

Legal Protection of Adults in Germany – An Overview¹

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I. Introduction

In Germany, we have a two-tier system for the legal protection of adults who are not able to manage their own affairs: tier one is the statutory system, tier two is the enduring power of attorney (“Vorsorgevollmacht”), an alternative to the statutory system, which is the German equivalent of the English “lasting power of attorney”. This paper focuses on the statutory system.

II. Legal instruments for the protection of adults

The main statutory instrument for the protection of adults who are incapable of handling their own affairs is a court-appointed (legal) representative, employed to manage the adult’s affairs (“Betreuer”).² However, there are also other instruments available to protect an adult in the absence of such a (legal) representative.

One of these instruments is what you might call the legal defence of insanity (“natural incapacity”). It operates as follows: a contract or another legal act of the adult is made invalid by force of law if the adult, because of his mental condition, is unable to understand the meaning of the legal act or comprehend its consequences.³ Likewise, the adult is not held responsible for his conduct.⁴

In addition, there are rules that govern the benevolent intervention of a third person into the affairs of an adult, who is unable to manage them himself.

¹ Revised version (11.01.2016) of a lecture held at the Tokyo Bar Association on 22nd February 2013 in Tokyo, Japan.

² §§ 1896 et seqq. BGB.

³ E.g. §§ 104 Nr. 2, 105, 1304, 2229 subsection 4 BGB.

⁴ § 827 BGB.

They apply to financial affairs⁵ as well as to health care decisions, where they are called the rules on presumed consent.⁶

III. Legal defence of insanity (“natural incapacity”)

In principle, under German law a person becomes fully legally capable when he reaches the age of majority at 18. Consequently, from that age onwards adults are held responsible for their actions.

The provisions on the legal defence of insanity (“natural incapacity”) provide an exception to this general rule for activities like contracting, conducting court proceedings in one’s own name, making a will and committing a tort or a crime. If an adult, due to his mental condition, cannot understand what he does or cannot make his own decisions, his actions are considered legally invalid, and he is not liable for his behaviour.

The invalidity of the action or the absolution of responsibility need not be invoked or pleaded: they take effect by virtue of the law. Hence, the rules on the so called “natural incapacity” provide a basic form of statutory legal protection.

IV. Conducting another person’s affairs

An adult’s affairs may be taken care of by another person based on the legal doctrines of agency of necessity and presumed consent.

In urgent cases or emergencies, an agent may manage the financial affairs of a person who is unable to take care of himself under the doctrine of agency of necessity.⁷ The agent must act according to the real or presumed will of the adult and in his interest.⁸ However, agency of necessity does not grant the agent a power of attorney; it merely justifies the agent’s intervention into the adult’s affairs.

⁵ §§ 677 et seqq. BGB.

⁶ § 630d subsection 1 sentence 1 BGB.

⁷ § 681 BGB.

⁸ § 667 BGB.

In personal affairs, such as health care decisions, German law strictly adheres to the doctrine of informed consent. Medical interventions may only be carried out lawfully with the consent of the patient. If he is unable to consent, the doctor has to decide on behalf of the patient whether he would have wanted the medical treatment to be carried out. If the answer is “yes”, the medical treatment is lawful because of the presumed consent of the patient.⁹

As a general rule, the doctor must wait until the patient has recovered enough so that he himself can decide whether or not to consent to the treatment. Presumed consent is therefore limited to cases of emergency and urgency, i.e. if further delay would lead to severe and irreparable consequences for the patient.

Both doctrines, i.e. agency of necessity and presumed consent, may justify the intervention into another person’s affairs, but they do not constitute a power of attorney. Therefore, the agent cannot act on behalf of the incapable adult and represent him legally, neither in court nor in business transactions nor in medical interventions.

V. Court-appointed (legal) representative (“gesetzlicher Betreuer”)

For a long time, German guardianship law was like the law elsewhere in Europe and most of the world. Traditionally, a court or another public authority would issue an interdiction order rendering the adult legally incapable to manage his own affairs, and which appointed a legal guardian to act on his behalf. Guardianship and legal incapacity were inseparable, like two sides of the same coin. This traditional approach has been severely criticised since the 1970s, as, inter alia, violating the human rights of the adult and disregarding his existing abilities.

Germany fundamentally reformed this area of law at the beginning of the 1990s. The old guardianship system was completely abolished and replaced by a new system of “gesetzliche Betreuung”.

⁹ § 630d subsection 1 sentence 1 BGB.

