit*) and the entry into force of the *Vorsorgeauftrag*.[228] The adult can prevent such a 'competency gap' using an ordinary *Vollmacht* or *Auftrag*. However, as discussed above, the acceptance of these instruments can in practice prove problematic.

8. Comparative synthesis and best practices for the Netherlands

In the preceding sections an overview of the regulatory framework and the application of the *zorgvolmacht*, the *lasting power of attorney*, the *Vorsorgevollmacht* and the *Vorsorgeauftrag* has been presented. In this section, I will use this information to identify best practices that could provide a solution to the problems identified in the regulation and application of the *levenstestament*. Section 3 has outlined these problems. With regard to the regulation of the *levenstestament*, I have argued that a clear, solid legal basis that ensures compliance with international human rights norms and principles – such as Article 12 UNCRPD and the principles of Recommendation CM/Rec 2009(11) – is currently lacking. With respect to the application of the *levenstestament*, the following problems have been identified: a risk of misuse or abuse by the attorney, family disputes between attorneys or between the attorney and other family members, and third parties not accepting the *levenstestament*. In addition, a qualitative study involving interviews with both adults and nominated and active attorneys showed that more can be done to promote the active involvement of adults in the execution of the *levenstestament*. However, before turning to a discussion of best practices which could provide a solution to the aforementioned problems, it is important to first briefly outline the lens through which to look at the information presented in the previous sections. Scherpe notes with regard to comparative law research:

> 'A comparative lawyer, and particularly a comparative family lawyer, must never forget that all legal rules are embedded in their own unique cultural, social and traditional legal context. Whether or not we believe that societies and laws are converging, a solution or concept from one social, cultural and

225 Fassbind 2017, p. 234 (translation by RSR); see also Biderbost 2019, p. 97 and p. 108-109.
226 Fassbind 2017, p. 235-236.
227 Büttner & Fountoulakis 2015, p. 513.
228 Jungo 2018, p. 2144.

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> legal context cannot necessarily be transplanted into another and achieve the same results.'[229]

In terms of the legal context, there are, for example, differences between the broader legal constructs – such as the ordinary power of attorney or the mandate agreement – that underlie each enduring document.[230] For instance, the German *Auftrag* (mandate agreement) only partly corresponds to the Dutch *opdracht* (service provision agreement), although both words literally mean the same in the original languages.[231] Another example concerns the differences in each jurisdiction's organisational structure. In England and Wales and Switzerland, important tasks are carried out by administrative authorities, namely the Office of the Public Guardian and the adult protection authority. As the Netherlands currently has no equivalent of such an administrative authority, certain solutions may be less suitable for implementation here.

Notwithstanding these and other differences in the cultural, social and legal context, all four jurisdictions have to a more or lesser extent tried to implement the principles of Recommendation CM/Rec(2009)11. As noted in section 2, these principles have been used as a framework to compare the legislation of the four jurisdictions, looking at the form, content, entry into force, registration and/or certification of each enduring document and the appointment and role of attorneys, the preservation of legal capacity, conflicts of interests and supervision. In implementing the principles of Recommendation CM/Rec(2009)11 each jurisdiction has tried to balance the adult's right to autonomy with the need for adequate safeguards to prevent misuse or abuse by the attorney. With respect to the right to autonomy, a distinction can be made between the adult's right to autonomy at the time the enduring document is drafted and at the time it is executed. In this regard, jurisdictions seek to minimise administrative and financial barriers for adults to make an enduring document, while also ensuring that, at the time the enduring document is executed, support is based as much as possible on the adult's wishes, preferences and instructions. As Table 1 shows, there are differences in the way the four jurisdictions have implemented the principles of Recommendation CM/Rec(2009)11, which means that the balance between the aforementioned rights has been struck in different ways. In identifying best practices for the regulation of the *levenstestament*, the need to strike an appropriate balance between the above rights in the Netherlands has been kept in mind.

229 J.M. Scherpe, 'A Comparative Overview of the Treatment of Non-Matrimonial Assets, Indexation and Value Increases', *Child & Family Law Quarterly*, 2013, vol. 25, no. 1, p. 61-79 (61-62).

230 In all five jurisdictions enduring documents can be linked to broader legal constructs either because they are based on such constructs (Germany and the Netherlands), or because the legislation on these legal constructs is also (partly) applicable to the enduring document (Belgium, England and Wales and Switzerland).

