Development of the German Law of "Betreuung"

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In the Federal Republic of Germany, the German Law of "Betreuung" replaced the previously applicable regulations for incapacitation with subsequent ordinance of guardianship as well as curatorship ordered in case of physical or mental incapacity on January 1st, 1992. It is complemented by regulations regarding forced hospitalization by civil law including a medically imperative and stringently required forced medical treatment. The material German Law of "Betreuung" is regulated in §§ 1896 et seqq. BGB (German Civil Code), while the procedural law is regulated in §§ 271 et seqq. FamFG (Federal Act on Proceedings in Familiy Matters and on Non-Contentious Proceedings). The priority of this legal revision was the creation of a legal protection of adults that would mostly prevent state paternalism and therefore only permit an intervention in such cases where necessary for the protection of the adult concerned.

The condition for the ordinance of a regime of "Betreuung" is always the existence of a physical, mental or psychological disability, which must be determined by an expert and verified through a personal interview of the person concerned. Due to this disability, the person concerned must be completely or partially unable to conduct his or her affairs (§ 1896 section 1 BGB). This is not the case, if, when the person concerned still had transactional capacity, he/she submitted an enduring power of attorney, which enables the legal representative/ attorney to take action on behalf of the person concerned. However, in order to make allowance for the personal abilities the person concerned still has, a court-appointed (legal) representative ("Betreuer") may only be appointed for areas of responsibility where "Betreuung" is necessary (§ 1896 section 2 BGB). The need for "Betreuung" must be reviewed by the court periodically, the maximum period allowed for by the law being seven years (§ 295 section 2 FamFG).

To exclude state paternalism, German legislature has specified the conditions for the ordinance of a regime of "Betreuung" as of July 1st, 2005. Accordingly, a court-appointed (legal) representative may not be appointed against the free will of the person concerned (§ 1896 section 1 a BGB). If the person concerned does not consent to a regime of "Betreuung," it first needs to be determined if he/she is still capable of a free exercise of will. The decisive criteria here are the adult's ability to reason and his/her ability to act according to this reasoning, whereby both of these factors must relate to the areas of responsibility of the "Betreuung".

In his/her areas of responsibility, the court-appointed (legal) representative represents the adult judicially and extra-judicially. The regime of "Betreuung" comprises all tasks that are required to legally conduct the affairs of the adult conducive to his/her welfare and taking his/her wishes into consideration. Basically the person concerned remains entitled to conduct his/her affairs alongside the "Betreuer" according to his/her abilities. Only when essential in warding off a significant risk for the person concerned or their assets does the competent court for "Betreuung" order that when declaring a will that concerns the areas of responsibility of the court-appointed (legal) representative, the adult needs his/her consent (Einwilligungsvorbehalt/reservation of consent, § 1903 BGB).

Where particularly important decisions are concerned, the "Betreuer" needs the court to approve his/her decision. This applies for instance to medical procedures, when there is justified reason to

fear that the adult may die due to the procedure or suffer a severe and prolonged impairment to his/her health (§ 1904 BGB). With the German Law of "Betreuung" that came into effect in 1992, the legislator already specifically prescribed the consideration of written wishes of the person concerned within the regime of "Betreuung". As of September 1st, 2009, the legislator amended the regulation and laid down the purport of an advance directive in health care. If an adult able to consent has composed a written advance directive in health care in case of his/her inability to consent, the court-appointed (legal) representative will verify if these determinations apply to the current living and treatment situation and therefore need to be actually considered. If this is not (no longer) the case, the "Betreuer" must determine the treatment wishes or the presumed will of the adult and make a decision on these grounds as to whether he/she consents to a medical procedure or prohibits it (§ 1901 a BGB).

A forced (psychiatric) hospitalization for the protection of the person concerned is also subject to approval (§ 1906 BGB). After the Federal Court of Justice (BGH) recognized the need for a basis for medically required compulsory medical treatment in established law (BGHZ 193, 337 = FamRZ 2012, 1366) the legislator laid down the conditions for approval of such an involuntary medical measure within the scope of a forced (psychiatric) hospitalization as of February 26th, 2013, in § 1906 section 3, 3a BGB. However, treatment against the declared will of the person concerned is currently only permitted within the scope of a forced (psychiatric) hospitalization and under the respective additional conditions. The Federal Court of Justice considers this loophole in the legal protection of adults as unconstitutional and has submitted a procedure to the Federal Constitutional Court for the court to give a ruling on (BGH order of 1st July 2015 – XII ZB 89/15 – FamRZ 2015, 1484). In the case, medical treatment is urgently required, however, the refusing person concerned who no longer possesses free will cannot be hospitalized in a closed institution because he lacks a tendency to run away. Hence, also in the Federal Republic of Germany, developing regulations for the legal protection of adults has not been finalized.

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