Today there is no incapacitation by court order anymore and, instead of a legal guardian who controls all aspects of the life and the affairs of the adult, a court-appointed (legal) representative (“gesetzlicher Betreuer”) merely takes care of the specific matters assigned to him by the court in each individual case and is obliged to respect the will and preferences of the adult.

Now let’s have a look at the new statutory system of protection. You will realise, I am sure, that I will speak of a “representative” rather than a “guardian”. That is because I want to make absolutely clear that the “gesetzliche Betreuer” of today has very little in common with the guardian under the old system. Please note that I also use the term “representative” for practical reasons. On its web-pages, the German Ministry of Justice uses this term in the more or less official translation of the German Civil Code into English.

1. Basic structure

A special court for proceedings for “Betreuung” (“Betreuungsgericht”) may appoint a (legal) representative, if an adult is no longer able to handle his own affairs due to mental illness or a physical or mental disability. The court-appointed (legal) representative must respect the adult’s wishes, as long as they are not contrary to his welfare.¹⁰ This is a bit vague, but its meaning has been clarified by legal writing and the courts: wishes have to be respected unless (1) they result from the psychiatric condition and (2) they would actually harm the adult. The court-appointed (legal) representative is given the task to help the adult in exercising his rights and to protect him from harming himself. However, he is not appointed to educate the adult or to oversee dealings where the adult is still able to make his own decisions autonomously.

Therefore, the main functions of the court-appointed (legal) representative are to advise and assist the adult. His role is thus defined to limit the interference with the adult’s autonomy as much as possible.

¹⁰ § 1901 subsection 2 and subsection 3 BGB.

Consequently, the court-appointed (legal) representative must respect the principle of necessity and adhere to the UN Convention on the Rights of People with Disabilities. It is only as a last resort, i.e. if advising and assisting the adult proves unsuccessful, that the court-appointed (legal) representative may use his power to represent the adult in legal affairs.¹¹

As I have already mentioned, necessity is a basic principle that must be observed at all times. The autonomy of the adult forms the second basic principle. This principle is twofold. Firstly, the court-appointed (legal) representative must enable the adult to lead his life as autonomously as possible: the court-appointed (legal) representative may only become involved when the adult is unable to decide and act by himself.

Secondly, the court-appointed (legal) representative must respect an autonomous decision of the adult. This also includes a decision that the adult has made in advance of the representative's appointment, e.g. in an advance directive on "Betreuung"¹² or in an advance directive in health care.¹³

Another principle is that the court-appointed (legal) representative must fulfil his task in person and through personal contact with the adult. He cannot delegate his main tasks to office staff or work like a bureaucrat at his office and send out other people to deal with the adult.

2. The adult's legal capacity

In contrast to traditional guardianship laws, nowadays the judicial order to appoint a representative neither limits the adult's transactional capacity or capacity to make a will, nor his capacity to consent to medical treatment etc. Unless on the rare occasion that a so called "natural incapacity"¹⁴ arises and makes a specific act or transaction invalid, an adult is still legally capable of entering into contracts, consenting to medical treatment etc.

¹¹ § 1902 BGB.

¹² §§ 1897 subsection 4 sentence 3, 1901 subsection 3 sentence 2, 1901c BGB.

¹³ §§ 1901a subsection 1 BGB.

¹⁴ See above no 3.

The court-appointed (legal) representative has to advise and assist and, if necessary, act on behalf of an adult who is unable to act. However, the court-appointed (legal) representative must not represent the adult if he is still able to act for himself.

If, however, the danger exists that the adult, due to his mental condition, might harm himself or his assets, and there is no other way to protect him, the court may rule that the adult needs the consent of the representative when engaging in certain financial transactions. In effect, this restricts the legal capacity of the adult with respect to the specific financial affairs listed in the court order.¹⁵ Here we have one of the few relics of the old guardianship system, since the court has the power to limit the legal capacity of the adult. But please also note the differences: this applies only to financial affairs, and only to those stated in the court order. Additionally, the requirements for such a court order are very strict, thus they exist only in very few cases (5-6 % of all cases). And, the court-appointed (legal) representative has to, as always, respect the will and preferences of the adult when exercising his powers.¹⁶

3. Proceedings to appoint a (legal) representative

It is the court's task to appoint a (legal) representative, be it ex officio or be it at the request of the adult. German law entrusts a court with the appointment and the control of a (legal) representative, since it limits the autonomy of an adult if he has a "state agent" at his side who may meddle with his affairs. We prefer a court to be in control rather than a public authority for support and protection of vulnerable adults, e.g. the "Betreuungsbehörde", since an independent court guarantees the protection of the adult's rights better than a public authority. Otherwise we would also run into the problem of how to enable the adult to have access to a court. Instead, under German law, we have the organized court to come to the incapable adult.