231 T.F.E. Tjong Tjin Tai, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel IV. Opdracht, incl. de geneeskundige behandelingsovereenkomst en de reisovereenkomst*, Deventer: Wolters Kluwer 2012, §9.

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Table 1 Comparative synthesis

		Belgium	England & Wales	Germany	Switzerland
1. Adult makes the enduring document	**Form**	Private document or notarial deed[1]	Prescribed form + assessment by certificate provider	Private document or certified document1	Private (handwritten) document or certified document
	Restrictions appointment attorney	Persons placed under a guardianship measure; persons who according to the law cannot be appointed as guardian	Persons who are bankrupt or subject to a debt relief order; paid care workers	Management or staff of an institution in which the adult resides	Assessment of suitability by the adult protection authority
	Restrictions content	No highly personal acts. Donations are possible when the object, the beneficiary and the terms and conditions of the donation are clearly stipulated.	No highly personal acts. Donations are possible, but only on customary occasions to persons or charities connected to the adult.	No highly personal acts. Donations are possible. The adult should explicitly exclude the possibility of donation when it is not wanted.	No highly personal acts. Donations are possible but only on customary occasions.
	Registration	Mandatory	Mandatory	Voluntary	Voluntary
2. Entry into force enduring document	**Entry into force**	For the adult to determine in the *zorgvolmacht*	For the adult to determine in the *LPA*, except for health and care affairs where the attorney can only act upon the incapacity of the adult	For the adult to determine in the *Vorsorgevollmacht*.	Upon the incapacity of the adult, subject to a validation procedure
	Legal capacity	Yes	Yes	Yes	No, limitation regarding termination *Vorsorgeauftrag* and right to vote

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Table 1 (Continued)

		Belgium	England & Wales	Germany	Switzerland
3. Active enduring document	**Rights and duties attorney**	– Duty to follow the adult's wishes and preferences; – duty to involve the adult; – duty to keep the adult's and the attorney's assets separate; – duty to render account;	– Duty to follow the adult's wishes and preferences; – duty to provide the adult with the support to make his own decisions; – duty to render account; – duty to keep the adult's and the attorney's assets separate	– General duty to assist and represent the adult and to protect the adult against self-inflicted harm; – tailored provisions can be included in the *Vorsorgevollmacht*	– Duty to follow the adult's wishes and preferences; – duty to put the interests of the adult first; – duty to render account
	Conflicts of interest	The attorney cannot act as a counterparty of the adult. An attorney ad hoc can be named by the adult or appointed by the court	The attorney has a fiduciary duty not to take advantage of his position and benefit himself, but benefit the adult	The adult can exempt the attorney from the legal prohibition act as a counterparty of the adult	The attorney may not act when there is a conflict of interest and must notify the adult protection authority, unless the adult has expressly agreed to the conflict of interest in the *Vorsorgeauftrag*
	Supervision	Passive supervision by the court by means of an alarm bell procedure	Passive supervision by the Office of the Public Guardian and the Court of Protection	Passive supervision by the court	Passive supervision by the adult protection authority

[1] Second form in certain cases required.

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As Table 1 shows, all elements can be placed in one of three phases: 1) when the adult makes an enduring document, 2) when the enduring document enters into force, and 3) when one or more attorneys act on behalf of the adult.[232] In phase 1, four elements can be distinguished: requirements on the form of the enduring document; restrictions on the choice of attorney; restrictions on the content of the enduring document and requirements concerning the registration or certification of the enduring document. It is of course in this phase that the adult's right to autonomy, in the sense of minimising administrative and financial barriers to make an enduring document, is particularly relevant. As to the form of the enduring document, this means that the possibility to make an enduring document must be easily accessible for all adults. At the same time, there must be sufficient safeguards to ensure that adults who consciously choose to make an enduring document are aware of its content and are not subject to undue influence.[233] In this respect, I have stressed the importance of the involvement of a third party, who has to verify that the adult understands the significance of the enduring document, has the capacity to make it and is not unduly influenced.[234] In the Netherlands, this position is currently fulfilled by notaries. In theory, Dutch adults also have the option of making an enduring document by way of a private document. However, in practice, this is not recommended as such a *levenstestament*, not authenticated by a notary, may not be accepted, for example, by banks. One aspect not yet covered in this article is the costs of making an enduring document. In the Netherlands, the cost of engaging a notary to make a *levenstestament* can range from €278-€1,258.[235] Not everyone can afford this, meaning that not everyone can make a *levenstestament* that is also accepted by third parties. In England and Wales the involvement of a professional – although recommended – is not required. Adults must use a prescribed form to make a lasting power of attorney. A so-called certificate provider – who can be a person who has known the adult personally for at least two years – confirms that the adult understands the purpose of the LPA and has not been unduly influenced to make it. Not taking into account the cost of engaging a professional, the cost of making an LPA in England and Wales at £82 (registration fee) is significantly lower than in the Netherlands. However, as noted above, any best practice must be evaluated within the organisational structure of the jurisdiction. In England and Wales, the Office of the Public Guardian checks upon registration whether the LPA has been made in the prescribed form and whether a certificate provider has been involved.[236] In the Netherlands, there is no equivalent authority that could carry out such an assessment. As I will discuss below, it might be worth considering the introduction of such an authority in the Netherlands. Such an authority would not only be responsible for the homologation of the

