

*Legal instruments*



## **Principles concerning continuing powers of attorney and advance directives for incapacity**

Recommendation CM/Rec(2009)11  
and explanatory memorandum

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# **Principles concerning continuing powers of attorney and advance directives for incapacity**

Recommendation CM/Rec(2009)11  
adopted by the Committee of Ministers  
of the Council of Europe  
on 9 December 2009  
and explanatory memorandum

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1. Recommendation CM/Rec(2009)11 adopted by the Committee of Ministers of the Council of Europe on 9 December 2009 as proposed by the Committee of Experts on Family Law (CJ-FA) and supported by the European Committee on Legal Co-operation (CDCJ).
2. This publication contains the text of Recommendation CM/Rec(2001)11 and its explanatory memorandum.



## **Introduction**

Continuing powers of attorney and advance directives constitute two methods of self-determination for capable adults for periods when they are capable of making decisions. Both are anticipatory measures which subsequently have a direct impact on granters' lives during periods when their capacity to make decisions is impaired. Where continuing powers of attorney have been available for some years, they are increasingly viewed as something which everyone should consider in order to provide for eventual periods of incapacity. Continuing powers of attorney are granted more and more often by people of all ages in view of the fact that incapacity can occur suddenly.

Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults continues to be of great relevance and remains entirely up-to-date. The Working Party on Incapable Adults (CJ-FA-GT2) was set up under the authority of the European Committee on Legal Co-operation (CDCJ) and given the task of complementing this recommendation by drawing up a new recommendation to deal with planning for future incapacity by means of continuing powers of attorney and advance directives.

The recommendation, as prepared by the Working Party, was adopted by the Committee of Ministers on 9 December 2009.





**Recommendation CM/Rec(2009)11  
of the Committee of Ministers to member states  
on principles concerning continuing powers of attorney and advance  
directives for incapacity**

*(Adopted by the Committee of Ministers on 9 December 2009  
at the 1073rd meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its member states, in particular by promoting adoption of common rules in legal matters;

Noting that demographic changes have resulted in an increasing number of elderly people who have become incapable of protecting their interests by reason of an impairment or insufficiency of their personal faculties;

Noting that there continue to be other circumstances in which adults become incapacitated;

Having regard to relevant instruments of the Council of Europe, including the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950), the Convention on Human Rights and Biomedicine (Oviedo Convention, ETS No. 164, 1997) and Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015;

Having regard to the Hague Convention on the International Protection of Adults (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006);

Bearing in mind the relevant case law of the European Court of Human Rights;

Agreeing that Recommendation No. R (99) 4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable

adults is a valuable and up-to-date international instrument containing detailed guidance and general advice on legal rules dealing with measures of protection of such adults;

Noting that the above recommendation and the legislation of the member states concerning adults with incapacity strongly promotes self-determination and autonomy;

Considering that self-determination is essential in respecting the human rights and dignity of each human being;

Noting that in some member states continuing powers of attorney are a preferred alternative to court decisions on representation;

Noting that legislation on continuing powers of attorney and advance directives has recently been passed or proposed in some member states;

Noting that in legal systems where continuing powers of attorney and advance directives are available, adults of all ages increasingly make use of them;

Recognising that there are considerable disparities between the legislation of member states as regards these issues;

Building upon the principles of subsidiarity and necessity contained in Recommendation No. R (99) 4 and supplementing it with principles on self-determination,

Recommends that governments of member states promote self-determination for capable adults by introducing legislation on continuing powers of attorney and advance directives or by amending existing legislation with a view to implementing the principles contained in the appendix to this recommendation.

## **Appendix to Recommendation CM/Rec(2009)11**

### *Part I – Scope of application*

#### *Principle 1 – Promotion of self-determination*

1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.

2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.

*Principle 2 – Definition of terms used in the present recommendation*

1. A “continuing power of attorney” is 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. The “granter” is the person giving the continuing power of attorney. The person mandated to act on behalf of the granter is referred to as the “attorney”.

3. “Advance directives” are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity.

*Part II – Continuing powers of attorney*

*Principle 3 – Content*

States should consider whether it should be possible for a continuing power of attorney to cover economic and financial matters, as well as health, welfare and other personal matters, and whether some particular matters should be excluded.

*Principle 4 – Appointment of attorney*

1. The granter may appoint as attorney any person whom he or she considers to be appropriate.

2. The granter may appoint more than one attorney and may appoint them to act jointly, concurrently, separately, or as substitutes.

3. States may consider such restrictions as are deemed necessary for the protection of the granter.

*Principle 5 – Form*

1. A continuing power of attorney shall be in writing.

2. Except in states where such is the general rule, the document shall explicitly state that it shall enter into force or remain in force in the event of the granter’s incapacity.

3. States should consider what other provisions and mechanisms may be required to ensure the validity of the document.

*Principle 6 – Revocation*

A capable granter shall have the possibility to revoke the continuing power of attorney at any time. Principle 5, paragraph 3, is applicable.

*Principle 7 – Entry into force*

1. States should regulate the manner of entry into force of the continuing power of attorney in the event of the granter's incapacity.
2. States should consider how incapacity should be determined and what evidence should be required.

*Principle 8 – Certification, registration and notification*

States should consider introducing systems of certification, registration and/or notification when the continuing power of attorney is granted, revoked, enters into force or terminates.

*Principle 9 – Preservation of capacity*

The entry into force of a continuing power of attorney shall not as such affect the legal capacity of the granter.

*Principle 10 – Role of the attorney*

1. The attorney acts in accordance with the continuing power of attorney and in the interests of the granter.
2. The attorney, as far as possible, informs and consults the granter on an ongoing basis. The attorney, as far as possible, ascertains and takes account of the past and present wishes and feelings of the granter and gives them due respect.
3. The granter's economic and financial matters are, as far as possible, kept separate from the attorney's own.
4. The attorney keeps sufficient records in order to demonstrate the proper exercise of his or her mandate.

### *Principle 11 – Conflict of interest*

States should consider regulating conflicts of the granter's and the attorney's interests.

### *Principle 12 – Supervision*

1. The granter may appoint a third party to supervise the attorney.
2. States should consider introducing a system of supervision under which a competent authority is empowered to investigate. When an attorney is not acting in accordance with the continuing power of attorney or in the interests of the granter, the competent authority should have the power to intervene. Such intervention might include terminating the continuing power of attorney in part or in whole. The competent authority should be able to act on request or on its own motion.

### *Principle 13 – Termination*

1. States should consider under which circumstances a continuing power of attorney ceases to have effect.
2. When a continuing power of attorney ceases to have effect in part or in whole, the competent authority should consider which measures of protection might be taken.

## *Part III – Advance directives*

### *Principle 14 – Content*

Advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed.

### *Principle 15 – Effect*

1. States should decide to what extent advance directives should have binding effect. Advance directives which do not have binding effect should be treated as statements of wishes to be given due respect.

States should address the issue of situations that arise in the event of a substantial change in circumstances.

*Principle 16 – Form*

1. States should consider whether advance directives or certain types of advance directives should be made or recorded in writing if intended to have binding effect.
2. States should consider what other provisions and mechanisms may be required to ensure the validity and effectiveness of those advance directives.

*Principle 17 – Revocation*

An advance directive shall be revocable at any time and without any formalities.

# Explanatory memorandum

## 1. General comments

### *1.1. Moving forward from Recommendation No. R (99) 4*

1. The Council of Europe first addressed the issue of protection of incapable adults in discussions at the 3rd European Conference on Family Law entitled “Family Law in the Future”, held in Cadiz, Spain, in April 1995. The conference requested the Council of Europe to invite a group of specialists in this field to examine the desirability of drafting a European legal instrument. The aim was to guarantee the integrity and rights of incapable adults and, wherever possible, their independence. Following this proposal, the Committee of Ministers of the Council of Europe set up the Group of Specialists on Incapable and Other Vulnerable Adults (CJ-S-MI) in 1995, later renamed the Group of Specialists on Incapable Adults.

2. The result of the group’s work was Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults. It contains detailed principles and is accompanied by an extensive explanatory memorandum. According to the recommendation’s scope of application, its principles “apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their own interests. The incapacity may be due to a mental disability, a disease or a similar reason”. The principles address measures of protection or other legal arrangements enabling such adults to benefit from representation or assistance in relation to those affairs. The recommendation contains governing principles and sections on “procedural principles” and “the role of representatives”.

3. Principle 2, “Flexibility in legal response”, stipulates that the measures of protection and other legal arrangements “should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations”. Principle 5, “Necessity and subsidiarity”, indicates that, “no measure of protection should be established for an incapable adult unless the measure is necessary, taking into account

the individual circumstances and the needs of the person concerned. In deciding whether a measure of protection is necessary, account should be taken of any less formal arrangements which might be made and of any assistance which might be provided by family members or by others". Principle 6 on "Proportionality" underlines that a measure of protection "should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned". Principle 3, "Maximum preservation of capacity", provides that "the legislative framework should, as far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned". It is supplemented by Principle 2, paragraph 4, according to which, "the range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned". The recommendation strongly promotes self-determination and autonomy, which are essential in respecting the human rights and dignity of each person. Principle 2, paragraph 7, states that, "consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity". Such a possibility clearly facilitates flexibility and proportionality of the legal response, as mentioned in Principles 2 and 6, as well as respecting the principles of necessity and subsidiarity in accordance with Principle 5. Finally, Principle 9, paragraph 1, states that, "in establishing or implementing a measure of protection for an incapable adult, the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect".

4. Since incapacitated persons are among the most vulnerable in society, the Committee of Experts on Family Law (CJ-FA), at its 36th meeting on 15 to 17 November 2006, decided, in the light of the increased number of elderly people in Europe, to set up a Working Party on Incapable Adults (CJ-FA-GT2) to examine the usefulness of drafting a convention based on Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults.

5. During the first meeting of the Working Party from 17 to 19 September 2007, it was assessed that little value would be added by preparing new



binding rules, as they would have almost the same content as the existing recommendation. The Working Party considered that the Recommendation No. R (99) 4 continues to be of great relevance, and that it remains entirely up to date. Its strength is that it is addressed to all member states and provides detailed guidance on how to reform national legislation. Indeed, it has guided several member states in the preparation of recent legislative reforms. Further reference to this recommendation has been made in three judgments of the European Court of Human Rights, namely *H.F. v. Slovakia* of 8 November 2005 (Application No. 54797/00), *Shtukaturov v. Russia* of 27 March 2008 (Application No. 44009/05) and *X v. Croatia* of 17 July 2008 (Application No. 11223/04). In the *Shtukaturov* case, the Court concluded in paragraph 95: "Although these principles [of the Recommendation No. R (99) 4] have no force of law for this Court, they may define a common European standard in this area". The Working Party proposed therefore to build on that recommendation and to elaborate new principles focusing on self-determination, in particular on continuing powers of attorney and advance directives.