¹⁵ §§ 1903, 108-113, 131 subsection 2 BGB.

¹⁶ See no 5. e) below.

Court proceedings to appoint a (legal) representative are regulated extensively by statute. They are inquisitorial in nature and the judge has to gather all necessary information *ex officio*.¹⁷ The fundamental guarantees for court proceedings have to be observed, i.e. the right to a fair trial and the right to be heard.

These rights cannot be suspended for reasons of (presumed) legal incapacity. Everybody is legally capable to be heard in person and take part in court proceedings, regardless of his mental condition. Therefore, the court has to listen to the adult¹⁸, unless this will significantly endanger his health or if it is evident that he is in fact unable to express himself. In those cases, but also in other cases where it is likely that the adult is not fully able to master the proceedings himself, the judge must appoint a representative *ad litem*.¹⁹ The representative *ad litem* must independently safeguard the interests of the adult during the proceedings.

Before appointing a (legal) representative, the court must obtain an expert medical report on the medical condition of the adult, his abilities and inabilities, and their effect on his capability to manage his affairs.²⁰ A medical certificate may be sufficient if the adult requests the appointment of a (legal) representative and if a full medical report is unnecessary.²¹

If the adult so requests, the judge must also hear from his partner and close relatives.²² The local "Betreuungsbehörde" has to appear in court to provide information on the adult's situation.²³ Since 1st July 2014²⁴ it became mandatory for the "Betreuungsbehörde" to give a statement before the court and report on the adult's situation, and possibly also to suggest alternatives to the appointment of a (legal) representative.²⁵

¹⁷ § 26 FamFG - **FamFG** = *Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit* (Act on Proceedings in Family Matters and on Non-Contentious Proceedings). It replaced the former **FGG** = *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (Act on Non-Contentious Proceedings) with effect from September 1st 2009.

¹⁸ § 278 FamFG.

¹⁹ *Verfahrenspfleger*, cf. § 276 FamFG.

²⁰ § 280 FamFG.

²¹ § 281 subsection 1 FamFG.

²² § 278 subsection 1 FamFG.

²³ § 279 subsection 2 sentence 1 FamFG.

²⁴ Gesetz zur Stärkung der Funktionen der Betreuungsbehörde, BGBl. I, 3393.

²⁵ § 279 subsection 2 sentence 2 FamFG.

On the basis of all this information gathered and provided, the court must decide whether or not to appoint a representative and also the areas in which the representative's assistance and support is necessary. Whilst on an abstract level there is only one kind of (legal) representative, in practice almost every (legal) representative has different tasks, as his tasks are determined flexibly, according to the individual needs of the respective adult. His role may be limited to just one situation, e.g. to take care of all issues concerning ongoing treatment in a hospital, or it may relate to a specific area, e.g. all matters relating the management of some land or of a house owned by the adult. Alternatively it may either relate to a more generally defined area like the financial affairs of the adult or his medical treatment, or, in rare cases, the scope of the representative's role may be wide enough to include all matters.

4. Selection of the court-appointed (legal) representative

Who should be appointed as (legal) representative? German law does not leave that completely to the discretion of the court, rather it has laid down several principles. Apart from the general notion that the (legal) representative should be qualified to perform his tasks, the overriding principle is respect for the autonomy of the adult. If the adult suggests somebody to become his (legal) representative, the court must appoint that person unless it is not based on the free will of, and harmful to the adult.²⁶

If the adult does not suggest somebody, the court has to take into account family ties and other personal ties of the adult on the one hand, and the risk of conflicts of interest on the other.²⁷ According to the German Constitutional Court, that means that, in the light of the German Constitution²⁸ and the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁹ a family member must be appointed to the position, unless this would seriously endanger the adult.

²⁶ § 1897 subsection 4 sentence 1 BGB.

²⁷ § 1897 subsection 5 BGB.

²⁸ Art. 6 Grundgesetz (German Basic Law).

²⁹ Art. 8 European Convention on Human Rights.

If there is no family member or close person willing and able to take over the management of the adult's affairs, the court will appoint a professional (legal) representative. There is no statutory regulation on who can become a professional representative, and there is no legally required professional education. But, over the past 20 years, the local and regional "Betreuungsbehörden", together with the courts, have developed certain standards. Moreover, professional representatives have now organised themselves into nationwide professional associations ("Betreuungsvereine"), which take part in the development of professional standards.