232 Stelma-Roorda 2021, p. 18.

233 Recommendation CM/Rec(2009)11, p. 42.

234 Stelma-Roorda 2021, p. 19.

235 www.degoedkoopstenotaris.nl/informatie/kosten-levenstestament?ref=adwords&gclid=EAIaIQobChMIzaWBssTI-gIVxQOLCh2gwgQLEAAYAiAAEgIVBfD_BwE# (last accessed 5 October 2022).

236 Lush & Bielanska 2017, p. 170. The OPG is also obliged to apply to the Court of Protection to determine the meaning of provisions which seem ineffective or which could prevent the instrument from operating as a valid LPA.

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levenstestament and the assessment of the adult's capacity when making a *levenstestament* but could also be responsible for the supervision of attorneys.

However, in the absence of such an authority, other best practices could be explored as a 'second best' option to promote the possibility for all adults to make a *levenstestament*. Legislation regarding the form of the *levenstestament* – including both the possibility of a notarial deed and a private document – might help to promote the acceptance of privately drafted *levenstestamenten* by third parties. Like the German government, the Dutch government could make available a form adults can use to make a *levenstestament*.[237] To ensure that adults have the capacity to make a levenstestament and are not unduly influenced, the possibility of asking adults to sign a privately drafted *levenstestament* at the local authority could be explored.[238] In Germany, the so-called *Betreuungsbehörde* – authorities responsible at the local level for certain adult protection matters – can verify the identity of the adult and confirm that the signature on the enduring document is that of the adult concerned. Again, there is no equivalent authority in the Netherlands, but perhaps other options could be explored to entrust this task to the local authorities. For example, consideration could be given to extending and strengthening the position of what in Dutch is called the 'ambtenaar van de burgerlijke stand' (civil registry officer). In the Netherlands, the *ambtenaar van de burgerlijke stand* (hereafter: *ambtenaar*) is authorised to draw up certificates of births, marriages, registered partnerships and deaths. In the context of marriages and registered partnerships, the *ambtenaar* is obliged to verify that there is no impediment to marry or enter into a registered partnership (Art. 1: 57 of the Dutch Civil Code). This includes an assessment of the impediment to enter into a marriage or registered partnership when the capacity of one of the parties is impaired (Art. 1:32 of the Dutch Civil Code). In other words, one could say that there is already a situation in which the *ambtenaar* has to carry out a (basic) assessment of the adult's capacity, namely the adult's capacity to marry or enter into a registered partnership. The duties of the *ambtenaar* could be extended to include an assessment of the adult's capacity to make a *levenstestament*. The position of the *ambtenaar* in this regard could be strengthened by providing him with the tools to make such an assessment. Like the notary, the *ambtenaar* is not a medical expert and is therefore expected to infer the presence of an impediment based on the information known to him.[239] This will be sufficient in most cases, but in cases of doubt, a guideline similar to the guideline for notaries could be developed for the *ambtenaar* to assess the capacity of his clients.[240]

237 www.bmj.de/SharedDocs/Downloads/DE/Service/Formulare/Vorsorgevollmacht.html (last accessed: 5 October 2022).

238 In Germany, so-called *Betreuungsbehörde* verify the identity of the adult and confirm that the signature on the *Vorsorgevollmacht* is that of the adult concerned.