6. On the basis of the conclusions of the Working Party, which were supported by the CJ-FA at its 37th meeting held from 28 to 30 November 2007, and by the Bureau of the European Committee on Legal Co-operation (CDCJ) at its 80th meeting from 13 to 14 December 2007, the Committee of Ministers of the Council of Europe adopted new terms of reference for the CJ-FA for the period January 2008-June 2009, which included, *inter alia*, the task of drawing up a new recommendation dealing with planning for future incapacity, by means of continuing powers of attorney and advance directives.

7. Because of the revised mandate of the Working Party, its composition was changed and new members selected, in consultation with the Chair of the CJ-FA. It met four times in 2008, under the chairmanship of Mr Kees Blankman (Netherlands) and with Mr Svend Danielsen (Denmark) as consultant.

8. After its second meeting from 14 to 16 May 2008, the Working Party sent its preliminary draft recommendation and a preliminary explanatory memorandum to the members of the CJ-FA for information and possible comments. Other relevant bodies and institutions were also invited to comment. The replies received were discussed and taken into account at the third meeting of the Working Party from 3 to 5 September 2008.

9. The draft recommendation and its explanatory memorandum, as prepared by the Working Party, were examined by the CJ-FA at its 38th plenary meeting from 17 to 20 March 2009 and submitted to the CDCJ for approval at its 84th plenary meeting from 6 to 9 October 2009 before their transmission to the Committee of Ministers for adoption on 19 November 2009.

### *1.2. The need for a new recommendation*

10. Experience at both national and international level in recent decades shows that the issue of adults with incapacity is arguably the most topical issue of family law at present; this may also prove to be true in years to come. Despite the overall improvement in the protection of human rights, this area of law was underdeveloped or even completely neglected in a number of member states.

11. It should be borne in mind that the numbers of elderly people are rising steadily in Europe, due to an overall improvement of living conditions, demographic and social changes and medical advances. However, the mental faculties of the elderly often decline with age and the number of persons suffering from diseases such as senile dementia or Alzheimer's disease is increasing throughout Europe. In addition, groups other than the elderly may also experience impairments of capacity.

12. Measures to address incapacity may be put into two broad categories: responsive and anticipatory. Responsive measures are initiated after impairment of capacity, responding to that incapacity, and generally require judicial or other public intervention. Anticipatory measures, on the other hand, are put in place by a capable person, prior to any impairment of capacity.

13. In several member states, attention has recently been focussed on persons' self-determination as opposed to judicial or other public intervention. However, at present there is no instrument at the European level which provides guidance for member states in the reform of laws allowing provision to be made for future incapacity. A new international instrument might therefore be relevant and timely. It could benefit the lives of many citizens who might wish to plan for their own possible future incapacity with the help of an instrument of legal nature, which might provide added value.

14. Continuing powers of attorney and advance directives constitute two methods of self-determination for capable adults for periods when they may not be capable of making decisions. Both are anticipatory measures which subsequently have a direct impact on granters' lives during periods when their capacity to make decisions is impaired. They are both defined in Principle 2 of the new recommendation. The terminology of the recommendation is explained in section 1.5, "Terminology".

15. Where continuing powers of attorney have been available for some years, they are increasingly viewed as something which everyone should consider in order to provide for eventual periods of incapacity, in the same manner that it is generally recommended to make a will. Increasingly, continuing powers of attorney are granted by people of all ages in view of the fact that incapacity can occur suddenly. Furthermore, medical trends towards early diagnosis of progressive conditions likely to result in incapacity, and the availability of treatments which slow the progress of such conditions, mean that there are many people who are aware that they are in the early stages of a progressive deterioration of capacity, but who still have sufficient capacity to appoint someone to represent them. Therefore, certain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid continuing power of attorney to appoint a person of their choice to deal with matters which they themselves would find very difficult to handle, if not beyond their capacity. Some legislation recognises that people may have adequate legal capacity to select an attorney and grant a continuing power of attorney even though they might not have adequate capacity to do themselves everything which the attorney is appointed to do on their behalf.

### *1.3. Other international instruments*

16. Many recent international instruments deal with persons with disabilities, other vulnerable persons, incapacity issues and methods of self-determination. The following are particularly relevant.

17. The United Nations' Convention on the Rights of Persons with Disabilities of 13 December 2006 stipulates in its preamble and in Article 4 that states who are parties to the convention reaffirm the universality, indivisibility, interdependence and inter-relatedness of all human rights and fundamental freedoms, and also reaffirm the need for persons with disabilities to be guaranteed full enjoyment of such rights without discrimination.

This convention entered into force on 3 May 2008 after being ratified by the required number of 20 states. By that time, over 100 other states had signed the convention. The convention recognises the capacity of persons with disabilities to make their own decisions, and its Optional Protocol further allows those persons to petition an international expert body. Lastly, the convention foresees national mechanisms of implementation and monitoring (Article 33).

18. This United Nations convention addresses all disabilities, including physical, sensory and intellectual disabilities. Article 12.1 reaffirms the right of all persons with disabilities to recognition everywhere as persons before the law. On the one hand, across the great range of intellectual disabilities, human rights can be put at risk by ascribing incapacity to those who have capacity, but may still require support in exercising their legal capacity. On the other hand, they can be put at risk by suggesting that only support – rather than enforceable legal safeguards – is required by those lacking capacity, and whose apparent compliance with the guidance and decisions of others is not a valid exercise of legal capacity.

19. The first situation is addressed in Article 12.3, which gives new authoritative force to existing best practice principles according to which, where there is capacity but difficulty in exercising it, all necessary support should be given to facilitate, encourage and develop the exercise of capacity. Therefore, where needed, such support should be given to enable a continuing power of attorney to be granted. Article 12.4 briefly re-states the main guiding principles applicable where there is impairment of capacity and “measures that relate to the exercise of legal capacity” are required. This article, however, does not contain principles explicitly addressing such incapacity. Recommendation No. R (99) 4 therefore remains an important starting point for the continued development of legislation in Europe to ensure the protection of the human rights and fundamental freedoms of those with impaired capacity to make valid decisions, and effectively to exercise and assert their rights. The present recommendation includes principles necessary to provide such protection for granters who no longer have capacity when the attorney is acting.

20. Furthermore, the Hague Convention on the International Protection of Adults of 13 January 2000 regulates jurisdiction, applicable law, recognition, enforcement and co-operation. The convention entered into force on

1 January 2009 upon ratification by the required number of three states. Of special interest is the fact that Articles 15, 16 and 38 of the convention deal with international private law issues as regards continuing powers of attorney. As the new recommendation does not deal with these issues, these articles are of relevance as a supplement. Article 15, paragraph 2, regulates which law is applicable, and prescribes that “the existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such an adult is not in a position to protect his or her interests, are governed by the law of the State of the adult’s habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing”. According to paragraph 3, “the manner of exercise of powers of representation is governed by the law of the State in which they are exercised”. Article 16 deals with withdrawal and modification of continuing powers of attorney if they “are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult”. A decision to that effect may be “taken by an authority having jurisdiction under the convention. Where such powers of representation are withdrawn or modified, the law referred to in Article 15 should be taken into consideration to the extent possible.” Article 38 deals with an international certificate: “the authorities of the contracting State where a power of representation [has been] confirmed may deliver to the person entrusted with protection of the adult’s person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred”.

21. On a European level, reference should first be made to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5). Another important instrument is the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164 – Oviedo Convention). Its various provisions are relevant in this context, but particular attention should be paid to Article 9 which stipulates that “the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account.” The explanatory report indicates on this point, “nevertheless, taking previously expressed wishes into account does not mean that they should necessarily be followed. For example, when the wishes were expressed a long time before the intervention and science

has since progressed, there may be grounds for not heeding the patient's opinion."

22. Finally, Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015", deserves also to be mentioned.

#### *1.4. Relevant developments in certain member states*

23. The legal concept "continuing powers of attorney" was first introduced in English-speaking countries, and it is found throughout Australia, Canada and the United States of America. The first legislation based upon Recommendation No. R (99) 4 was the Adults with Incapacity (Scotland) Act 2000, which has been improved in light of experience by an act of 2007. It is a code with unifying principles and provisions, which includes continuing powers of attorney. In England and Wales, the 1985 legislation was replaced by the Mental Capacity Act 2005 supplemented by Statutory Instrument 2007 No. 253 on lasting powers of attorney, enduring powers of attorney and public guardian regulations. In Ireland, a bill to change the 1996 Power of Attorney Act was presented to Parliament at the beginning of 2007 (Mental Capacity and Guardianship Bill 2007, No. 12).

24. In states such as Belgium, Denmark, Finland, Germany and the Netherlands, powers of attorney have for some years been in use after the granter's incapacity without specific regulations other than the general legislation on powers of attorney. In Germany, the situation changed when the 2nd Guardianship Modification Act of 21 April 2005 (Law Gazette 2005, part I, 1073) entered into force in July 2005 with the purpose of strengthening self-determination for persons unable to protect their own interests. Continuing powers of attorney, called *Vorsorgevollmacht*, constitute its main tool.

25. Legislation on continuing powers of attorney has recently been introduced in other states as well. In Spain, *Ley 41/2003 de 18 de noviembre de protección patrimonial de las personas con discapacidad* introduced a new provision in Article 1732 whereby the mandate terminates upon supervening incapacity of the granter, unless the mandate provides that it should continue in that event or unless the mandate has been given for the purpose of exercise in the event of the granter's incapacity as assessed according to the

granter's instructions. In Austria, the Guardianship Act of 1984 was revised by the *Sachwalterrechts – Änderungsgesetz 2006* which came into force on 1 July 2007 (Law Gazette 2006, part I No. 92, Art. 284 f, 284 g and 284 h of the Civil Code). The new law introduces continuing powers of attorney, called *Vorsorgevollmacht*. In Finland, in April 2007 the Parliament passed *Lag om interessevakningsfullmakt* (Law No. 648/2007) concerning representation powers of attorney, which entered into force on 1 November 2007. In France, Law No. 2007-308 of 5 March 2007 (JORF No. 56) on the reform of the legal protection of adults entitled "*Mandat de protection future*" and Articles 477-494 of the Civil Code introduced a new form of legal protection for adults, including continuing powers of attorney. It entered into force on 1 January 2009. In Switzerland, the modification of 19 December 2008 of the Swiss Civil Code (*Protection de l'adulte, droit des personnes et droit de la filiation*) foresees new legal instruments aimed at self-determination in case of incapacity. Firstly, this would allow a natural or legal person to be responsible for providing the granter with personal assistance or for representing him or her in the event that he or she becomes incapable of proper judgment. Secondly, this law regulates the ways of deciding, in advance directives, which medical treatment the granter would consent to in the event that he or she becomes incapable of proper judgment.

26. Work is in progress in some other states. In Norway, a Law Reform Committee published its report "Guardianship" (*Vergemål*) in 2004 (NOU 2004:16). In accordance with this report, the government proposed a bill to the parliament in September 2009 (*Ot.prp.nr. 110 (2008-2009) Om lov om vergemål (vergemålsloven)*). Chapter 10 (*Fremtidsfuldmagter mv*) deals with future powers of attorney. That same year, in Sweden, a Law Reform Committee published a report on "Questions concerning guardians and substitutes for adults" (*Frågor om Förmyndare och ställföreträdare för vuxna*, SOU 2004:112) containing a proposal for a bill on future powers of attorney (*Lag om Fremtidsfuldmagter mv*).

