

### **1. International obligations and fundamental reform in 1992**

Germany has ratified both the **CRPD** and its Optional Protocol in 2009 (24th of February), without any reservations. The Hague Convention 2000 has entered into force in 2009 (1th of January). Moreover, since 1994 the German Constitution (*Grundgesetz, GG*) provides that nobody may be discriminated against on the ground of disability, Art. 3 para. 3 GG.

In Germany the fundamental reform of the law relating to vulnerable persons already dates back to the introduction of the **Law of Custodianship** (*Betreuungsgesetz*) of 1990 (BGBl. I 1990, S. 2002) which led to significant changes in the Civil Code as of January 1, 1992. It eliminated the legal institution of judicial incapacitation (*Entmündigung*) both for reason of mental illness as well as for mental weakness, addiction and waste, which had been in effect since the enactment of the German Civil Code in 1900. Simultaneously, it abolished the previously existing guardianship over adults (*Vormundschaft über Volljährige*) as well as the infirmity guardianship (*Gebrechlichkeitspflegschaft*). Instead a new system was instituted which provides both for protection and empowerment of adults who are not able to (fully) take care of their own affairs: The law introduced the new statutory regime of custodianship (*rechtliche Betreuung*, ie legal assistance). In accordance with the principles of subsidiarity and proportionality it allows for the judicial appointment of a custodian as a legal representative of the concerned person if and to the extent which is necessary. This no longer affects the legal capacity of the person concerned. In order to promote autonomy the law explicitly provides for instruments of advance provisions by the adult him- or herself, such as a lasting power of attorney (*Vorsorgevollmacht*). This can expressly include consent to medical measures in a living will (*Patientenverfügung*).

Since this system for the legal protection of adults already embraces the shift from protection to autonomy mandated by the CRPD no major reforms have been considered necessary after the ratification of the CRPD.

### **2. Current legal system**

The legal protection of adults is comprehensively regulated in the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), in its fourth book dedicated to family law, in §§ 1896 et seqq BGB devoted to custodianship (*rechtliche Betreuung*). The procedure is laid down in the Family Procedure Act (*Ge-setz über das Verfahren in Familiensachen und in den Angelegenheiten der Freiwilligen Gerichtsbarkeit, FamFG*).

The statutory system of **custodianship** provides for the possibility of a court-appointed custodian as legal representative. The appointment requires that a person of **full age** cannot, in whole or in part, take care of his or her affairs by reason of a **mental illness** or a **physical, mental or psychological handicap**, § 1896 para. 1 s. 1 BGB. The proceedings may be initiated by the person him- or herself or ex officio. A custodian can only be appointed for an adult, however, an advance appointment is possible upon reaching the age of 17, which then takes effect upon majority, § 1908a BGB.

Pursuant to the **principle of necessity** a custodian may only be appointed for such tasks which the adult is not capable to take care of him- or herself. The custodianship may therefore be limited to one or a group of tasks in which it is necessary (eg health care, determination of place of residence, financial affairs etc.) but may also cover all affairs. The assistance merely concerns legal affairs and not the actual caring for the person. Moreover, the appointment of a custodian is not necessary and therefore impermissible to the extent that the affairs may be

taken care of by a person authorised by a **lasting power of attorney**, § 1896 para. 2 BGB. However, in this case the court may appoint a custodian with the task of supervising the representative authorized by the lasting power of attorney, § 1896 para 3 BGB.