239 See *e.g.* the conclusion of the Attorney General of the Dutch Supreme Court, ECLI:NL:PHR:2013: BZ8782.

240 See section 3. In Dutch the guideline for notaries is known as the 'Stappenplan beoordeling wilsbekwaamheid ten behoeve van notariële dienstverlening'.

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Besides the form of the enduring document, all four jurisdictions have legislation that regulates the content of the enduring document. Adults are limited in the matters they can include in the enduring document and in their choice of attorney. Representation for certain highly personal acts, such as marriage, divorce, and making a will, is excluded in all four jurisdictions. In all four jurisdictions, the attorney can be authorised to donate on behalf of the adult, but such donations are confined to customary occasions in England and Wales and Switzerland. In Belgium, the adult must clearly stipulate the object, beneficiary and the terms and conditions of the donation. The aforementioned restrictions limit adults in their right to shape the enduring document as they see fit. Such restrictions, especially regarding donations, seem however justified from the point of view of protecting the adult against potential misuse or abuse of the enduring document. Specific legislation on highly personal acts is not necessary in the Netherlands, because representation in such cases is already not possible under current legislation. When it comes to donations, I do recommend adopting specific legislation restricting the possibility to donate. In this context, a combination of the above options seems appropriate, allowing attorneys to continue customary donations that fit the adult's gifting pattern, such as birthday presents and annual donations to charities. 'Exceptional' donations should be allowed up to a certain amount when the adult clearly defines the object, beneficiary and the terms and conditions of the donation. As in England and Wales, I recommend that donations above the set amount should be subject to court approval.

Various motives underlie the exclusion of certain persons as an attorney. With regard to the exclusion in Germany of the management or staff of the institution where the adult resides, Zimmerman notes that the aim is to avoid potential conflicts of interest between the interests of the institution and those of the adult.[241] Another motive is that the attorney's task is not an easy one. Much is demanded of attorneys, such as promoting the active involvement of the adult and, if necessary, managing the adult's affairs and acting on the adult's behalf. Thus, in Belgium, persons deemed unfit to act as court-appointed representative, are also barred from acting as attorney. I recommend the adoption of similar legislation in the Netherlands, so that at least persons, who cannot act as court-appointed guardian, can also not act as an attorney. In addition, it seems sensible to exclude persons who are bankrupt or subject to a debt relief order from acting as financial attorney. A final element in phase 1 is the registration of the enduring document. This element has two sides. First, registration ensures that others, for example, the court, can take note of the adult's wishes and preferences and choice of attorney, thus respecting and promoting the adult's right to autonomy. Second, registration constitutes a safeguard against abuse of the enduring document by the attorney, as it allows for verification that the presented enduring document is the most recent version. To achieve the latter, registration – including amendments and terminations – of the enduring document must be made mandatory. Given the benefits of such a safeguard and its minor impact on the adult's right to autonomy,

241 Zimmerman 2017, p. 92.

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it seems sensible to make registration mandatory. Legislation in this regard should also include an obligation for the court to check the register when confronted with a request for an adult guardianship measure. As in Germany, the register could still be maintained by the notariate, but it should be opened for registration of privately drafted *levenstestamenten*.

In the second phase – the entry into force of the *levenstestament* – two elements can be distinguished, namely the time and manner in which the *levenstestament* enters into force and whether or not the adult retains legal capacity when the *levenstestament* enters into force. These matters seem already well-regulated in the Netherlands. Adults can choose whether the *levenstestament* enters into force immediately or whether it takes effect at a specified time in the future, often upon the incapacity of the adult. With regard to the second option, adults can, for example, include a provision in the *levenstestament* stipulating that a physician should assess the capacity of the adult. Adopting legislation that involves an assessment by a government authority, as is the case in Switzerland, is, in my view, not advisable. As noted above, the Swiss requirement that the *Vorsorgeauftrag* can only take effect upon the incapacity of the adult is not always practicable. Before the actual period of incapacity, there is often a phase in which the adult is still able to act and decide, but requires the assistance of others to do so. Because of this, an informal entry into force of the *levenstestament* seems preferable. This allows the attorney to gradually step in and fulfil a double role, initially providing the adult with the support needed to make his own decisions and taking over the handling of the matters for which the adult is no longer able to decide and act.[242] In this context, it is also important that the adult retains his legal capacity when the enduring document enters into force so that the adult remains (legally) able to also act himself. Naturally, there may be circumstances where adults, although perfectly capable of managing their own affairs, would prefer someone else to manage their affairs for them. In these cases, the enduring document can function as an ordinary power of attorney as long as the adult can still supervise the actions of the attorney himself. However, as in England and Wales, this should only be made possible for financial matters and not for health and care matters. These are very personal matters and a decision in this regard should be taken by the adult when possible. Specific legislation on the aforementioned points is not necessary in the Netherlands, as current legislation already provides for this.

