

## **End-of-life decision-making under German law**

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## Right to self-determination - human dignity

- **The right to self-determination** over one's own body is a core aspect of human dignity and freedom.
  - It is protected by the German Constitution.
  - The right to self-determination is a defense right, i.e. it protects against interventions in one's own physical sphere.
  - However, it is not a claim right, i.e. others are under no obligation to act.
- => In particular, there is no entitlement to direct active euthanasia.

## Right to self-determination – regardless of medical condition

- Both healthy and sick people have the same right to self-determination over their own bodies.
  - => They have the right to refuse medical treatment, even if their refusal is unreasonable or life-threatening.
  - => **The right to self-determination over one's own body outweighs the duty of others to protect the body and the life of the individual concerned (e.g. the physician's duty to treat a sick person).**

## Right to self-determination – self-responsibility

- Self-determination also means **self-responsibility**.
- Self-responsibility requires the ability of the individual to make autonomous decisions  
=> This requires the capacity to consent
- A person has the capacity to consent if he is able to understand the nature, meaning and consequences of the medical measure, to weigh the pros and cons and to make an autonomous decision based on these considerations.
- In contrast to the capacity to contract, the capacity to consent is not tied to certain age limits.
- Under German law, it is no longer possible to declare someone incapable of consenting or contracting (incapacitation)

## Lawfulness of a medical treatment

- A medical treatment and the *continuation* (not discontinuation) of such treatment is only lawful if there is
  - a medical indication (=> a decision to be made **exclusively** by the physician) and
  - a consent of the patient.
- The patient's consent is only effective if the patient
  - has the capacity to consent and
  - has been properly informed in advance by the physician.

## Representation of the patient

- If the patient is unable to consent, the consent of a party entitled to do so (representative) is to be acquired unless a binding living will of the patient himself permits or prohibits the treatment.
- Consent of the parties entitled to do so:
  - Parents for their children
  - Adults:
    - a representative previously appointed by the patient or
    - a custodian appointed by the court
  - Family members (even spouses) are **not** automatically representatives!

## Presumed will of the patient

- If consent to a treatment that cannot be delayed cannot be acquired in good time, it may be done without consent if this is in line with the **presumed will** of the patient.
  - ⇒ If it would be possible to ask the patient, how would he now decide?
  - ⇒ The presumed will must be ascertained on the basis of concrete indications. Consideration must be given, in particular, to previous oral or written statements, ethical or religious convictions and other personal values of the person concerned.
  - ⇒ When ascertaining the patient's presumed will, close relatives should be asked to give information about the aspects mentioned before.

## Patient's advance directive (1)

- The right to self-determination also gives the patient the right to decide about his future medical treatment.
- An advance directive (living will) enables the patient to state which medical measures may or may not be performed in a specific situation.
- Legal definition of the advance directive (section 1901a of the German Civil Code):

A person of full age who has the capacity to consent has determined in writing, for the event of losing the capacity to consent, whether he consents to or prohibits specific tests of his state of health, treatment or medical interventions not yet directly immanent at the time of determination.



## Patient's advance directive (2)

- If the advance directive is effective and corresponds to the current situation, it is legally binding for everyone.
- However, the patient may withdraw an advance directive at any time. A withdrawal needs not to be in writing.

=> Major problems of interpretation in practice.

- If the advance directive is not legally binding, the decision is made by a representative or alternatively on the basis of the presumed will of the patient.

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