



To Support and to Represent / Support and Representation

Position Paper BGT – Betreuungsgerichtstag e. V. (German Adult Guardianship Law Association)

I. UN CRPD specifications

1. UN CRPD principles

Article 12 UN CRPD provides for persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life. It places State parties under the obligation to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

There are certain circumstances that hinder persons with disabilities to exercise their rights and legal capacity. These obstacles can be of legal or factual nature. Therefore the UN CRPD obliges State parties to provide persons with disabilities with appropriate support measures to help them overcome these obstacles in exercising their legal capacity (Art. 12, paragraph 3 UN CRPD).

Support in the exercise of legal capacity within the meaning of Art. 12 UN CRPD includes all measures and instruments that help persons with disabilities to overcome these obstacles to enable them to be effective legal agents on an equal basis with others (supported decision-making).¹ The UN CRPD does not specify the measures that are to be taken. However, it requires sufficient safeguards to protect the right to self-determination (Art. 12, paragraph 4 UN CRPD).

The antithesis of supported decision-making is substitute decision-making. Substitute decision-making is characterized by the fact that neither the will nor preferences of a person are respected and carried out but that a person other than the person concerned acts on their behalf according to their own or some objective standards.

Article 12 UN CRPD demands priority of support in the exercise of legal capacity over a substitute decision, which – should it be necessary – requires an additional and separate justification.

However, the UN CRPD also requires that the rights of persons concerned are protected (e.g. Art. 12, paragraph 4, Art. 16, Art. 17). The UN CRPD suggests that a substitute decision is only justified if it is necessary under the specific circumstances of an individual case as a last resort (*ultima ratio*) in safeguarding the rights and the protection of especially significant

¹ General Comment No. 1, 15.



interests of the person concerned and if this person is unable to exercise his/her rights him-/herself².

2. General Comment of the UN Committee on the Rights of Persons with Disabilities

The Committee on the UN CRPD has specified these statements of the UN CRPD in its General Comment on Article 12 UN CRPD with regard to interdiction, guardianship, and curatorship. Even if these measures were abolished in Germany in 1992 and substituted by the German Law of “Betreuung” (which includes court-appointed representation and support), German law and its practice need to be examined in the light of the UN CRPD.

In its General Comment, the Committee demands universal legal capacity of all persons, regardless of any disability or decision-making skills,³ and opposes substitute decision-making regimes.⁴ This refers to a regime which constitutively removes legal capacity from a person with disabilities (denial of legal capacity). In this event the person concerned can no longer act legally; his/her actual abilities and resources in making a decision in a specific situation are of no consideration. With this, the Committee opposes all forms of complete or partial denial of capacity (interdiction, guardianship, conservatorship). Further characteristics of a substitute decision-making regime are that the will and preferences of a person with disabilities are of no legal consequence in the appointment of the substitute decision-maker and the termination of the regime and that the decision-making criterion of a substitute decision-maker is the objective “best interest” of the person with disabilities or even a third party’s interest.

Therefore the Committee demands for supported decision-making regimes to be introduced instead.⁵ This type of regime is characterized among other things by not building on the legal *incapacity* of a disabled person but by respecting and realizing his/her will and preferences or the best interpretation of his/her will and preferences as well as being accessible for all persons with disabilities without discrimination and regardless of the type and level of support needs as well as their financial resources. Furthermore, it must include the safeguards of Article 12, paragraph 4 UN CRPD for the protection of rights and the right to self-determination of the disabled person.⁶

II. Implementation in Germany

1. Recognition of legal capacity, substitute decision-making regime

² Art. 12, paragraph 4 UN CRPD also regards the “rights” of the disabled person as a criterion for support, which in individual cases – when the priority must be protection – can differ from the “will”.

³ General Comment No. 1, 21.

⁴ General Comment No.1, 23.

⁵ General Comment No. 1, 24, 25.

⁶ General Comment No. 1, 18.