Specific legislation is important concerning the third and final phase when the attorney acts on behalf of the adult. In all four jurisdictions, the legislative framework provides for various rights and duties of the attorney. These include, for example, a duty to follow the adult's wishes and preferences, a duty to render account and a duty to keep the assets of the adult and the attorney separate. These rights and duties seem clearly defined in Belgium, England and Wales and Switzerland and less clearly defined in Germany. In Germany, there is a general duty to assist and represent the adult. However, the inclusion of specifically tailored

242 Stelma-Roorda 2021, p. 12.

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provisions in the *Vorsorgevollmacht* is left to the adult. As in Germany, in the Netherlands adults also have the opportunity of including tailored provisions on the rights and duties of the attorney in the *levenstestament*. Nevertheless, I would argue that clear rights and duties guiding the actions of the attorney are of such importance that it should not be left (completely) to the discretion of the adult to include these in the enduring document. The most important rights and duties should also be enshrined in legislation. While this may be seen by some as infringing the adult's right to draft the enduring document as he sees fit, it is important to realise that the right to autonomy of the adult must be respected not only when the enduring document is drafted, but also when the enduring document is applied. This means, first, that a duty for the attorney to actively involve the adult in the execution of the enduring document when the adult wants to be involved and a duty to follow the adult's wishes and preferences are of such importance that they should be included in legislation. Second, it means that safeguards in the form of, for example, a duty for the attorney to render account are important to prevent the misuse or abuse of the enduring document by the attorney. In this regard, it should be noted that in a situation where the attorney misuses or abuses the authority granted, he will often also act against the adult's wishes and preferences, thus violating the adult's autonomy. Clear provisions on the attorney's duties are particularly important in situations of conflict of interest. In this context, a best practice seems to be the appointment of an attorney ad hoc in Belgium, who temporarily acts instead of the attorney for those matters where there is a conflict of interests.

A final element for which legislation is important concerns the supervision of the *levenstestament*. It is in line with the nature of enduring documents as privately organised instruments of support and protection that the responsibility for ensuring supervision is left initially to the adult. The adult can include modes of supervision (*e.g.* the appointment of a supervisory attorney) in the enduring document. However, according to Principle 12 states should also consider introducing a system of supervision whereby a competent authority has the power both to investigate suspicions of misuse or abuse and to intervene if necessary. In this regard, it should, first of all, be clear where suspicions of misuse or abuse can be reported.[243] In the Netherlands, suspicions of misuse or abuse by the attorney can be reported to *Veilig Thuis*. This is an organisation responsible for the investigation of concerns about domestic violence or child abuse at the local level. *Veilig Thuis* does not have the power to intervene when it finds that a concern is founded and must inform other authorities (*e.g.* the police or the Child Care and Protection Board) so that appropriate action can be taken (Art. 4.1.1 of the Social Support Act 2015). In addition, *Veilig Thuis* appears to have limited powers to investigate concerns in the specific context of the *levenstestament*. While *Veilig Thuis* can ask third parties, such as doctors, for information in some instances, it cannot, for example, require an attorney to provide information or submit documents such as financial statements. Suspicions of misuse or abuse of the

243 Stelma-Roorda 2021, p. 17.

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levenstestament can also be reported to the court in the context of an adult guardianship procedure. The court does have the power to intervene, but will generally have limited possibilities in terms of time and resources to investigate complaints. In addition, only a certain group of persons – the adult, his partner, a close relative (not including the family-in-law), the public prosecutor or a (residential) care facility – can apply for an adult guardianship measure, which means that this procedure cannot be used by other interested parties, such as neighbours or friends of the adult, to report concerns of misuse or abuse to the court. Even *Veilig Thuis* cannot report directly to the court but must do so through the Public Prosecutor's office.