27. The experience of states where continuing powers of attorney have been in place for some time indicates that adults of all ages increasingly make use of them.

28. In England and Wales, under the old system, the registration of enduring powers of attorney took place at the onset of the granter's incapacity. The registration of the new lasting powers of attorney must take place before the attorney can use them, regardless of whether the granter has lost capacity.

Once registered, the attorney may use the powers and many powers come into force immediately after signing. In the first 13 months after the new system came into force (1 October 2007), the number of registrations of enduring and lasting powers of attorney was 69 377.

29. In Scotland, the present regime of continuing powers of attorney was introduced in 2001. Since then, the number of registrations has continued to grow. Documents are most commonly registered at the time of granting, rather than later at the time of loss of capacity. Some 5 592 powers of attorney were registered in the year to 31 March 2002. The number rose to 18 113 in the year to 31 March 2005, and to 32 066 in the year to 31 March 2008. The figure for 2007/2008 could usefully be compared with the number of guardianships in that year (only 876). In 2007/2008, 791 of the registered powers conferred only personal welfare powers, 1 850 only financial powers, and 14 451 both welfare and financial powers. In 2001/2002, 29% of powers of attorney registered concerned personal matters, in 2003/2004 the number had risen to 48%, and now it is 82%. Some 80% of granters were 60 years old or more.

30. In Germany, it was estimated that more than 1.5 million continuing powers of attorney agreements had been concluded by autumn 2008, and the proportion of adults whose affairs were managed by an attorney rather than a publicly appointed legal representative was constantly increasing. According to a recent study, 30% of residents in German care homes for the elderly were represented by an attorney.

31. Furthermore, in Austria, 5 155 registrations were made from the entry into force of the new legislation on 1 July 2007 to October 2008.

32. Advance directives are recognised in a number of member states. They are found either in legislation concerning measures of protection of incapacitated adults, in legislation on continuing powers of attorney, or in health legislation. All these rules permit capable persons to make statements about certain aspects of their lives in the event of incapacity. Some may be legally binding, others may be wishes which must be taken into consideration and given due respect. As they may deal with health issues, they are often called "living wills" or *Patientenverfügung*.

33. In Austria, instructions may be given to a medical doctor orally or in writing (*Beachtliche Patientenverfügung*) about objections to future medical treatment. They are not legally binding, but should be used as guidelines. The



*Verbindliche Patientenverfügung* is a binding instruction made in writing with a lawyer or a public notary following the receipt of detailed and extensive information from the person concerned. Such instructions have effect for a five-year period and can be renewed. If requested, such a binding instruction may be registered in a centralised register, *Patientenverfügungsregister*, of the Austrian Chamber of Notaries.

34. In Denmark, where the Health Law (*Sundhedslov* nr 546 of 24 June 2005) provides for “living wills” (*livstestamenter*), the patient may express wishes as regards treatment in case he or she is no longer able to make decisions him/herself.

35. The same holds true in Finland, where the Act on the Status and Rights of Patients No. 785 of 1992 imposes an obligation on health-care professionals and the patient’s representatives to respect the previously expressed will of the patient.

36. In the Mental Capacity Act 2005 of England and Wales, there are also some principles on advance decisions limited to decisions to refuse treatment.

37. In Belgium, France and the Netherlands, there is a possibility to state wishes regarding care, and eventual refusal of a treatment in the event of incapacity.

38. Another possibility relates to statements by the person concerned about who should be guardian, if a decision of guardianship is to be made (*Betreuungsverfügung* or *Sachwalterverfügung* in German-speaking countries). This is the case in Austrian, Belgian, French, German and Italian law.

### 1.5. Terminology

39. The present recommendation and this explanatory memorandum distinguish between “capacity” and “legal capacity”. Here the terms “capacity” and “capable” are the counterparts of “incapacity” and “incapable”. “Incapacity” is limited to what might be termed “factual incapacity”, or in some states “mental incapacity”, although the latter term is outdated and unpopular. Such incapacity may impair the ability of an adult to make decisions, assert and exercise rights, and so forth. An extreme form is the incapacity of a person in a coma or in a persistent vegetative state. Although severe dementia or a profound learning disability (formerly “mental handicap”) can cause substantial incapacity, many other conditions can cause

various lesser degrees of incapacity. It is, however, fundamental that such factual or mental incapacity, here termed “incapacity”, never detracts from the adult’s rights and status in law.

40. While in the past “capacity” and “legal capacity” have often been used synonymously, a trend has emerged of sometimes using “legal capacity” to encompass the adult’s rights and status themselves, rather than the ability to exercise and assert them. According to this usage, “legal incapacity” refers to the diminution by law of an adult’s rights and status, similar to that which might be imposed upon some criminal offenders, or upon bankrupted persons. Persons with disabilities should never have such legal incapacity imposed upon them by reason of their disabilities. This point is stressed by Recommendation No. R (99) 4, Principle 3 (“Maximum preservation of capacity”) and by the 2006 United Nations Convention on the Rights of Persons with Disabilities, which uses “legal capacity” in that sense. Article 12.2 of that convention provides, “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” The present recommendation uses “legal incapacity” in that same sense, but is only required to do so once, in Principle 9, to emphasise in accordance with Article 12.2 that the granter of a continuing power of attorney loses no legal capacity when the power continues in force, or enters into force, upon the granter’s incapacity.

41. This recommendation uses “enter into force” in relation to a continuing power of attorney which is not operable before the granter’s incapacity. The term refers to the point in time when the continuing power of attorney becomes operable and the attorney becomes entitled to act.

#### *1.6. Characteristics and perspective of the new recommendation*

42. The new recommendation differs from Recommendation No. R (99) 4, which deals with public measures of protection, procedural rules and the role of the representative appointed by a competent authority. The present complementary instrument primarily deals with decisions made privately by the persons concerned. Self-determination implies that the granters, to a large extent, are free to make decisions on their future life. National legislation may contain specific limitations on this freedom.

43. There might be a unilateral document describing who shall be the attorney, what he or she has the power to do, and under what conditions, though this model requires the acceptance of the appointee before it

becomes effective, and will often be treated as a species of contract following such acceptance. The acceptance, and the establishment of the contract, may be delayed until after loss of capacity. Where there is a substitute appointment, there may be a later acceptance, and subsequent contract, if and when the substitution is triggered. Another possibility is a contract from the outset between the granter and the appointed attorney.

44. The drafting of the new recommendation was influenced by the fact that only a minority of member states already have legislation or draft proposals on continuing powers of attorney and advance directives. The intention has been to draw the attention of member states that are in the process of adopting, or that are considering drafting, legislation concerning persons with incapacity, to the possibility of introducing or refining these methods of self-determination, and to a number of issues and principles which may be addressed in this respect. Member states are recommended to consider most of them. However, some principles regarding continuing power of attorney contain more specific advice. This explanatory memorandum describes the issues in more detail, with examples illustrating how the problems have been addressed in states that have already introduced new legislation.

45. The recommendation also deals with advance directives as defined in Principle 2, paragraph 3. The principles in Part III are broadly formulated and address general questions to be taken into account. In the future, they might be built upon in the light of developing experience on a national and international level. Advance directives, in practice, vary considerably in the matters which they cover. The more detailed the regulations are, the more they may depend on specific national legislation, especially in the health field.

46. In accordance with the revised terms of reference of the Committee of Experts on Family Law (CJ-FA) from January 2008 to June 2009, the recommendation does not deal with methods of facilitating self-determination other than continuing powers of attorney and advance directives, such as supported decision making. This recommendation concerns anticipatory measures which address possible future loss of capacity, as opposed to the very different situation of people who are capable, but require support to exercise that capacity. These areas overlap where a person requires support in order to grant a valid continuing power of attorney or issue a valid advance directive. Therefore, the recommendation's perspective

differs from that of the 2006 United Nations Convention on the Rights of Persons with Disabilities, although the two instruments shall be considered as complementary.

## *1.7. Continuing powers of attorney*

### *1.7.1. General remarks*

47. There is a clear need to introduce the possibility of establishing continuing powers of attorney as an alternative to public representation, as that possibility is less restrictive of the person's rights. It permits adults, and even encourages them, to prepare for what shall happen if and when they are no longer able to protect their own interests. Such powers of attorney may also be created by younger people as a precaution against unexpected illness or accidents. This step might be considered at the same time as making a will or buying property.

48. It might be reassuring for the granters to be able to decide for themselves who, in the event of their incapacity, shall make decisions on their behalf and take care of their interests; this is often going to be someone they know and trust. They may appoint one or more people from among their family members or friends, or a professional such as a lawyer, notary or accountant. This might be felt to be preferable to a competent authority deciding who the appointed person should be and what powers should be conferred. A valid continuing power of attorney may prevent the courts or other public authorities from intervening and interfering in the granter's affairs. To a large extent, public supervision can be avoided and the sometimes strict rules on administration and investing capital do not have to be followed. The granters will thus be able to maintain confidentiality in respect of their economic and financial affairs. They may decide when the document may be used and what decisions it shall cover. Where a power of attorney has been designed to remain in force during incapacity, the mandate continues without interruption after the granter loses capacity.

49. In using one of these options, the granter can be more certain that he or she will not be dragged into time-consuming and sometimes costly, sensitive and burdensome legal or administrative proceedings to establish public representation. The relatives would not have to take the potentially unpleasant initiative of instituting such proceedings, a thankless task they are often reluctant to undertake.

50. Another important aspect might be a need to reduce the demands on public resources in this area. The growing number of people who cannot make decisions themselves, and therefore need to be represented, has put pressure on judicial and administrative authorities which are facing an increasing number of cases in which an application for a public measure of protection has to be dealt with and measures of control have to be applied to the publicly appointed representatives.

51. Public resources thus have to be taken into consideration. Were continuing powers of attorney to become a real alternative to public representation, there can well be considerable savings for public authorities. Some states that have recently introduced the system have identified a further benefit in reducing the workload of the judicial and administrative authorities concerning measures of protection, having regard to the time required, the rising public costs and the risk that the public representation might be ineffective. Therefore, in some states continuing powers of attorney have been given priority over public measures of representation, which should be used as a last resort, restricted to serious and contested cases, when they are necessary and unavoidable in order to protect the adult concerned. The goal is to minimise the administrative and financial obstacles to making a continuing power of attorney whilst retaining appropriate protection of rights. A balance has to be found when considering rules on involvement of public authorities as regards the creation, certification, registration, notification and control of continuing powers of attorney. It is generally considered an advantage of continuing powers of attorney that they are relatively simple, flexible and effective compared to public representation.