In Germany, every person attains universal legal capacity (transactional capacity, capacity to marry, capacity to make a will, capacity to consent, capacity for delict liability etc.) ex lege (i.e. by the force of law) upon reaching the age of majority (18 years). Since incapacitation was abolished, German legislation no longer provides for judicial or administrative removal of legal capacity, neither completely nor in respect of certain areas or a certain decision. Both, the appointment of a legal representative under an enduring power of attorney by an adult and the appointment of a “Betreuer” as (legal) representative by the court have no effect on the legal capacity of the person with disabilities. He keeps his/her full legal capacity.

In the case of an enduring power of attorney it is the granter that appoints a (legal) representative and is also the one to terminate the power of attorney. The legal representative in “Betreuung” on the other hand is appointed by the competent court in proceedings for “Betreuung”. However, the disabled person’s will and preferences are legally relevant both for the appointment as well as the selection of the “Betreuer”, and for the termination of legal “Betreuung” (§ 1896, sections 1 and 1a, § 1897, section 4, § 1908d, section 2 BGB (German Civil Code)). In their actions the attorney as (legal) representative under an enduring power of attorney and the “Betreuer” as court-appointed (legal) representative need to comply with the will and preferences or the best interpretation of the disabled person’s will and preferences (§ 1901, section 2 and 3, § 1901a BGB).

In some special cases enduring power of attorney and “Betreuung” do actually allow for a decision against the current wishes of the person with disabilities, i.e. a substitute decision (for instance deprivation of liberty measures or involuntary medical measures according to § 1906 BGB), but only if it is necessary as a measure of last resort (ultima ratio) to safeguard the rights and to protect especially significant interests of the person concerned and if this person is unable to exercise his/her rights him-/herself. However, neither an enduring power of attorney nor the “Betreuung” are substitute decision-making regimes in the sense of the General Comment, since in these cases the (legal) representative under an enduring power of attorney and the court-appointed (legal) representative are also obliged to observe and implement the disabled person’s previously declared will and preferences or the best interpretation of his/her will and preferences.

2. Forms and measures of support in the exercise of legal capacity

Support in the exercise of legal capacity can take on a variety of forms:

a. Informal support within the social context or social environment

Often persons are supported de facto, i.e. without having been formally arranged, in the exercise of their legal capacity by receiving counseling and support from persons in their social environment (family, friends, neighbors, self-help groups etc.). This may include assistance when conducting legal transactions. This informal support enables the persons concerned to exercise their legal capacity themselves despite their disability.



b. Formal support arrangements, measures provided by the welfare state

Support in the exercise of legal capacity in the form of counseling, assistance and other forms of support may also be provided by government agencies or through state- (co-) funded (local government) services. They enable persons with disabilities to exercise their rights unhampered by barriers in the same way as other persons. These type of support arrangements are provided e.g. by the advisory service for debtors, the pension consultancy service or the legal aid and advice services, and can also be found in various forms in social legislation or in public healthcare (e.g. in the form of Socio-psychiatric Services).

3. Support with the option of legal representation

Representation also in the form of “statutory representation” must not be confused with the notion of a substitute decision-making regime. The General Comment denotes as substitute decision-making regime certain legal instruments such as incapacitation or guardianship the key factor being whether legal capacity is removed from the person with disabilities and his or her will is declared as insignificant (above, I.2.). The question of legal representation is completely irrelevant in this context.

Legal representation must also not be confused with the concept of a substitute decision. Legal representation is merely an instrument; what is crucial is the purpose it is used for. Legal representation allows for a person’s decision to be communicated to others, and, if necessary, a representative to decide on behalf of this person based on the will and preferences or the best interpretation of will and preferences of the person with disabilities. In these cases legal representation is a measure of support in the exercise of legal capacity for the person with disabilities. This indisputably applies to an attorney as legal representative acting under an enduring power of attorney, even though in some cases it also allows for a substitute decision against the current wishes of the granter. However, the same applies to “Betreuung”.