In other jurisdictions, the procedure seems less cumbersome either because there is a direct link between the authority responsible for investigating signs of abuse and the authority responsible for intervention (the Office of the Public Guardian and the Court of Protection in England and Wales) or because the responsibility for the investigation of complaints and intervention lies in the hands of the same authority (the adult protection authority in Switzerland). As noted above, it might be worth considering the introduction of an equivalent authority in the Netherlands. Such an organisation could be responsible – in addition to the homologation of the *levenstestament* mentioned above – for the investigation of suspicions of misuse and abuse and could be given specific powers to do so. This would include, at a minimum, the power to demand information and documents such as financial statements from the attorney. However, I recognise that it does not seem feasible to establish such an authority solely for the regulation of the *levenstestament*. In England and Wales and Switzerland, the Office of the Public Guardian and the adult protection authorities also have other responsibilities, such as the supervision of court-appointed representatives. The necessity of an authority to also assume such tasks in the Netherlands cannot automatically be assumed and is something that must be examined further.[244] In the meantime, it seems sensible that legislation is amended to give *Veilig Thuis* the power to bring founded suspicions of misuse or abuse to the attention of the court. The court must subsequently have the power to intervene. In the Netherlands, the court currently only has the power to terminate the *levenstestament* partly or completely. The competent authorities in the four jurisdictions have more options to intervene. In Belgium, the court can subject the execution of the *zorgvolmacht* to the same procedural requirements that apply to the adult guardianship measures, such as the obligation to obtain court approval for certain actions or the obligation to periodically render account. In Germany, the court can appoint a *Kontrollbetreuer* – a supervisory court-appointed representative – whose role is to supervise the attorney. In Switzerland, the adult protection authority may require the attorney to submit an inventory and subsequent periodical financial report or give the attorney certain instructions regarding the execution of the *Vorsorgeauftrag*. Such interventions allow the enduring document to remain in force, which means the

244 A large-scale, multidisciplinary research project on a new system for the empowerment and protection of older adults is currently underway in the Netherlands.

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autonomy of the adult is respected as much as possible. Legislation extending the powers of the court seems therefore also appropriate in the Netherlands.

Turning to a discussion of the problems that arise in the application of the *levenstestament*, several of the problems that occur in the Netherlands also occur abroad. The risk of misuse or abuse of the enduring document by the attorney is something all four jurisdictions struggle with. It is a problem that is inherent to the intrinsic nature of enduring documents as instruments based on trust. When adults are given the possibility to appoint an attorney of their own choice in whom they place their trust, there will inevitably be situations where this trust proves to be misplaced.[245] I have argued elsewhere that this risk can at best be managed through legislation, including safeguards, but it can never be completely eliminated.[246] The adoption of legislation that can help to tackle this risk has been already discussed above. However, this risk can also be managed by taking certain steps in practice. Experts from several jurisdictions indicated that attorneys seem to be insufficiently aware of their rights and obligations, which may contribute to the misuse of the enduring document by the attorney.[247] As noted, a first step towards improving this situation seems to be the inclusion of the most important rights and duties of the attorney in legislation. The second step towards improvement is to make sure that attorneys are aware of their rights and obligations.[248] This can, for instance, be done by attaching or including information about the attorney's rights and obligations in the enduring document, which is recommended in Belgium and Germany, or by actively informing the attorney when the enduring document enters into force (Switzerland).[249] The first option seems the most feasible for the Netherlands, as the time of entry into force of the *levenstestament* is flexible and the Netherlands does not have a similar authority like the Swiss adult protection authority, actively monitoring the entry into force of the *levenstestament*. Another best practice is the Code of Practice of England and Wales, where the attorney's rights and duties are explained – using examples – in a clear and illuminating manner.[250]

Family disputes in the form of disputes between multiple attorneys or disputes between attorneys and other family members also occur in all four jurisdictions. Various recommendations and best practices are put forward to prevent or resolve such disputes. Both Kurze (Germany) and Fassbind (Switzerland) recommend that adults and professionals pay more attention to the drafting of the enduring document. For example, in cases where the adult appoints multiple attorneys, the

245 Stelma-Roorda 2021, p. 24.
246 *Ibid*.
247 Kurze 2018, p. 50 (Germany); Daley *et al*. 2017, p. 97 (England and Wales). See for other recommendations concerning steps to be taken to prevent the misuse or abuse of enduring documents, Stelma-Roorda 2021.
248 For other recommendations concerning steps to be taken to prevent the misuse or abuse of enduring documents see Stelma-Roorda 2021.
249 Wuyts 2020b, p. 324-326 (Belgium); Kurze 2018, p. 50 (Germany); Art. 363(3) SCC (Switzerland).
250 MCA 2005 Code of Practice.