52. There can of course be disadvantages and risks with continuing powers of attorney. One is that the granter, when the document is created, already lacks sufficient capacity or is weak and/or under undue pressure, or misled, for example by the person who wishes to be appointed as attorney. The satisfactory use of powers of attorney depends to a large extent on the attorney's integrity and honesty. In most states, it is felt necessary to regulate the creation of the document, although requirements should not be too formalistic or burdensome. It is important that the granter is informed, so that he or she is able fully to understand the nature and scope of the document and the effects of the power. It is equally important that the attorney accepts the appointment. He or she must be aware that they differ from a publicly established representation, as, depending on the

national legislation, the same rules of protection may not be applicable: there might not be the same public supervision, no requirement to have important decisions approved, and few or no formalities for record-keeping. An important safeguard against misuse is the liability of the attorney. The granter therefore has to be warned in advance about possible conflicts of interest and risks of misuse. Circumstances may change in ways not foreseen at the time of signing, while at the same time the granter may have become unable to guide the attorney or to change or withdraw the document.

53. As provisions regarding the granting of powers of attorney are intended to replace public representation, the use of the power of attorney is thereafter regulated only to a limited extent, and public authorities are rarely involved in monitoring and supervision to protect the interests of the incapacitated adult. The attorney may act contrary to the intention and the interests of the granter and operate in a way which the latter, if capable, would not have accepted. Relatives may consider that if the granter were capable, he or she would have preferred their assistance. Financial abuse can occur where attorneys act in ignorance of their obligations or otherwise negligently. Unfortunately, a liability case against the attorney may be of no value if there is nobody to take the initiative or if the attorney has already spent the granter's funds. On the other hand, a person who wishes to abuse the granter's trust might find an easier way than having a power created. By way of example, the weaker person may be persuaded to transfer funds. Similarly, his or her signature may be faked.

54. Any measures addressing incapacity, whether anticipatory or responsive, face particular challenges where there is a history of family conflict and/or mistrust. Such measures require recognising such issues, but are unlikely to resolve the underlying causes. Depending upon the granter and the circumstances, a continuing power of attorney may be the best way of addressing such issues; or it may be fraught with difficulties, or even unworkable. Legislation on continuing powers of attorney should provide a relatively straightforward and uncomplicated framework for the principal target group of well-functioning, co-operative families. However, it should also allow for the more sophisticated provisions and controls which may be required by a granter aware of such difficult issues and seeking realistically to establish arrangements which will be workable despite them. In some such cases, granters may be unwilling or unable to address likely problems in advance, and might prefer not to attempt anticipatory measures, leaving

incapacity – should it arise – to be addressed under responsive measures. For cases where powers of attorney have been granted but are misused, or have encountered serious conflict, or have become unworkable, it is necessary for legislators to provide for resolution of such situations, if necessary by public intervention.

55. Before making a continuing power of attorney, the granter and the attorney must, with reasonable certainty, be convinced that the document will have the intended effect after the granter has become incapacitated. They must find it to be the right solution. The situation of the granter and his or her relationship with his or her family must be taken into account. In individual cases, there might be reasons to consider the likely reaction of relatives to deterioration in the granter's health. Furthermore, the most suitable attorney has to be identified.

56. To sum up, the wish to have an informal, simple, flexible, effective and inexpensive arrangement should be weighed against the necessity to protect persons with impairment of capacity against abuse and the consequences of unresolved family conflicts.

#### *1.7.2. Types: in force before or upon incapacity?*

57. According to the definition in Principle 2, paragraph 1, a continuing power of attorney is 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. This is the case, as stated in Principle 5, paragraph 2, regardless of whether it is according to a legal rule or to an individual decision by the granter. This wording of Principle 2 reflects the fact that there are different types of continuing powers of attorney concerning economic and financial matters. A continuing power of attorney concerning issues of health, welfare and other personal matters should not enter into force and be used before the granter has become incapable of making decisions in this regard.

58. The first type is a power of attorney that the attorney may use immediately after the signing and may continue to use after the granter has become incapacitated. In a number of states, the general rules on powers of attorney state or imply that the document remains in force after the granter's incapacity. Legislation may contain an explicit rule whereby a power of attorney remains in force unless the granter expressly provides that it is terminated by his incapacity. Another possibility is a rule indicating whether the specific

legislation on continuing powers of attorney covers this type of power of attorney or not.

59. The second type is a power of attorney which enters into force only if and when the granter has become incapacitated. The phrase “enter into force” refers to the point in time when the continuing power of attorney becomes operable and the attorney becomes entitled to act. In some states, this is the only type possible, covered by the special legislation on continuing powers of attorney.

60. A third possibility the granter may choose is a power of attorney that enters into force at a later, fixed date, or when the granter informs the attorney that he or she wishes the document to be used.

61. A power of attorney concerning economic and financial matters that remain in force after the granter’s incapacity is governed by the general legislation on powers of attorney as long as the granter is able to make his or her own decisions. After that, the principles of the recommendation apply fully unless otherwise indicated. As mentioned in the commentary to this principle, the need to consider Principle 5, paragraph 3, as regards “provisions and mechanisms ... required to ensure the validity of the document” is less necessary when the legislation of powers of attorney implies that they remain in force after the granter’s incapacity. Principle 7 deals mainly with powers of attorney that enter “into force ... in the event of the granter’s incapacity”. It is important that Principle 10 on “Role of the attorney”, Principle 12 on “Oversight” and Principle 13 on “Termination” are also applicable after the granter’s incapacity as regards powers that have been in force before that time.

62. There might be certain advantages with continuing powers of attorney that remain in force after the granter’s incapacity. They require more contact between the granter and the attorney as they have to agree whether, and, if so, when the document should be used while the granter is still capable of deciding relevant matters. If the attorney acts while the granter is still capable, the latter can monitor whether the power of attorney is being used as intended. A further important advantage is that it is not necessary to follow the procedures described under Principle 7 when the granter has become incapacitated. This may also make it easier for third parties to accept the attorney’s decisions.



## 1.8. Advance directives

63. Advance directives enable a capable adult to give instructions or make wishes about issues that may arise in the event of the author's incapacity. According to Principle 9 of Recommendation No. R (99) 4, legal representatives shall have respect for the wishes and feelings of the person concerned. Principle 10, paragraph 2 of the present recommendation similarly states that "the attorney, as far as possible, ascertains and takes account of the past and present wishes and feelings of the granter and gives them due respect".

64. National law may contain rules enabling a capable adult to anticipate and address in a more formalised way problems and issues which may arise after he or she has become incapacitated. The directives are addressed to the persons who may be required to make decisions on behalf of or affecting the incapacitated author. Such a person may be a publicly appointed representative if a measure of protection is established, or an attorney acting under a continuing power of attorney. It may also be medical staff who may operate or who may make decisions concerning life-saving, life-maintaining or life-prolonging treatment, social workers or any other person who may make decisions affecting the author.

65. The most important type of legally regulated advance directives concerns health issues. Most rules in this regard are found in special health legislation, and often in the same laws as measures of protection. The term "living will" is often used, even if the directions are meant to be taken into consideration before the adult has died and therefore are not, *stricto sensu*, wills. They might concern life-saving, maintaining or prolonging treatment. The author may not wish to be subjected to relentless pursuit of treatment where there is no hope of improvement, recovery or cure. In the same context, the author may wish to refuse any harsh and painful treatment, or treatment which would merely serve to prolong the process of dying and suffering. The directive may deal with a wish to receive palliative care to ease suffering, a wish to receive sufficient medication to keep the adult free from pain even if this entails a risk of shortening life, and a wish to be given the possibility to die with dignity and in peace. A further possibility is a wish not to be resuscitated in a state of unconsciousness. On the contrary, the directive may be to keep the author alive for as long as possible, using whatever forms of medical treatment available.

66. The legislation in some states gives further examples of the subject matter of advance directives. For instance, directives may contain a wish to be placed into residential care, if the author can no longer live independently at home, to be allowed to stay at home for as long as possible, or to go to an appropriate day-care centre, should circumstances necessitate and permit this. In the above cases, the advance directive may be addressed to close relatives.

67. A third type of directive concerns the choice of a representative if a court order about legal representation should be proposed.

68. In general, some advance directives are incorporated within, or linked to, continuing powers of attorney.

## **2. Comments on the principles**

### *Part I – Scope of application*

#### *Principle 1 – Promotion of self-determination*

69. Principle 1 introduces promotion of self-determination. It encourages states to enable capable adults to make decisions about their lives for periods when they are not capable of making decisions. The requirement that the decision has to be taken by an adult implicitly excludes persons who have not reached the age of majority.

70. In paragraph 2, there is a reference to the notion of subsidiarity, which is also the topic of Principle 5 of Recommendation No. R (99) 4 (“Necessity and subsidiarity”). It reflects the trend in legislation towards giving priority to the establishment of private continuing powers of attorney and binding advance directives over public measures of protection.

71. These anticipatory measures put in place by the adult will accordingly have priority over all responsive measures. For example, it will not usually be appropriate to appoint a guardian with powers which are contained in a continuing power of attorney which is in operation and working well or can be brought into operation. Such appointment would be unnecessary, because of the existing appointment of an attorney. It would thus contravene Principle 5 of Recommendation No. R (99) 4, which includes the provision that “no measure of protection should be established for an incapable adult unless the measure is necessary”. It would also contravene Principle 9 of the same recommendation, because the fact that the granter

has appointed an attorney is a clear expression of the granter's wishes and feelings. Principle 9, paragraph 1 requires that, in relation to the establishment of any measure of protection, the adult's wishes and feelings should be ascertained as far as possible, taken into account, and given due respect. Principle 9, paragraph 2 requires that the wishes of the adult as to the choice of any person to represent or assist him or her should particularly be taken into account and, as far as possible, given due respect.

72. Even in relation to a proposed measure of protection to address some issue not covered by a continuing power of attorney or advance directive, the fact that the adult has granted a continuing power of attorney or issued an advance directive, and the terms of such documents, represent a clear statement of the adult's wishes and feelings which should be taken into account and given due respect.

73. In accordance with Principle 13 of this recommendation, measures of protection might become necessary upon termination of a continuing power of attorney, including termination by a competent authority under Principle 12. These are the only situations in which a measure of protection might replace a continuing power of attorney.

#### *Principle 2 – Definitions of terms used in this recommendation*

74. In paragraphs 1 and 2, the term "continuing powers of attorney" is defined as a mandate given by a capable person with the purpose that it shall enter into force, or remain in force, in the event of the granter's incapacity.

75. The terminology varies from one state to another. In England and Wales, the term "enduring power of attorney" has been replaced by "lasting power of attorney". In Scotland, the term "continuing powers of attorney" is used to cover economic and financial matters. In Austria and Germany, the term is "*Vorsorgevollmacht*", in Switzerland, "*Vorsorgeauftrag*", in France, it is "*mandat de protection future*". The terminology in the Norwegian and Swedish proposals may be translated by "future powers of attorney", and in the Finnish law by "representation powers of attorney".

76. It is unusual to have a special name for powers of attorney as regards health, welfare and other personal matters, but in England and Wales, and Scotland, such powers are called "*welfare powers of attorney*". It is equally unusual to have special terminology for powers that enter into force only in

the event of the granter's incapacity, although the terms "*springing powers of attorney*" and "*trigger mechanism*" are sometimes used.