German law provides two instruments of support with the option of representation:

a. Mandate and power of attorney

Enduring power of attorney has been part of German law for a long time, health matters and other personal matters being included at least since 1999. Any adult may grant such a power of attorney to a trusted person or an attorney-at-law. The basis is a mandate regulating the tasks and responsibilities of the attorney. There are no specific requirements concerning the form and legal capacity. With the help of counseling, possible barriers in drawing up the power of attorney can usually be overcome. In its continuity the enduring power of attorney is independent of the granter’s legal capacity. The granter neither loses his/her legal capacity nor his/her decision-making competence. Support may be provided by the attorney in the form of counseling, assistance, decision guidance, communicating a decision of the granter or in the form of deciding and acting on behalf of the granter according to the best



interpretation of will and preferences of the granter. The mandate and power of attorney can always be revoked and cancelled.

The rights of the granter are ensured by the attorney's obligation to obtain authorization from the competent court in certain serious cases (§ 1904, section 4, § 1906, section 5 BGB), as well as by the court's power to intervene by means of appointing a monitoring "Betreuer" or directly when there is a risk of abuse by the attorney.

Therefore the enduring power of attorney meets the criteria of the General Comment for a supported decision-making regime.

However, an enduring power of attorney may also allow for a substitute decision for the protection of the granter if the granter determines this (cf. e.g. § 1906, section 5 BGB). But even in this case the enduring power of attorney does not become a substitute decision-making regime, since the attorney as (legal) representative is obliged to act according to the previously declared will and preferences or the best interpretation of the granter's will and preferences.

b. "Betreuung" and legal representation by the court-appointed "Betreuer"

The appointment of a "Betreuer" as (legal) representative does not remove the decision-making competence from a person with disabilities. Contrary to a view commonly held, his/her legal capacity is neither put into question nor suspended. Rather, it is the Betreuer's responsibility to provide support in the exercise of legal capacity so that the will and preferences of the person with disabilities are accounted for. This is a legal obligation according to § 1901, section 2 and 3 and § 1901a BGB. This alignment with the person's will and preferences results in a person-centeredness of "Betreuung" and takes into consideration the diversity and variety of persons with disabilities.

The implementation of self-determination and participation in legal transactions has to be carried out primarily in the form of guidance and assistance by the "Betreuer". Only if it is necessary the court-appointed "Betreuer" is allowed to use the measure of legal representation (§ 1901, section 1 BGB). He must not use legal representation as substitute decision-making but as a means of communicating and implementing the decision of a person with disabilities. The "Betreuer" is legally obliged to act according to the will and preferences of the adult and to take his/her abilities into account (§ 1901, section 3 sentences 1 and 2, § 1901a, sections 1 and 2 BGB). This involves personal contact and the need to discuss important matters with him or her (§ 1901, section 3, 3rd sentence BGB). If the person concerned is not able to express him- or herself, the "Betreuer" must always act according to the best interpretation of the will and preferences and certainly not the objective best interest of the adult (§ 1901, section 2, § 1901a, section 2 BGB). As in the case of the power of attorney, a substitute decision is only permitted as a measure of last resort (ultima ratio).



The competent court is required to check if the "Betreuer" is acting lawfully and observing his/her responsibilities. In case of a breach of duty the court must intervene and dismiss the representative if necessary. Beyond that, for important legal acts the law provides preventive supervision through a judicial authorization process (e.g. §§ 1904, 1906, 1907, 1908i read in conjunction with §§ 1821, 1822 BGB). Where required in these proceedings, a guardian ad litem is assigned to the adult in order to make sure that procedural safeguards are followed, and to articulate the wishes of the adult in the proceedings.

The "Betreuer" is appointed by the competent court in proceedings for "Betreuung". However, the will and preferences of the person with disability are legally significant both for the appointment as well as the selection of the "Betreuer", and for the termination of "Betreuung" (§ 1896, sections 1 and 1a, § 1897, sections 4, § 1908d, sections 2 BGB). A motion for the appointment of a "Betreuer" or termination of "Betreuung" may be brought forward by a person with disabilities at any time. Since the adult always has the capacity to stand trial (§ 275 FamFG), any person may bring forward such a motion, regardless of the type and degree of his/her disability. Access to the court for "Betreuung" and the appointment of a (legal) representative are guaranteed for all persons irrespective of their financial situation.

Consequently, "Betreuung" also meets the criteria of the General Comment for a supported decision-making regime.