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tasks of these attorneys should be clearly delineated.[251] In addition, Wuyts (Belgium) and Kurze (Germany) recommend that attorneys should be asked to act clearly and transparently, for instance, by allowing family members to view the adult's online banking environment to check the attorney's transactions.[252] When conflicts do occur, the court or the administrative authority in several jurisdictions can intervene. In Belgium, the court can try to reconcile the conflicting parties through mediation. However, mediation does not necessarily have to be offered in the context of court proceedings; in Germany, so-called *Vorsorgemediation* is offered by solicitors.[253] In addition to mediation, the Belgian court has the option of ordering an evaluation period, during which the attorney's actions are monitored by the court, to eliminate a sense of distrust among family members. Something similar can be achieved through the appointment of the *Kontrollbetreuer* by the court in Germany. All the above recommendations and best practices seem to be relevant for the Netherlands. As noted above, currently the only intervention possibility in the Netherlands in cases of family conflicts seems to be the appointment of a guardian by the court. However, given the already considerable overburdening of the Dutch courts and the role of the court in the supervision of enduring documents, best practices that increase the workload of the courts as little as possible seem best suited for the Netherlands.[254] So-called inheritance mediation is already offered by several solicitors in the Netherlands and perhaps these solicitors could be persuaded to also offer mediation in case of disputes with the *levenstestament* as well. Instead of granting the court the power to order an evaluation period, the possibility for the court to appoint a supervisory guardian who supervises the actions of the attorney seems preferable.

Problems with the enforceability of the enduring document are also encountered in several jurisdictions. Various sectors are mentioned in this regard, including banks and the medical and care sector. Best practices to solve this problem are unfortunately less evident. In Germany, a distinction is made between the *Vollmacht* (power of attorney), *i.e.* the conferral of authority to act on behalf of the adult, and the basic agreement, *i.e.* the agreement between the adult and the attorney on how the conferred authority should be used. By including certain items in the basic agreement – such as the time of entry into force, restrictions and directions on how attorneys are to take decisions together and instructions regarding donations – the assumption is that problems with the acceptance by for example banks can be avoided. As noted, in practice the impression is that adults frequently fail to include a basic agreement in the *Vorsorgevollmacht*. This then creates the risk of an unlimited *Vollmacht* for the purpose of acceptance, which does not offer sufficient safeguards to counterbalance the risk of misuse or abuse. In Switzerland, the adult protection

251 Kurze 2018, p. 50; Fassbind 2017, p. 229.

252 Wuyts 2020b, p. 265-267 and p. 318-319; Kurze 2018, p. 51.

253 See *e.g.* https://vorsorgevollmacht-anwalt.de/mediation-betreuung-vorsorgevollmacht (last accessed: 1 August 2022).

254 See *e.g.* NOS, 'Rechtspraak krijgt meer geld, 155 miljoen om overbelasting op te lossen', via https://nos.nl/artikel/2436315-rechtspraak-krijgt-meer-geld-155-miljoen-om-overbelasting-op-te-lossen (last accessed: 1 August 2022).

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authority has the authority to interpret the *Vorsorgeauftrag* and add clarifications on minor points, which can promote the acceptance of the *Vorsorgeauftrag*. However, the downside of this provision is that the adult protection authority has seemed to have made itself indispensable as in practice a tendency to pass any liability risks to the state seems to have emerged. According to Wuyts, there seem to be few problems with the enforceability of the *zorgvolmacht* in Belgium. However, clear reasons why this is the case are not given.[255] Further research exploring this problem and potential solutions is in other words called for. However, there is a best practice that safeguards the adult's privacy. To avoid situations where third parties become privy to information they do not need to know, Wutys advocates the introduction of so-called 'certificates'. These certificates contain information relevant to the third party but exclude non-relevant information, thus ensuring that the adult's privacy is respected concerning the information the third party in question does not need to know.[256]