77. The person issuing the power of attorney may be called the granter, the principal, the donor or the appointer. The person who is appointed to act on behalf of the granter may be called the attorney, the agent, the donee, or the appointee. As stated in paragraph 2, the words "granter" and "attorney" are used for the purpose of this recommendation. The word "attorney" reflects the use of the term "continuing power of attorney"; and it therefore does not imply that an attorney needs to be a lawyer.

78. Paragraph 1 uses "enter into force" in relation to a continuing power of attorney which is not operable before the granter's incapacity. The phrase refers to the point in time when the continuing power of attorney becomes operable and the attorney becomes entitled to act.

79. Paragraph 3 contains a definition of "advance directives", the second form of self-determination covered by the recommendation. Like continuing powers of attorney, advance directives are issued by a capable adult with the purpose of giving instructions, or making wishes concerning issues that may arise in the event of the author's incapacity. The term "living wills" is commonly used in national legislation, even if it covers two different types of decisions, the binding instructions, as well as wishes to be given due consideration (and therefore often called "advance statements"). Paragraph 3 uses only the term "advance directives" but, as described in the definition and expanded in Principle 15, paragraph 1, the term covers both instructions with binding effects and wishes. Advance directives are addressed to persons who may take decisions during the granter's incapacity. They might in particular be addressed to medical staff, social workers, legal representatives, or attorneys appointed under continuing powers of attorney. If the directive takes the form of a wish, it shall, as mentioned in Principle 15, paragraph 1, be given due respect.

80. In the definitions contained in paragraphs 1 and 3, the term "*capable*" is used without defining it. It is necessary that the granter has capacity relevant for this particular document. English case law has established that the granter must know who the attorney will be, what his or her task will be when the granter has become unable to act, and that the document can be withdrawn without the intervention of a court. If the power is of a

general nature, the granter must have understood that the attorney may make decisions in all areas and dispose of all of his or her assets.

81. The title of the Recommendation No. R (99) 4 is “Principles concerning the legal protection of incapable adults”. The term “incapable adults” is not used in the present recommendation, as it is replaced by the more modern “adults with incapacity”, but the terms cover the same reality. It was not felt necessary to define it, as reference can be made to Part I of Recommendation No. R (99) 4 and the definition provided there.

82. Further explanations are found in the explanatory memorandum to the Recommendation No. R (99) 4 (paragraphs 15-20). The incapacity may only be temporary, as the granter may recover. It may also be partial, in which case it is necessary to decide if it is of such nature that it prevents the person from making decisions about issues covered by the continuing power of attorney. Indeed, there is no place in modern incapacity law for the outmoded and factually inaccurate concept that people are either completely capable or completely incapable. All the recommendation’s references to capacity, incapacity and impairment of capacity should be taken to mean “relevant capacity”. This is particularly important in relation to powers about health, welfare and other personal matters, where legislative practice is to permit the attorney to make only decisions of which the granter is incapable so that in some cases the attorney may exercise only some of the powers conferred by the document. As already indicated, relevant incapacity is obviously independent of an adult’s age.

## *Part II – Continuing powers of attorney*

### *Principle 3 – Content*

83. Principle 3 deals with the content of the power of attorney and requires states to consider whether it should be possible to cover economic and financial matters, as well as health, welfare and other personal matters.

84. The main rule is that the granter is free to decide on the content of the document. It is important that such content is clearly described. Because of its special nature and due to the fact that it will be used when the granter may no longer be able to influence it, certain legal requirements about its content may be needed. In most states, a continuing power of attorney is unilateral at the time of granting and becomes a contract upon subsequent

acceptance by the attorney. In others, it takes the form of a contract between the granter and the attorney from the outset.

85. As stated in Principle 5, paragraph 2, the document, except in states where such is the general rule, shall explicitly state that it shall enter into force or remain in force in the event of the granter's incapacity. These two types of powers of attorney are described above in Part I, 1.7.2.

86. Traditionally, powers of attorney refer to "economic and financial matters" or use the terminology "property and financial matters". This has also been the case with continuing powers of attorney. Economic and financial matters may include:

- buying or selling property;
- dealing with the granter's mortgages, rent and household expenses;
- insuring, maintaining and repairing the granter's property;
- repaying interest or capital on any loan taken out by the granter;
- opening, closing or operating bank accounts;
- obtaining and giving access to the granter's financial information;
- claiming, receiving and using all benefits, pensions, allowances and rebates;
- receiving any income and other entitlements on behalf of the granter;
- accepting or renouncing an inheritance or legacy;
- investing the granter's savings;
- making and accepting gifts;
- paying for medical care and residential care or nursing home fees;
- applying for any entitlements to funding for care and social care;
- representing the granter in certain court proceedings.

87. In recent years, it has become more common to widen continuing powers to health, welfare and other personal matters. In accordance with the principle of self-determination, the person concerned makes decisions in such matters when he or she is still capable of doing so. When he or she becomes incapacitated, and if the power of attorney so provides, the attorney can make decisions for him or her. The powers might include a whole range of primarily non-economic decisions, for instance:

- where the person lives and with whom, for example the place of provisional or permanent residence,

- assessments for and provision of community services,
- whether the granter works and, if so, the kind and place of work and the employer,
- education and training,
- in which social or leisure activities the granter should take part,
- right of access to personal information about the granter,
- arrangements needed for the granter to be given medical, including dental or ophthalmological, treatment,
- consenting to or refusing medical examination and treatment,
- consenting to social care,
- complaints about the granter’s care and treatment.

88. There are differences between economic powers on the one hand and personal powers on the other. The latter should not be used as long as the granter is capable of making such decisions him/herself. Therefore, a power of attorney about personal matters should be operable only during the granter’s incapacity. The competent authority which, according to Principle 12, paragraph 2, may intervene, may be different from the one dealing with economic matters. Furthermore, as mentioned in Principle 3, some particular matters may be excluded. Finally, in most jurisdictions, the bankruptcy of the granter or a sole attorney will end economic powers, but not welfare powers.

89. The power of attorney is often of a general nature, covering all economic and financial, as well as health, welfare and other personal matters. However, it might be preferable to provide in the document or in legislation examples of more important decisions the attorney is authorised to make, as it reinforces the awareness of the granter as to the step he or she is taking in signing the document.

90. There may be reasons for creating two continuing powers of attorney, one about economic and financial matters, and another about health, welfare and other personal matters, as the granter may not wish his or her business associates to learn, through the document, about the latter matters.

91. It is possible to limit the power of attorney to certain specific areas, either by listing the areas covered, or by excluding some of them. The power may also be limited in time. The risk with such limitations is that a need for decisions may arise concerning matters which the attorney is not authorised

and the grantor is unable to deal with. It might then be necessary to obtain a court order of legal representation covering such decisions.

92. The grantor may insert binding conditions, restrictions and instructions to the attorney in advance directives, for example for a house to be bought or sold, or funds invested. Owing to the importance of such decisions, they have to be considered carefully, and sometimes it is recommended to grant the continuing power of attorney unconditionally. It is preferable to issue a special document about such directives, as it might not be advisable that a third party – who wishes to consult the power of attorney document – becomes aware of such conditions. Such advance directives should comply with Principle 16.

93. It is essential to the principles of self-determination that legislation should be widely framed, enabling individual grantors each to select what is best for them in relation to the matters discussed above, to confer wider or narrower powers as they may choose and to decide what limitations or conditions should be imposed.

94. As mentioned in Principle 3, states should consider whether some particular matters should be excluded. Any such exclusions should be kept to a minimum. Certain legislation contains a rule that some questions are of such a character that the attorney is not permitted to deal with them and that they are therefore excluded. Examples are agreeing to marriage or a registered partnership, adoption, acknowledgement of paternity or maternity, or making or revoking a will. Some health issues may also be excluded, as they may pose various problems, such as may be the case as regards the representative appointed by a competent authority. If it is possible to exclude or include health and social welfare issues, this might necessitate a change of the relevant health and social welfare legislation.

#### *Principle 4 – Appointment of attorney*

95. Principle 4 deals with the appointment of the person who has a mandate to act after the grantor's incapacity. The word "attorney" is, as mentioned under Principle 2, paragraph 2, closely linked to the term "continuing power of attorney", and this does not mean that the attorney must be a legal professional or a person with other formal qualifications.

96. The grantor's choice of attorney is crucial to the success of the power of attorney. It is important that the grantor considers the person or persons



whom he or she wishes to appoint as appropriate, as stated in paragraph 1. The granter should have confidence in the appointed person(s), as he or she will be unable to control the attorney's decisions, to appoint a new attorney, or to revoke the power of attorney when he or she becomes incapacitated. The appointed person(s) must be relied upon to take care of the interests of the granter. An attorney must have the necessary integrity and ability to resist a wish from family members to use money outside the limits of the power. If these conditions are not fulfilled, there is a risk that the power of attorney will not function properly. A family member may often be preferred by the granter, but he or she may also wish to appoint his or her lawyer, notary, accountant, or simply a friend.

97. According to paragraph 2, the granter may appoint more than one attorney and may appoint them to act jointly, concurrently or separately, or as substitutes. Clearly, if the granter makes such a choice, it must be specified in the document.

98. Two or more attorneys acting jointly may be the solution in cases where there are several children involved, as a reasonable assurance against misuse or undue concentration of power, or to reduce the risk of family dispute. If one of the attorneys cannot or will not take on the task, or if one subsequently resigns or dies, it should be made clear either in the document or in the law whether the other(s) may continue to act. It might be prescribed, either in the document or by law, that if three or more attorneys are appointed to act jointly, a majority decision might be deemed to be unanimous.

99. The appointment may be concurrent, as there may be different attorneys each dealing with some matters, for example one acting as regards economic and financial matters, and another dealing with health, welfare and other personal matters. The reason might be a wish to ensure that someone who has a special competence in the relevant field makes adequate decisions.

100. If the attorneys may act separately, any risk of conflict should be addressed in the continuing power of attorney document. Otherwise, a solution may exist in the law relating to all powers of attorney, or it may be considered necessary to provide a solution.

101. Obviously, a variety of combinations is possible. It may be prescribed that a decision by one of the attorneys is sufficient in most cases, but that two

or three attorneys have to agree on major decisions, for example, the sale of a house. Legislation may also prescribe that if the granter has not decided otherwise, each attorney may exercise his or her authority individually, but in consultation with the others.

102. A final possibility is to appoint one or more substitute attorneys to act in case the first-mentioned attorney is not able or willing to take on the task, has resigned or has died. If more attorneys are appointed, it may be prescribed that they shall act successively in the order in which they are named.

103. According to paragraph 3, states may consider such restrictions as are deemed necessary for the protection of the granter. In some legislation, there are requirements as regards the choice of the attorney. Usually the attorney has to be an individual, natural person, but it might also be a legal person, for example an organisation or an association, sometimes even in cases where the mandate concerns health, welfare and other personal matters. The appointed natural person must be an adult and capable. If the power of attorney covers economic and financial matters, the attorney must not be a bankrupt. One jurisdiction prescribes that the attorney may not be employed by, or closely associated with, a hospital or other institution where the granter is living. Other requirements may be included in a certification or registration procedure as described under Principle 8.