Also with a view to preserving autonomy the adult is given a right to propose the **person** who should be appointed custodian, § 1897 para. 4 s. 1 BGB. This suggestion should be followed by the custodianship court unless it is inconsistent with the best interests of the person of full age. If the person concerned does not make a suggestion, the family and other ties as well as the risk of conflicts of interest must be taken into consideration, § 1897 para. 5 BGB. Primarily, a suitable natural person should be appointed, § 1897 para. 1 BGB. Preferably a person should be chosen who under-takes this on a voluntary basis, but for lack of one a person who conducts custodianships as part of his occupation or profession may be appointed custodian, § 1897 para. 6 s. 1 BGB. Moreover, individual employees of officially recognized custodianship associations (*Betreuungsverein*) or of the custodianship authorities (*Betreuungsbehörde*) can also be appointed, § 1897 para. 2 BGB. There are no legal requirements as to a specific professional training. However, a person who is employed at the institution or home where the adult lives may not be a appointed custodian, § 1897 para. 3 BGB. The appointment of more than one custodian is possible, § 1899 BGB.

The legal position of the **person** concerned is characterised by the fact that his or her **capacity to contract** is not affected by the custodianship. Thus, despite the existence of a custodianship the person is generally bound by the contracts he or she has entered into him- or herself as well as by other legal acts performed. However, this is not the case if the person is incapable of contracting under the general rules of private law. Thus, if a person is in a state of pathological mental disturbance, which not only temporarily prevents the free exercise of will, a contract is invalid by operation of law, §§ 104 No. 2, 105 BGB. In addition, the legal position of the person concerned can be restricted by the court requiring a consent of the custodian for the legal transactions which relate to the tasks of the custodian, § 1903 para. 1 BGB. Such a reservation of consent may only be ordered if this is necessary to prevent substantial danger for the person or the property of the person under custodianship.

Custodianship is an office under private law with primary responsibility to the person cared for and which is supervised by the custodianship court. The custodian acts as legal representative of the person concerned in relation with third parties. The power of representation is limited to the tasks for which the custodian is appointed. Representation is excluded with regard to personal inalienable rights, such as marriage, the disposition in contemplation of death or the recognition of paternity. Regarding the relationship between custodian and the concerned person, the custodian must respect the adult's wishes to the extent that this is not inconsistent with the best interests of the latter, § 1901 para. 2, para. 3 s. 1 BGB. This also refers to wishes expressed in advance in a living will concerning medical treatment. Certain decisions of the custodian which are deemed particularly important or dangerous require the approval of the court, §§ 1904 et seqq BGB. These include important health care decisions, sterilization, forced treatment, the placement in a closed facility or certain financial transactions.

An appointment of a custodian is not possible against the free will of the adult, § 1896 para. 1a BGB. This follows from the constitutionally protected right of personality as well as the human dignity of a person. Thus if a person opposes the appointment of a custodian no custodian may be appointed if the person is able to understand the consequences, even if this is not in his or her best interest.

### 3. Statistics on measures of protection

The custodianship is of great factual importance. In 2015, the total number of proceedings amounted to 1,276,538.<sup>1</sup> This includes initial appointments, cancellations, expansions, restrictions and extensions of care. In 2016, 47% of all custodians were family members, 10% other volunteers, 8% lawyers and 34.5% other professional custodians.<sup>2</sup> More recent figures currently do not exist due to a change in the recording requirements for the statistics.

At the end of the year 2018, a total of 4,184,451 lasting powers of attorney were registered.<sup>3</sup> A living will is associated with approximately  $\frac{3}{4}$  of the powers of attorney.

### 4. General private law instruments

General private law rules are applicable in several respects: Since generally the appointment of a custodian does not affect the capacity of the adult to contract, the rules on **natural incapacity** provide an important protection. A contract concluded by a person who is, not merely temporarily, in a state of pathological mental disturbance, which prevents the free exercise of will, is void by operation of law, §§ 104 No. 2, 105 BGB. However, in order to enable a thus naturally incapacitated person to a certain degree, since a reform of 2002 he or she may validly conclude everyday transactions that can be effected with funds of low value, unless there is considerable danger to the person or the property of the person incapable of contracting, § 105a BGB. Moreover, a person in such a mental condition is not held liable for his acts, § 827 BGB. Nor can he or she validly consent to medical treatment.