While this is not an indication of a problem but merely an observation, as noted above, a qualitative study with both adults and nominated and active attorneys showed that more could be done in the Netherlands to promote the adult's autonomy in terms of the active involvement of adults in the execution of the *levenstestament*. Research in the four jurisdictions on this issue is limited. In relation to Belgium, Wutys examined the extent to which various legal provisions to promote the adult's autonomy have been successful. What Wuyt's study shows is that legislation on adult involvement alone is not enough to bring about a change in attitudes. There are practicable obstacles – such as time constraints – that hinder the implementation of legal provisions. While legislation creates a legal obligation for professionals and attorneys, among other, to consider ways in which the adult's autonomy can be promoted, finding ways to do so should not be left entirely to practice. Wuyts mentions developments such as 'legal tech' and 'legal design', which could be further explored as a means to support a process in which the adult considers his wishes and preferences to be included in the enduring document in advance. More research into these and other developments is needed to explore how best to promote the adult's right to autonomy in practice.

9. Conclusion

The aim of this article has been to find solutions and best practices in the regulation and application of enduring documents in four jurisdictions that might provide a solution to the problems identified with the *levenstestament* in the Netherlands. With regard to the regulation of the *levenstestament*, this concerns the absence of a clear, solid legal basis that ensures compliance with international human rights norms and principles. Although the *levenstestament* is currently regulated within the framework of the existing law on ordinary powers of attorney, service provision agreements and mandate agreements, I concluded that the adoption of specific

255 Wuyts 2020b, p. 324-326
256 *Ibid*.

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legislation on the Dutch *levenstestament* is called for. Looking at the legislation of enduring documents in the four jurisdictions, several best practices could serve as an inspiration for the legal framework in the Netherlands. These concern – at the stage when the adult makes the *levenstestament* – clear regulation of the form of the *levenstestament* (both private and notarial) and the formal requirements that must be met when making a *levenstestament*, such as signing a *levenstestament* either before a notary or a civil registry officer (*ambtenaar van de burgerlijke stand*), who verifies that the adult has capacity and has not been unduly influenced. Furthermore, I recommend legislation on the content of the *levenstestament* – especially concerning donations – and the suitability of attorneys (*e.g.* the exclusion of, for example, persons deemed unfit to act as court-appointed representative). I have also argued that the Dutch government should through legislation provide for mandatory registration of the *levenstestament*, including an obligation for the court to check the register, thus ensuring that the adult's rights to autonomy is respected.

Legislation is also important at the stage when the *levenstestament* is active. In this regard, I have argued that it should not be left completely to the adult whether or not to specify certain main rights and duties of the attorney in the *levenstestament*. Legislation should provide for certain minimum rights and duties to be observed by the attorney. These include a duty for the attorney to involve the adult in the execution of the *levenstestament* by informing and consulting him, a duty for the attorney to respect the adult's wishes and preferences, a duty for the attorney to render account and a duty to keep the adult's assets separate from his own. Legislation should, in addition, ensure that conflicts of interest are managed by prescribing the appointment of an attorney ad hoc, who temporarily acts when a conflict of interest arises. Finally, legislation is important to ensure that there is passive supervision by the state. In this regard, I have argued that the introduction of an adult protection authority is something that should be explored further. In the meantime, it seems important that there is at least a direct link between the organisation responsible for the investigation of complaints (*Veilig Thuis*) and the authority responsible for intervention (the court). When faced with a situation of misuse or abuse of the *levenstestament*, the court should have more options to intervene than is currently the case. Best practices in this respect seem an obligation for the attorney to obtain court approval for certain actions, the appointment of a supervisory court-appointed representative to whom the attorney must render account and the possibility of giving the attorney certain instructions regarding the execution of the *levenstestament*. These powers to intervene can also be used by the court in situations where there are family disputes.

I recommend that this legal framework be included in Book 1 of the Dutch Civil Code, more specifically in a subsection before the legislation on the Dutch adult guardianship measures. This would allow the Dutch legislator to simultaneously enact legislation regulating the relationship between the *levenstestament* and the adult guardianship measures. The enactment of legislation should be accompanied by efforts to address the problems with the *levenstestament* in practice. In this

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context, greater awareness of the attorney's rights and duties could be raised to prevent situations of misuse. Furthermore, alternatives to court intervention, such as mediation offered by solicitors, should be explored to resolve family disputes. In addition, ways to prevent or resolve problems with third-party acceptance of the *levenstestament* should be explored. Finally, further research is needed to explore how professionals and attorneys can be supported in their task of promoting the adult's autonomy by involving the adult in the execution of the *levenstestament* and respecting the adult's wishes and preferences.