104. The formal arrangements between the granter and the attorney may vary. The continuing power of attorney may take the form of an agreement between them, but it may also be unilateral. It is preferable that the attorney is informed about the creation of the power, and has at the time of creation accepted the role or prospective role. The two people are thereby able to discuss what shall happen if and when the power is used. It may be advisable that the attorney signs the document, as is sometimes prescribed. Some granters may not wish to disclose their intentions to the attorney and therefore may instruct a third person to hand over the power once they have become incapacitated. In this case, it is up to the attorney to accept or refuse the mandate. Even when the power of attorney is granted unilaterally, there should be a requirement for acceptance by the attorney (and by each successive substitute attorney where substitutes are appointed) before the attorney may commence to act. A contract is concluded by such acceptance.

105. A further question is whether the attorney must act personally or may delegate powers to a third person without a legal basis in the document. This question is not addressed in this recommendation.

#### *Principle 5 – Form*

106. The form of the continuing power of attorney is dealt with in Principle 5. It is supplemented by Principle 8, which concerns certification, registration and notification.

107. Paragraph 1 requires a written document. It shall be signed or confirmed by the granter. It is preferable that the document is dated, as required by some legislation.

108. Paragraph 2 deals with the requirement for the granter to state in the document when the continuing power may be used, if this is not regulated by the legislation. As described above in Part I, 1.7.2, in some legislation powers of attorney normally remain in force after the granter's incapacity. If under such a rule the granter wishes for the power of attorney to be brought to an end in the event of his or her incapacity, this must be stated explicitly in the document. In other legislation, it is the general rule that a continuing power of attorney enters into force only in the event of the granter's incapacity, and then it is not necessary for the granter to state that fact. In states where powers of attorney are presumed to terminate in the event of the granter's incapacity, and the legislation about continuing powers of attorney covers both possibilities, it is necessary for the granter to state explicitly in the document if it is the intention that the power of attorney shall remain in force or that the power should enter into force only in the event of the granter's incapacity.

109. A further question not addressed in the recommendation is whether a type of form should be offered. It might be a form issued by an official body. In states where forms are found, they offer a number of choices as regards particular questions. Various forms might be accessible via the Internet. It may be an advantage that it is simple and cheap to produce the document, perhaps seeking advice on the Internet or by using a "do-it-yourself kit". The risk is that the granter might not consider carefully enough the steps to be taken, which may facilitate abuse. The option of an individualised document prepared with professional advice should always be available. The purpose of using a more detailed form is to ensure that the granter understands all

the powers that are granted, and can delete any specific powers which he or she does not wish to confer.

110. It should be considered whether professional assistance should be recommended or even made compulsory. In some legislation, there is a requirement that a professional, such as a lawyer, a notary, or a court official assists, at least if the decision covers more important matters, for example major medical treatment, a change of the place of the granter's habitual residence, and important economic and financial matters. This implies that the granter has been duly informed about the consequences of the document and the possibility of revocation.

111. Since continuing powers of attorney will be effective at a time when the granter is no longer able to intervene or to revoke the power, it is important, as stated in paragraph 3, that states consider what provisions and mechanisms may be required to ensure the validity of the document. Safeguards and procedures may be considered necessary at the time when the document is signed or confirmed. They are probably more necessary when there is specific legislation covering both types of continuing powers of attorney, those that remain in force and those that enter into force in the event of the granter's incapacity, and less necessary if the use after incapacity is a consequence of general rules on powers of attorney. The purpose of regulation is to confirm that the granter, when the document is created, is capable of doing so and not subject to undue influence, and perhaps also that he or she knows the content of the document and that he or she is informed about or confirms that he or she is aware of its consequences. The reason for such considerations is that the granter, at the time of the signing, may be frail and somebody may have an interest in obtaining a mandate to act when the granter is no longer able to do so. A parallel can be drawn with procedures for making wills, and in some legislation they are followed as models. The requirements must be weighed against the consideration that it should not be too difficult and bureaucratic to create the document.

112. In some legislation, it is possible to write the whole document by hand and, if this is not the case, the granters have to sign or confirm their signature in the presence of one or more witnesses. In other legislation, the use of witnesses is the only possibility. These witnesses are required to be independent and unbiased and, for this reason, neither the attorney nor persons connected to the granter or the attorney may act as witnesses. There

might be a requirement that the witnesses must have known the granter for a specified time.

113. Other alternatives require professional involvement. It may be required that the document be established or certified by a notary, a court official or a person with other specific qualifications.

114. Depending on the national system, the primary purpose of a certifier or witnesses is to confirm, if necessary by taking professional advice, that the granter has capacity to grant the continuing power of attorney, as implied by the document. They may be asked to certify that the granter signed voluntarily, that there are no reasons to believe that the granter acted under undue influence, that there is no fraud, and that the document is not for any other reason invalid. In some legislation, the certifier or witnesses are required to confirm that they are convinced that the granter, at the time of signature, has knowledge of the character and the effects of the document or to confirm that the granter has an awareness of them. The certifier or witnesses may be required to read the document aloud if the granter has not confirmed his or her knowledge of the document.

115. The role of the appointed attorney at the time of signature is generally not described. In some legislation, a continuing power may take the form of a contract to which the attorney is a party. In other legislation, where the power is granted unilaterally, the attorney may be obliged to sign the document, thus confirming his or her willingness to take on the task, or to provide signed acceptance separately, for example in a registration application. The attorney may have to confirm a readiness to take the necessary steps to have the document certified and registered when the time comes. If the signature of the attorney is not required, the granter runs the risk that, when it is time to act, the appointed person may not be aware of the document, or may not be willing to act as attorney.

#### *Principle 6 – Revocation*

116. Principle 6 deals with the granter's ability to revoke a continuing power of attorney while he or she is still capable of doing so. A continuing power of attorney, because of its nature, and particularly since it will have effect after the incapacity of the granter, should not be irrevocable. It is also one way of rectifying undue pressure at the time of the signing. This principle applies when the continuing power of attorney is made in the form of a contract, as well as when it is granted unilaterally. The principle does not

prevent states from regulating the possibility of changing or amending the mandate.

117. The reference to Principle 5, paragraph 3, indicates that states should consider what provisions and mechanisms should be in place to ensure the validity of the revocation, for example to establish that the granter has the necessary capacity to make the decision to revoke. Revoking the power potentially raises the same issues and concerns as the granting of the power.

118. An attorney who has knowledge of the power of attorney must be informed about a revocation, as must third parties appointed to monitor the attorney. If the document is already entered into a register, it is necessary to register the revocation.

119. Termination of the continuing power of attorney during the granter's incapacity is dealt with in Principle 13.

#### *Principle 7 – Entry into force*

120. As mentioned above under 1.5 – Terminology, this recommendation uses “enter into force” in relation to a continuing power of attorney which is not operable before the granter's incapacity. The term refers to the point in time when the continuing power of attorney becomes operable and the attorney becomes entitled to act.

121. According to Principle 7, paragraph 1, states should regulate the manner of entry into force of the continuing power of attorney in the event of the granter's incapacity. Where, according to legislation or the terms of the document, a power of attorney already in force remains in force in the event of incapacity, there is no need for special provisions about the continued use, unless some form of registration or notification is required to trigger enhanced monitoring.

122. In situations covered by this principle, it is necessary to establish the incapacity of the granter.

123. Other considerations have to be taken into account. It is important that the granter, if he or she is able to understand the information, is made aware that the attorney intends to use the document. Close family members may also have an interest in being informed that a continuing power has been granted as well as of its content, and that it is now going to be used by the attorney. Furthermore, the attorney may need certification to act as

regards third parties, for example banks, which may require proof from an independent source of the existence and validity of the mandate, and that it has entered into force.

124. Various procedures are used to establish the existence of the requirements for the entry into force of the document. As stated in paragraph 2, states should consider what evidence should be required to determine the granter's incapacity. Those procedures must protect the confidentiality of the detailed medical information upon which incapacity is certified, if such certification is required.

125. The decision about the entering into force of the power may be made in different ways and Principles 7 and 8 do not give examples or express preferences, although Principle 8 lists some possible mechanisms.

126. Application of the principle of self-determination might allow the granter to decide him/herself what kind of evidence about his or her health situation shall be produced, whether or not it is the intent of the legislator that there should be any public involvement. The granter might choose to make it the duty of the attorney to take action and decide to use the power. In those countries where it exists, a medical certificate about the condition of the granter normally will be necessary and sufficient. There might be a provision, in the legislation or in the document, that the attorney has a right to obtain such a certificate regardless of the rules on professional confidentiality. The attorney may, as described below under Principle 8, be required to notify close relatives, as specified in legislation or by the granter. According to the general rules on powers of attorney, the attorney may be held responsible to third parties for ensuring that the power is valid. The attorney has perhaps not been informed in advance of the existence of the document, but that is a risk taken by the granter.

127. Another possibility is that the granter establishes a procedure in the document whereby a third party has to make a written declaration that the granter has become incapacitated, perhaps requiring that a medical certificate about the incapacity be attached or referred to. In some states, such arrangements are imposed by law. A third party holding the document, while the appointed attorney has no knowledge of it, will have the same duty to decide that it is time to use the power and to hand over the document to the attorney. Such a procedure reduces the risk of the power being used prematurely.

128. Legislation may require that a court or the appropriate administrative authority be involved to certify that the document is effective. This often implies a registration procedure. Both procedures are mentioned in Principle 8 and described below.

129. The choice between the possibilities described depends on the extent to which legislators wish public authorities to be involved. Public involvement usually means a delay in the use of the power of attorney and more work for public authorities. It is important that the power of attorney is accepted by third parties, who might be less inclined to do so if the attorney makes the decision him/herself, rather than if the attorney is able to produce a public certificate. Where evidence of medical certification of medical incapacity is requested by third parties, the certificate produced should contain only certification of the fact of incapacity, not the detailed medical information on which that conclusion is based.

#### *Principle 8 – Certification, registration and notification*

130. Principle 8 lists three different systems which states should consider introducing: certification, registration and notification. They apply in different situations, as they may refer to the time of the creation of the power or to the time when it enters into force. Their purposes may vary. They may constitute alternative solutions, or may supplement each other. Once again, it is necessary to find the right balance between the self-determination of the granter and the need for some degree of public involvement.

131. Certification may be required or available at any time and may serve various purposes.

132. Certification may be carried out by a public authority for various purposes. Such a certificate may be issued as part of a registration procedure connected with the creation as described below, and it is then considered to be a certificate of registration, but it might also be independent of such procedure.

133. As already indicated above under 1.3, states which have ratified the Hague Convention of 2000 may, according to Article 38, deliver, on request, a certificate to the person entrusted with protection of the adult's person and property, indicating the capacity in which the person is entitled to act and the powers conferred. It is recommended that a model form is



used. According to the form, the validity of the power of representation is confirmed.