5. Activities of the (legal) representative

The task of the (legal) representative is to assist and to protect the adult, within the areas defined by the court. In turn, the activities of the representative are guided by two main principles: necessity and the respect of the autonomy of the adult.³⁰

The court-appointed (legal) representative cannot simply intervene and become involved in every matter that may potentially fall within his jurisdiction, as defined by the court. He is only allowed and required to act if it is necessary to do so in order to assist or protect the adult.

And, in cases where his intervention proves necessary, the second principle becomes significant. Since the court-appointed (legal) representative has to respect the adult's autonomy, he must comply with the adult's wishes and preferences, unless these are not based on his free will and harmful to him. In order to discover the wishes of the adult, the representative has to keep in touch with the adult and personally discuss important issues with him. If the adult is not able to say what he wants, the court-appointed (legal) representative has to consider what the adult would have directed him to do, if he were in a position to be asked.

³⁰ § 1901 BGB.

In 2009, this general provision³¹ was amended by provisions on health care.³² They are much more detailed but the main content remains the same.

6. Control of the court-appointed (legal) representative

The court has to supervise and control all activities of the appointed (legal) representative and intervene if he violates his duties and obligations.³³ The court-appointed (legal) representative must report to the court at least once a year and account for his management of the adult's assets.³⁴ If the court-appointed (legal) representative violates his duties, he may be liable for damages under civil law and, in some cases, also criminally liable.

This applies for all (legal) representatives, for family of the adult as well as for professional representatives. Yet for the spouse, parents or descendants of the adult, the court's controls are usually less rigid, unless it directs otherwise.³⁵

Moreover, for certain decisions the court-appointed (legal) representative needs the approval of the court. These are decisions that are very important or dangerous for the adult, for example if there are doubts about the will of the adult relating to important health care decisions,³⁶ if the adult is to be placed in a closed institution, if he is to be sterilised or to undergo forced treatment, or for certain financial transactions.³⁷

7. Termination

As a rule, the court-appointed (legal) representative should give up his position if it is no longer necessary for the adult to have a representative. In order to safeguard this, German law has created the following provisions.

³¹ § 1901 BGB.

³² §§ 1901a, 1901b BGB.

³³ § 1908 i in conjunction with § 1837 subsection 2 BGB.

³⁴ §§ 1908 i subsection 1, 1840, 1841, 1843 BGB.

³⁵ §§ 1908 i subsection 2, 1857 a BGB.

³⁶ § 1904 BGB.

³⁷ Cf. §§ 1905-1907; §§ 1801i and §§ 1810, 1811, 1812 subsection 3, 1814-1816, 1819-1821, 1822 numbers 1-4 and 6-13, 1823, 1825 BGB.

Firstly, the court-appointed (legal) representative has to notify the court if he becomes aware of circumstances which would allow for the termination or limitation of his tasks.³⁸

Secondly, if the court-appointed (legal) representative was appointed upon the adult's request, the court must, if the adult so requests, terminate his office, unless the court finds that a (legal) representative is now necessary.³⁹

Thirdly, the court has to fully review the conditions and the necessity of the court-appointed (legal) representative after a maximum period of seven years.⁴⁰

8. Costs

In principle, the adult has to pay the costs of the court proceedings as well as the expenses of the court-appointed (legal) representative or the salary of a professional representative, respectively.

Depending on the value of his assets, the adult may be entitled to legal aid. Then both sets of costs will be paid for by the state's treasury.

VI. Compulsory measures, in particular, forced medical treatment

When the new law of court-appointed (legal) representatives was introduced in 1992, it was already established that a (legal) representative could enforce a measure against the adult's will if the adult would otherwise severely harm himself, if he was unable to consent and if the compulsory measure was proportionate. The new law introduced a provision⁴¹ that regulated the deprivation of liberty, especially when placing the adult in a closed institution, but did not regulate other involuntary measures, such as forced medical treatment.

³⁸ § 1901 subsection 5 BGB.

³⁹ § 1908 d subsection 2 BGB.

⁴⁰ § 294 subsection 3 FamFG.

⁴¹ § 1906 BGB.

This was heavily criticised, and with great success. The Federal Court of Justice (BGH) decided in 2012, that there was no statutory basis for any involuntary measures other those that constitute a deprivation of liberty. Thus, in particular, there was no basis for forced medical treatment. Consequently, the Civil Code was amended in 2013. There is now a specific provision regulating forced medical treatment.⁴² In effect, such forced treatment will now only be possible in very limited cases as a last resort to protect the adult from self-inflicted harm, and only with the court's approval.

⁴² §§ 1906 subsections 3 and 3a BGB.