These rules apply whether or not a custodian has been appointed. Furthermore, there are general provisions for the benefit of persons with limited legal capacity, i.e. a minor under the age of 18, § 106 BGB, which apply *mutatis mutandis* if the custodianship court has exceptionally ordered a reservation of consent in favor of the custodian and the adult can therefore only validly conclude a legal transaction with his consent. In this case, the provisions stipulate for the benefit of the adult that he or she can still carry out certain transactions fully and effectively without the consent of the custodian (**partial legal capacity**). Thus the custodian can subsequently approve transactions which were carried out without his consent, § 108 para. 1 BGB.

Furthermore, the adult can, without the custodian's consent, effectively conclude such transactions, which he or she effects with such means as were provided to him for this purpose, § 110 BGB. This includes, in particular, funds which have been handed over for free disposal.

### 5. Assessment in terms of empowerment and protection

Although there has been a certain rise in the taking of private precautionary measures, there are still considerable deficits with regard to such measures. In addition, there is a widespread misconception that spouses are legally authorized to represent the other in the event of a health crisis. Since in practice, spouses are often appointed by the courts as custodians, legal reforms have been suggested for some time now to grant spouses a statutory right of representation at least for certain transactions, such as medical matters (e.g. consent in medical interventions). A bill giving spouses a statutory right of representation for medical matters was already passed by the Bundestag in the past legislative period, however, it was not approved by the Bundesrat before the elections (BT- Drucks 18/12427). The discussion should continue.

Moreover, the system of custodianship and marriage law is not always in harmony: The rights and duties conferred on a custodian might conflict with the rights and obligations as a spouse. This may be the case both if the spouse is appointed as custodian and thus acts as legal

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<sup>1</sup> [https://www.bundesanzeiger-verlag.de/fileadmin/BT-Prax/downloads/Statistik\\_Betreungszahlen/2015/Betreuungsstatistik\\_2015.pdf](https://www.bundesanzeiger-verlag.de/fileadmin/BT-Prax/downloads/Statistik_Betreungszahlen/2015/Betreuungsstatistik_2015.pdf), zuletzt abgerufen 20.03.2019.

<sup>2</sup> Bundesamt für Justiz, Betreuungsverfahren. Zusammenstellung der Bundesergebnisse für die Jahre 1992 bis 2016, 3.

<sup>3</sup> <https://vorsorgeregister.de/Presse/Statistik/2018/index.php>, zuletzt abgerufen 20.03.2019.

representative but also if a third person is appointed as custodian and thus participates in legal transactions as representative on behalf of one spouse with the other.

In addition, the current system of custodianship may be questioned critically with a view to the quality of the assistance provided. On the one hand, there does not exist a recognized professional training in case of professionals being appointed as custodian, and on the other hand, in the case of relatives as custodians, their lack of specialist knowledge may influence the quality of the support. Moreover, professionals acting as custodian receive a lump-sum remuneration which does not reflect their actual personal contacts with the assisted persons and neither rewards nor promotes multiple contacts.

## **6. Legislation and other sources**

[https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/)

[https://www.gesetze-im-internet.de/englisch\\_famfg/index.html](https://www.gesetze-im-internet.de/englisch_famfg/index.html)

*Lipp*, Legal Protection of Adults in Germany – An Overview:

<https://www.bgt->

[ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp\\_Legal\\_Protection\\_Adults.pdf](https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf)

*BMJV (Hrsg.)*, Qualität der rechtlichen Betreuung, Abschlussbericht:

[https://www.bmjv.de/SharedDocs/Downloads/DE/Service/Fachpublikationen/Forschungsbericht\\_Qualitaet\\_rechtliche\\_Betreuung.html](https://www.bmjv.de/SharedDocs/Downloads/DE/Service/Fachpublikationen/Forschungsbericht_Qualitaet_rechtliche_Betreuung.html)

*Dethloff*, Familienrecht, 2018, C.H. Beck Verlag, § 17 Rechtliche Betreuung