134. Another possibility is certification when a continuing power of attorney enters into force, to confirm that the granter has now become incapacitated, and that other possible procedures, mentioned under Principle 7, paragraph 1, have been duly followed. The purpose may then be to supply the attorney with a certificate stating that he or she has authority to act.

135. As regards continuing powers of attorney that remain in force as well as those that enter into force, the certificate may be sent to the attorney or, where combined with a registration procedure, to whoever initiated the registration. Such a certificate, perhaps annexed to an authenticated copy of the document, may be required for submission to third parties (for instance banks where the granter has accounts or deposits) in order to prove the appointment of the attorney and that he or she has authority to carry out certain transactions on behalf of the granter.

136. In countries where a notarial system exists, a notary could be given the task of issuing a certificate to the effect that the power of attorney is to enter into force. This may follow submission of the power of attorney and, where it is required, a medical certificate about the granter's incapacity to the notary. The notary would confirm the powers conferred upon the attorney in a certificate and issue it to the attorney. Any third person may rely on such a certificate.

137. Rules about registration of continuing powers of attorney exist in a number of states and registration may be voluntary or compulsory. Rules vary as regards the time of the registration and the procedure followed by the registration authorities. The purpose of the registration may vary and is to a large extent dependent on whether there is a certification procedure attached to the registration as well as rules about access to the register. The registration may be carried out with the competent authority, in a central register of notaries, or in a central databank.

138. Registration most often takes place following upon creation of a continuing power of attorney and may be a part of the mechanism to ensure the validity of the document mentioned in Principle 5, paragraph 3. If registration is compulsory, the power may not be used by the attorney before it is registered. This may be the case both as regards powers of attorney that remain in force after the incapacity of the granter and powers that

only enter into force in the event of impairment of capacity. If a lawyer or a notary has taken part in the creation of the document, the application for registration may be one of the lawyer's tasks. Another possibility may be that the application may be lodged by the granter as long as he or she is still capable, or by the attorney on an application form which includes acceptance of appointment by the attorney and provides other relevant information.

139. The registration authority may have different tasks to perform. It may check the validity of the document as described above under Principle 5, paragraph 3, for instance whether witnesses were present, and confirm that the required statements form part of the document. There may be a duty to notify the granter and the attorney about the application for registration, and possibly close relatives, as described below. This may result in an intervention from the granter and perhaps another person having the right to do so. The authority may then be required to investigate. It may be helpful to include registration of the attorney's acceptance of the mandate, of any resignation or revocation, of any event causing a substitute attorney to take over, or any other event relevant to the effectiveness or continuation of the power of attorney.

140. Registration may also take place when a power of attorney is to enter into force in the event of the granter's incapacity. The granter may also want registration to be postponed until a specific event has occurred. Then, the application may form part of the procedure and manner described above under Principle 7, paragraph 1. Usually, the attorney applies to the authority for registration if he or she finds that there are good reasons to believe that the granter has become incapacitated. Before applying, the attorney often has to provide a medical certificate and occasionally, as described below, documentation attesting that the granter (and sometimes others, such as family members) have been notified accordingly. If the authority receives protests from interested persons on the grounds that there is a real and actual risk of misuse of the power, or that there are good reasons to believe that the person appointed is not suitable for the task, this has to be taken into consideration by the authority.

141. In other legislation, registration is dependent on the wishes of the granter and therefore is voluntary. It requires that the document be created with the assistance of a lawyer or a notary, who attends the registration. The granter may be informed about the registration.

142. If registration of a continuing power of attorney is a possibility, the question arises concerning who may have access to the information contained in the register. In some legislation, courts and other authorities may obtain information from the register, in particular if the registration is carried out by a notary. The relevant court may wish to ascertain whether the adult concerned has granted a continuing power of attorney. Health and social welfare authorities may also wish to learn about the existence of a document, its content and who the decision maker is. In other legislation, the register may be consulted by the granter, relatives and third parties should the need arise, but also by courts or other authorities, such as social welfare authorities. When the register is accessible to the public, then banks and other third parties, when approached by the attorney, may wish to verify whether a power of attorney is registered. Access to the register may depend on legislation, in particular concerning data protection.

143. In Principle 8, notification is also mentioned. It is particularly important that the granter be notified of events such as certification, registration, revocation, entry into force, or termination, whether or not the granter is believed to have become incapable, except where there is compelling reason not to do so. It may be a requirement that the attorney notify, or it may be part of a registration procedure. It is important that a granter should be made aware that the continuing power of attorney is about to enter into force and that the attorney intends to begin to act. The granter may then intervene on the grounds that he or she is still capable of revoking the power of attorney.

144. There may be other persons or bodies who should be notified under the terms of the power of attorney, such as the granter's spouse, partner and/or close relatives. Such persons may also have an interest in being informed that a continuing power has been granted, as well as of its content, either when the document is created or once it enters into force. Notification gives the persons informed a possibility, within a fixed period of time, to intervene or protest by contacting the competent authority. They may be of the opinion that the granter is still capable of making decisions; they may claim that the document is invalid because the signing procedure has not been followed, that the granter was under undue pressure at the time of signing, or that the mandate has been revoked. Furthermore, they may find that the appointed attorney is unsuitable for the task, perhaps because of conflicts of interest or because of a risk of misuse.

### *Principle 9 – Preservation of capacity*

145. As stated in Principle 9, the entry into force of a continuing power of attorney shall not as such affect the legal capacity of the granter. The legal situation then accords with Recommendation No. R (99) 4 under which appointment of a legal representative does not decrease or completely remove the adult's legal capacity. The granting or entry into force of a continuing power of attorney can never disqualify or prevent the granter from doing or deciding anything of which he or she is capable.

146. A continuing power of attorney that can only be exercised in the event of the granter's incapacity may not be operated during periods when the granter has regained capacity.

### *Principle 10 – Role of the attorney*

147. Principle 10 deals with the role of the attorney when the mandate is exercised during the granter's incapacity.

148. As a general rule, the attorney is bound by the scope, content and limitations of the powers conferred upon him or her. As stated in paragraph 1, the attorney shall act in accordance with the power of attorney and in the interests of the granter. Decisions should be in accordance with what the granter, if capable, would have decided, in so far as this can reasonably be ascertained. Possible supervision of whether the attorney is doing so is described below under Principle 12.

149. Circumstances may arise in which the attorney becomes aware of a need to do something not authorised by the continuing power of attorney. Some states have procedures under which the attorney may seek specific authority, but not an amendment to the continuing power of attorney.

150. According to paragraph 2, the attorney, as far as possible, informs and consults the granter on an ongoing basis to the extent that this will be meaningful, which depends upon the granter's condition. It is essential that there is a good relationship between the attorney and the granter. Informing and consulting the granter about decisions which the attorney intends to make and about the state of the granter's economic and financial matters is necessary, so that the granter has the opportunity to express an opinion or, to the extent he or she is capable, give instructions. Paragraph 2 has a parallel in Recommendation No. R (99) 4, Principle 9 ("Respect for wishes and feelings of the person concerned"), when implementing a measure of

protection, in that it provides that the attorney shall take the granter's past and present wishes and feelings into account and give them due respect. Such past wishes are especially mentioned because advance directives, as mentioned above under Principle 3, may be addressed to an attorney to whom a continuing power of attorney is granted.

151. Paragraph 3 states that the granter's economic and financial matters, as far as possible, should be kept separate from the attorney's own. The assets and incomes of these two people should not, in principle, be intermingled. The attorney shall therefore ensure that share certificates, bank accounts and other documents are kept separately and in the name of the granter.

152. In paragraph 4, it is stated that the attorney keeps sufficient records about dealings and transactions made under the power. The extent of the duty to keep a file of the paperwork depends on the nature of the mandate, and must be proportionate. If there is significant capital, it is necessary to keep records on major decisions and transactions. It might normally be expected to preserve bank records, receipts of larger payments, as well as documentation about major decisions. In the case of a power of attorney about health, welfare and other personal matters, major decisions must be recorded. It may be useful to make notes on a regular basis.

153. One reason for the requirement to keep records is – as mentioned in Principle 10 – that the attorney must be able to demonstrate the proper exercise of his or her mandate. Such records shall be presented when the mandate comes to an end, for example if the granter recovers and becomes capable again, in the event of the granter's death, or when a public measure of representation has been decided. Furthermore, the attorney must, as mentioned in the present principle, be able to produce – at least on request – documentation or accounts to a third party mentioned in the continuing power, for example a person appointed to supervise the attorney, as stated in Principle 12, paragraph 1. This may be the granter's lawyer or accountant. A competent authority may, as an important element of the supervision mentioned in Principle 12, paragraph 2, in individual cases require the attorney to present accounts, and it may be necessary that they cover the whole period of the mandate.

154. As regards the role of the attorney, it is questionable if and to what extent the general rules of national legislation about powers of attorney shall

apply as a supplement to or a modification of these special powers. Such legislation may regulate the protection of third parties, the attorney's liability and the extent of his or her obligations, and the conditions under which the document can be deemed invalid. Certain legislation on continuing powers of attorney refers to these rules. In other legislation, some or many of the general rules on powers of attorney are repeated in the special legislation.

*Principle 11 – Conflict of interest*

155. States should, as stated in Principle 11, consider regulating conflicts of the granter's and the attorney's interests. It could be presumed that a conflict of interest arises in the case of any transactions between the attorney acting for him/herself and the attorney acting on behalf of the granter. Rules may be required to specify or regulate situations in which such transactions may be permitted.

156. A very important and – for continuing powers of attorney – a particularly relevant issue is the requirement that the attorney acts impartially. The attorney may be a member of the family of a granter, who has previously made donations to the attorney, as well as to relatives, and the attorney may feel that such practices should continue. In other situations, the attorney may consider it appropriate to buy the granter's house for him/herself. The attorney may also request an exceptional remuneration.

157. Other typical examples of conflicts of interest are when attorneys wish to give gifts to themselves, their spouses or children, or other persons. In legislation there may be very detailed rules to prevent conflicts of interest, often inspired by what is prescribed as regards representatives appointed by the competent authority. One example is that the attorney has no right to represent the granter if there is a possibility of a contract between the granter on the one hand, and the attorney, his or her spouse or partner, or somebody else being represented by the attorney on the other. Another even more specific rule is that the attorney's child, grandchild, siblings, parents or grandparents or such person's spouse or partner may not be such contracting parties.

158. On this topic, as with others, a balance between protection and self-determination can be achieved by having clear rules as to conflict of interest, but allowing the granter to permit – by express provision in the power of attorney – what would otherwise be a prohibited conflict. It can be particularly relevant in this situation to have a system of certification that the granter

fully understands the meaning and effect of the document, has capacity, and is not subject to undue influence (cf. commentary above on Principles 5 and 8). The grantor should thus be free to specify in the document that the attorney may make individual decisions that he or she otherwise could not have made. There may be detailed instructions about who may receive gifts, the maximum value of gifts, the continuation of previous practices, or measures taken for tax-planning purposes. To a certain extent, legislative rules have been designed to overcome some specific conflicts of interest. The attorney may be allowed to make usual gifts on customary occasions to persons, including him/herself, who are related to or connected with the grantor, or gifts to a charity to which the grantor may have made or might have wished to make gifts.

