HEALTHCARE & LIFE SCIENCES - AUSTRIA

Medical confidentiality and right to refuse to give evidence

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Physicians and other healthcare professionals have the right and obligation to refuse to give court evidence, unless they are released from this obligation by a patient. The Supreme Court recently decided on the hypothetical release by a deceased person.(1)

Facts

The deceased had made a notarial will instituting the opponent as his sole heir. The applicants (the deceased's cousins) were the deceased's statutory heirs.(2) The deceased had a special guardian who administered his property and represented him before administrative and judicial authorities and who is now trustee of his estate. The applicants submitted that the will was invalid because the deceased lacked the ability to make a will. They applied to hear two physicians and several other healthcare professionals (eg, carers for the elderly, home helpers, nurses) as witnesses. These witnesses invoked their right to remain silent as they had not been released from (medical) confidentiality by the deceased. The first-instance court decided on desistance of witness questioning and adjudged the opponent as testamentary heir. The court held that the physicians were under a statutory obligation to remain silent according to Section 54(1) of the Act on Physicians. The healthcare professionals were under similar statutory obligations to remain silent.

The appellate court set the decision aside and remanded the case for further investigation. Contrary to the first-instance court, the appellate court held that the witnesses had to be heard. According to Section 321 of the Code of Civil Procedure, a witness may refuse to respond only to specific questions, but may not refuse testimony in general. In the present case the physicians and healthcare professionals had submitted only that they had not been released from confidentiality, but had not submitted to refuse to testify for this reason. The court had only resolved to refrain from interrogation, but did not decide on the lawfulness of refusal to give evidence.

According to the appellate court, the first-instance court had to consider that physicians and healthcare professionals must observe medical confidentiality. A release by the patient is possible. Since this is a patient's personal right, which cannot be transferred, a release cannot be substituted by the court. Further, the guardian cannot release healthcare professionals from medical confidentiality instead of the patient. However, medical confidentiality does not apply if the disclosure is absolutely necessary for the protection of superior interests of public healthcare or judicature, which in general cannot be assumed in the course of a civil proceeding. An exception was accepted in proceedings on guardianship for minors, but it is disputed whether this is also true for other proceedings following the investigation principle. In light of the Supreme Court's decision of August 29 2015 (2 Ob 194/14i), it seemed appropriate to further investigate the true last will of the deceased.(3)

It can be assumed that medical confidentiality does not extend beyond death, especially as the investigation of the true last will is of higher value than the post-mortal medical confidentiality. In the present case, the deceased's release from confidentiality may also be assumed. The witnesses

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therefore could not rely on the obligation to remain silent.

Decision

The Supreme Court accepted the opponent's appeal, but then dismissed it.

A valid testament must be made in a state of full sobriety. Although judicature does not apply the same strict standards to the ability to make a will as to legal capacity *inter vivos* (between living people), the deceased is deemed unable to make a will if he or she did not even notice to establish a will. The deceased is also judged to lack the ability to make a will if he or she is willing to establish a testament, but lacks the normal decision-making freedom.

According to Section 321(1)(3) of the Code of Civil Procedure, a witness has the right to remain silent in respect of facts on which he or she cannot testify without infringing an officially recognised obligation unless he or she has been released from this obligation. This provision is based on the assumption that the services of certain professions cannot be performed unless the person engaging the professional can trust in strict confidentiality. An obligation to remain silent is officially already recognised where provided by law.

According to Section 54(1) of the Act on Physicians, physicians and their auxiliaries must observe medical confidentiality. However, Section 54(2) provides for an exception where the beneficiary of medical confidentiality releases the physician or the disclosure is necessary for the protection of the higher interests of public healthcare, judicature and patients unable to provide consent in connection with the provision of vital basic data for the continuity of treatment. Although Section 321(1)(3) of the Code of Civil Procedure mentions only the valid release from the obligation of medical confidentiality (corresponding to Section 54(2)(3) of the Act on Physicians), in this respect, the interest of judicature must be also considered.

It is generally accepted that the personal sphere of life is the core of the protected sphere of personal privacy, which includes a person's health. If confidentiality also concerns personal rights, the declaration of release is a personal right which cannot be transferred. It cannot be substituted by the court or a representative, heir or guardian. This could suggest that physicians as persons entrusted with confidential information (except where provided for by Section 54(2)(4) of the Act on Physicians) are always obliged to confidentiality unless they have been released from this obligation by the patient when he or she was still alive. However, this assumption is incorrect. The question to be answered is whether, in the absence of a factual release, a release from obligation of confidentiality must be assumed on the hypothetical will of the deceased.

Similar to the Federal Court's decision of May 31 1983 (NJW 1983 2627), the Supreme Court held that the hypothetical will of the deceased must be investigated if a close relative and heir requests access to the patient file. While the hospital must evaluate the deceased's will, the final decision remains with the court. The majority of Austrian and German doctrine assumes that a testator who can make a will would not withhold evidence on his or her ability to make a will. Further, a person who is unable to make a will would have the same interest – he or she would not conceal the inability to make a will to enforce a testament that is, in the testator's interest, an invalid will. Therefore, the Supreme Court upheld the appellate court's view that the right to remain silent in a proceeding on the deceased's ability to make a will is subject to his or her hypothetic will. If the deceased has no will in this respect and if the physician has no indication that the deceased wanted to refuse a release, a reasonable person would release the physician from the obligation to remain silent to settle any doubts in his or her capacity to make a will. The same is true for the other healthcare professionals.

Comment

Medical confidentiality is one of the highest observable values by medical professions. In general, a healthcare professional may testify on observations made in respect of a patient only if he or she has been released from the obligation of confidentiality by the patient personally. However, there are a few limited exceptions to this general rule. In the present case, the Supreme Court carefully applied these exemptions.

For further information on this topic please contact Rainer Herzig at Preslmayr Attorneys at Law

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Endnotes

(1) Decision of July 27 2017 (2 Ob 162/16m); (JBl 2017 743).

(2) Under Austrian law, certain relatives and the spouse are statutory heirs. Statutory heirs inherit in the absence of a will and, where they are not recognised in the will, have a right to a compulsory portion of the inheritance.

(3) Decision of August 29 2015 (OJZ 2015/107, 817). In the present case, the deceased was also under guardianship and established three different wills instituting three different heirs. One of the heirs requested access to the court file on the appointment of the guardian. Although the law limits access to this file to the guardian and the person under guardianship, the Supreme Court held that an heir might have access to the file in the interest of investigating the true will of the deceased.