III. Need for reform

In view of this, the German Betreuungsgerichtstag has identified the urgent need for reform in the following aspects:

1. Support measures in the social environment, peer counseling and self-help must be strengthened and supported much stronger.
2. Other forms of support in the exercise of legal capacity have precedence over "Betreuung" (§ 1896, section 2 BGB). Therefore it is imperative to strengthen and develop these forms and instruments. In the context of current reforms of Social Law it is necessary to ensure that persons with disabilities are able to exercise their social rights effectively and receive the necessary support in accessing and implementing these social services. The same applies to the nursing care insurance reform (e.g. regarding service points, nursing facilities and the like).
3. The intermediation of other forms of assistance by the public authority charged with the support and protection of vulnerable adults (Betreuungsbehörde) is an important means of better implementing the precedence of other forms of support over "Betreuung" and therefore the UN CRPD's notion of support. It is therefore of crucial importance that and how this legal obligation is effectuated by these public authorities.



4. The BGT opposes the proposition to introduce a new profession where professionals act as legal representatives for money under an enduring power of attorney. Legal representation under an (enduring) power of attorney is an act of confidence and needs a relationship of trust between the granter and the legal representative. Without this personal bond of trust, the risk of abuse is too great. Professional support should be provided in the form of “Betreuung”. This includes the safeguards called for in Article 12, section 4 UN CRPD. Furthermore, there’s the risk of additional stigmatization of such persons that are not suited for this kind of mandated support and therefore “end up” in “Betreuung”.

5. “Betreuung” without the power to represent (as for instance “attended assistance” [Begleitbeistandschaft] in Switzerland) should not be introduced. This will lead to a substantial increase in cases of “Betreuung”. Moreover, forms of “Betreuung” with different thresholds would not be conducive to the idea of support in the German Law of Betreuung as this would perpetuate or reinforce the misconception of “Betreuung” restricting the legal capacity of a person with disabilities. As it is, it is the principle of necessity that determines the precedence of counseling and assistance in every individual case. Different forms and thresholds of intervention in “Betreuung” increase the risk of a schematized approach which does not take into consideration the disabled person’s abilities in an individual case.

6. All stakeholders involved in the system of “Betreuung” need to observe the principle of assistance:

- The “Betreuer” as court-appointed (legal) representative is a guarantor for the implementation of the principle of assistance within “Betreuung”. He/she must primarily assist the adult with his/her own decision and may only resort to the measure of legal representation if necessary. In any case he/she must respect the will and preferences, if necessary the best interpretation of the will and preferences of the adult, to have personal contact with him/her, and to discuss important matters with him/her.
- The court must promote the principle of assistance by strictly adhering to the principle of necessity and the obligation to conform to the will and preferences of the adult, especially when examining the qualification of the “Betreuer”, in a mandatory introduction, in the context of reporting and documentation requirements, in case of the “Betreuer’s” dismissal, and in the context of his/her civil liability according to § 1833 BGB.
- The guardian ad litem must not only articulate the interests but above all the wishes and the will of the adult during the proceedings; he/she needs to identify these wishes in a one-to-one conversation with the adult and must pay attention to comply with the principle of assistance in the proceedings as well as practice it him- or herself. All guardians ad litem need to be trained in these tasks in training courses and further education.



4. Weltkongress Betreuungsrecht
4th World Congress on Adult Guardianship
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- When making suggestions, the public authority charged with the support and protection of vulnerable adults needs to consider that the “qualification” of persons working as “Betreuer” must include their ability to observe the principle of assistance and to give precedence to the self-determination of persons in care.

7. Beyond that, the implementation of the principle of assistance requires the legislator to

- a. change the current reimbursement system for professional “Betreuung” because it creates false incentives, neglecting the time needed for counseling and assistance as well as the competency for support in the exercise of legal capacity.
- b. specifically create incentives for counseling and support by volunteer “Betreuer”, particularly by relatives who provide support with the aid of “Betreuung” and with (enduring) powers of attorney.
- c. ensure the adequate qualification and further education of all those working professionally in “Betreuung” (court-appointed representatives, interdisciplinary workers in associations, staff members in public authorities for “Betreuung”, judges and law officers in competent courts in proceedings for “Betreuung”, expert witnesses).

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