159. The grantor is free to decide that the attorney may be reimbursed for expenses incurred in connection with the task. The grantor may decide that the attorney should be entitled to a precise amount if the assistance is substantial, or if a professional, such as the grantor's lawyer, notary or accountant, is appointed as attorney (except in states where a professional attorney is automatically entitled to remuneration). If nothing is prescribed in the document, the attorney may expect to have his or her out-of-pocket expenses in connection with the task reimbursed.

### *Principle 12 – Supervision*

160. A basic concern is that continuing powers of attorney be used in accordance with the grantor's intention and in his or her interests, as mentioned in Principle 10, paragraph 1. The starting point is that the decision to appoint a trusted attorney and to confer upon him or her power to act is a calculated risk taken by a capable grantor, with the result that the attorney is allowed, as a rule, to do whatever he or she decides within the scope of the powers conferred with the grantor's capital, income and property once the latter becomes incapacitated. The grantor should, at the time of signing, be informed and aware of the fact that the attorney will act without automatic supervision. He or she might well see it as an advantage that public authorities are not involved. On the other hand, it should be pointed out that the risk of misuse may be overestimated, and that the same risk might still exist without a document. An essential feature of a continuing power of attorney is therefore that public authorities are not automatically and routinely involved in supervising all actions of the attorneys.

161. According to Principle 12, paragraph 1, the granter may establish a private supervision system. A third party may be appointed in the document to supervise the attorney during the granter's incapacity. He or she may be called a supervising attorney. The attorney may be required to produce annual accounts with documentation or regular reports to the appointed third party, who may be given power to veto certain specified decisions such as larger gifts or the sale of the granter's house. The granter may have prescribed that any request for remuneration from the attorney should require authorisation by this third party. The legislation may impose an obligation that, if no supervising attorney is appointed, annual accounts shall be provided to the granter's closest relative (other than the attorney him/herself). The purpose of privately organised supervision is to ensure that the attorney takes proper care of the granter's interests, that he or she does not act in situations where there is a potential conflict of interest, and that there is no misuse.

162. Paragraph 2 deals with involvement of public authorities if a person with an interest in the economic and financial affairs or the health, welfare or other personal matters of the granter requests it, or if the authority in the individual case finds that there are reasons to investigate the attorney's exercise of the mandate. One example is that a request for supervision may be made by the granter, the attorney, the closest relative of the granter and a recipient of the accounts, the granter's spouse, partner, parents, siblings or descendants.

163. The point at which a need for public supervision arises depends on the nature of the problem. Supervision is probably necessary in case of risk of misuse of the power, for example if the attorney wishes to use the money for his or her own benefit or to give relatives large gifts. The attorney may also have shown him/herself to be unable to perform the task. A particular problem is whether the power should be terminated in case of conflicts between the attorney and close family members about what is in the granter's interest. It is probably not sufficient that the relatives are simply dissatisfied with the attorney or his or her performance, as long as he or she takes care of the interests of the granter, according to the provisions of the document.

164. If the competent authority has reason to believe that the interests or the welfare of the granter may be at risk, such an authority should have appropriate powers and duties to investigate. These may include requiring



the attorney to produce accounts and documentation concerning the use of capital and income as well as reporting about decisions and failures to do something. Furthermore, the authority might examine the living conditions of the granter to find out if his or her interests are being taken care of satisfactorily by the attorney.

165. If the competent authority finds that there are clear and specific reasons for intervention, the available forms of intervention vary greatly between different jurisdictions. The attorney may be required to file accounts yearly or for a certain period, to report on decisions as regards personal matters and to produce documentation. He or she may be given instructions as to the exercise of the functions, for example concerning gifts. In some legislation, the scope of the power may be reduced. It should not be possible to extend the powers contained within the continuing power of attorney (cf. commentary on Principle 10). The attorney may be replaced by another one, and the power may be declared invalid or terminated. In some legislation, the only decision available is to establish a representation whereby the continuing power of attorney becomes null and void. The only method of intervention singled out in Principle 12, paragraph 2, is the termination of the continuing power of attorney in part or in whole.

166. Occasionally, there is deviation from the above pattern. In such cases, when the power enters into force, the attorney has always to make a statement to the relevant public authority about the economic and financial matters of the granter – the assets and income, as well as the debts and expenses. The granter may have prescribed in the document that the attorney must file accounts and other information with the authority and that the attorney cannot make certain important decisions without permission, for example under the same conditions which apply to a representative appointed by a competent authority.

167. Further possibilities for supervision, not addressed in the principles, may exist in general law relating to all powers of attorney, or may be considered necessary. While the principle of self-determination would normally minimise the provision for judicial or other intervention in the operation of continuing powers of attorney, circumstances can arise where it may be better that there be such intervention in relation to a particular issue, rather than that the continuing power of attorney should become unworkable, or the attorney should resign because of unresolved difficulties. In some states,

there are procedures under which a court or other competent authority may give authorisation or directions to an attorney.

168. A wide range of possible circumstances could be addressed in this way. In some states, when an attorney is unsure about whether a particular matter is within his or her competence, or about how he or she should decide a difficult and important matter, a decision in the matter by a court or other competent authority may provide clarity to all concerned, and reassurance to the attorney. In other states, certain specified matters must be referred to a court or other competent authority for authorisation.

169. Joint attorneys may disagree with each other, a close family member may disagree with an attorney, or a third party – because of genuine doubt or for no good reason – may be reluctant to accept an instruction or decision from the attorney. There may be questions about whether, in a particular case, formalities for creation, certification or registration have been properly followed.

### *Principle 13 – Termination*

170. Paragraph 1 deals with termination of a continuing power of attorney when the granter is no longer capable. When the granter is still capable, he or she, according to Principle 6, is free to revoke the power of attorney.

171. It is left to states to determine the circumstances under which the power of attorney should be terminated. One example of termination in part or in whole is mentioned in Principle 12, paragraph 2. An intervention by a public authority where the attorney is not acting in accordance with the continuing power of attorney may take the form of a termination.

172. The death of the granter may be another reason for termination, but in certain legislation there is a possibility for the attorney, after the granter's death, to continue to act temporarily or as regards certain decisions. This needs to be carefully co-ordinated with the role of the executors or other personal representatives.

173. The power of attorney also terminates if a sole attorney dies, resigns, or becomes incapacitated, and no alternative or substitute attorney is mentioned in the document. In some states, there is a rule stating that, if the attorney is the spouse or partner of the granter, the power is terminated if the couple gets separated or divorced, or their civil partnership is dissolved. A continuing power of attorney as regards economic and financial matters

is terminated in the event of bankruptcy of the granter or a sole attorney. States may wish to specify what should happen in the event of the bankruptcy of one joint attorney, and following discharge from bankruptcy.

174. The attorney is free to resign at any time, including after the incapacity of the granter. If the attorney has not accepted the task in advance, he or she may also refuse to take it on. It goes without saying that the granter has to be duly informed of the intended refusal or resignation, if this is meaningful, and that the attorney should be required to give advance notice. In one member state, the competent authority has to consent. If only one attorney is appointed in the continuing power of attorney and he or she resigns, then the power is terminated.

175. The consequence of the termination is that the competent authority, as stated in paragraph 2, should consider whether appropriate measures of protection are required. Appointment of a legal representative would in many cases constitute such a measure. Where there is a system for registering the termination of a continuing power of attorney, notification to the competent authority can be part of the registration procedure.

### *Part III – Advance directives*

#### *Principle 14 – Content*

176. This principle contains examples of areas where advance directives may be of use. Health issues are mentioned first. In general, there is a need for careful regulation in this area. Directives may address welfare and other personal matters, such as the place of care and residence of the author. They may also address economic and financial matters. Another example concerns who should be guardian, if a decision about legal representation is to be made.

177. Such directives may or may not be addressed to particular persons such as representatives appointed by a competent authority, attorneys, medical staff or other persons who make decisions on behalf of or affecting the author during incapacity. They are always unilateral documents which do not establish a contract with any such person.

#### *Principle 15 – Effect*

178. As described in the definition in Principle 2, paragraph 3, there are two types of advance directives. Some are binding instructions. In others,

wishes for the future are made. The question of the nature of the advance directives should, as mentioned in Principle 15, paragraph 1, be addressed in legislation as regards each individual type.

179. Issues may arise as to whether the advance directive was intended to address the situation which has in fact occurred. That is a question of interpretation of the document.

180. As described in paragraph 2, it is also important to regulate through legislation situations that arise in the event of a substantial change in circumstances. Examples might include cases where, since the advance directive was issued, a medical procedure prohibited by the advance directive has been much improved so that it is less hazardous, or less intrusive, or there has been a substantial change in family circumstances. This is especially necessary if the advance directive is binding. In this context, reference could usefully be made to the 1997 Oviedo Convention (cf. paragraph 21 above).

181. An advance directive may not be applicable in certain instances. There may be reasonable grounds for believing that circumstances have arisen which the author did not anticipate at the time when the advance directive was issued, and which would have affected the directive if they had been anticipated.

#### *Principle 16 – Form*

182. As described above, advance directives may be made in writing or may be expressed orally to family members, medical staff or others. States should consider whether all or certain types of advance directives shall be made or recorded in writing if intended to have binding effect. In some national legislation, a written document is required in relation to more serious health issues.

183. It is important that the principle of self-determination is not impaired by doubts about validity of an advance directive. States should therefore, as stated in paragraph 2, consider what other provisions and mechanisms may be required to ensure the validity and effectiveness of those advance directives mentioned in paragraph 1. If a directive is about health issues, in some states it is deemed advisable that the adult receives guidance from a lawyer, a notary or a medical doctor in order to ensure that the directive is clear and that the adult is aware of the consequences of the choice.

184. An advance directive is of no value if it is not known by or accessible to persons who need to make decisions on behalf of or in relation to the incapacitated adult. A general consideration is whether there should be an obligation to enter some, or all, advance directives into a public register, or whether this should be done on a voluntary basis. It might consequently be necessary to establish who should have access to such a register, especially bearing in mind data protection legislation.

*Principle 17 – Revocation*

185. It is well established that when persons express views, including strong ones, about a possible future situation, their views may change when they actually find themselves in that situation.

186. This principle states that it should be possible to revoke an advance directive at any time and without any formalities, even if the directive is binding. This can be done as long as the adult is still capable of making the decision on revocation. A capable person with severe physical disability may be able to revoke orally or by an unequivocal gesture only.

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The recommendation covers both continuing powers of attorney and advance directives and focuses on aspects such as content, appointment and role of the attorney, form, entry into force, revocation and termination.

In contrast to existing instruments in this field, this recommendation brings something new to the table, as it deals primarily with decisions made privately by the persons concerned. Self-determination, according to this instrument, implies that the granters, to a large extent, are free to make decisions regarding their future life.



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