

Adult guardianship legislation in the Netherlands is definitely in need of revision in order to make the system more user-friendly, and to make sure that Dutch legislation is in accordance with international human rights law. The improvements and changes that were realized in past years dealt particularly with standards and quality requirements for professional guardians and supervision by the courts. And it was easy to connect them with the Yokohama Declaration. The changes still to be made in the Dutch Civil Code concern enhancing the use of continuing powers of attorney and pushing back the deprivation of legal capacity as much as possible within our adult guardianship system. Several international instruments provide an external impulse that states take action, such as the Recommendation (2009)¹¹ from the Council of Europe, and the CRPD, together with the General Comment on article 12. Most of the changes can also be connected with the Yokohama Declaration, which has proven to be an important guiding instrument. It is clear that the stimulating influence of the Declaration has certainly not ended. The same applies to the work and efforts of Professor Makoto Arai and I hope that he will remain involved in the field of adult guardianship.

BETREUUNG. A legal perspective on supported and substitute decision-making regarding Art. 12 CRPD

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I. Introduction – Terminology

Before examining the German law regarding Art. 12 CRPD, it is necessary to discuss the terminology which is used in our country. Clarifying terminology is the basis for understanding. This is important because German guardian law was abolished in 1992. Since then, the term adult guardianship *Vormundschaft für Volljährige* is no longer used. *Vormundschaft* came along with a high level of interference in the adult's rights. But the law was changed to a considerable degree. For implementing these changes it was necessary to give the new concept built on the principles of autonomy and necessity a new name. The term which was established was *rechtliche BETREUUNG*, which might be translated as legal caretaking or legal care. In Germany this continues to be controversial because the distinction between caretaking of a person and legal care is not clear in practice and this confuses people. But it was nevertheless necessary to establish a new term in the context of the reform in 1992 to make clear that the old concept of guardianship *Vormundschaft* had been abolished.

1. BETREUUNG versus guardianship

In this article I will use the German term *BETREUUNG* to describe the German system. I will refer to the person concerned – who is generally called a ward – as the adult concerned. And the person appointed to assist the adult concerned will be referred to as the *Betreuer*.

A number of English language articles about the German “Law of *BETREUUNG*” use the term guardianship.¹ Of course most authors are explaining the German system. Since many of the articles were written in the context of the World Congresses on Adult Guardianship Law, it seems to make sense to use a similar term in a comparative context. However, I got the impression that the conclusion that the term guardianship gives clarity is misleading. In general the meaning of guardianship is not precise enough and therefore provokes the risk of misunderstanding. In many countries the term guardianship is still linked with the denial of legal capacity, removal of rights and mostly recognized as a substitute decision-making system.²

A modern definition is found in the context of the 1st World Congress of Adult Guardianship. The Yokohama Declaration of 2010 defined guardianship law as adult rights and protection law. The declaration challenges the proposition that a person must be assumed to have the mental capacity to make a particular decision.³ The declaration was a very important step towards a rationality of reforming the guardianship laws. It modified the understanding of and the approach to guardianship. Although I agree with the Yokohama declaration in many points, I prefer not to use the term guardianship.

2. *BETREUUNG* versus custodianship

Another term which is used as an English translation is the term custodianship which is used by the Federal Government of Germany.⁴ This trans-

1 Nussbaum, *Frontiers of Justice* 2007, p. 197 ff.; Lipp, *Guardianship and Autonomy: Foes or Friends?* in Arai/Becker/Lipp (Ed.), *Adult Guardianship Law for the 21st Century*, 2013, p. 103 ff.; Haußner, *Guardian Law – Support Systems in Germany* in Arai/Becker/Lipp 2013, p. 77 ff.; Mammeri-Latzel: *Overview of German Adult Guardianship Law from the Perspective of a German Judge*: in Arai/Becker/Lipp 2013; Meyer, *Adult Guardianship Legislation in Germany*: in Arai/Becker/Lipp 2013, p. 125; Brosey, *Presentation at the 3rd World Congress on Adult Guardianship* http://www.guardianship.org/IRL/ResourceLibrary/adult_guardianship_decision_making.aspx (accessed: 19.05.2015).

2 *UN Committee of the Rights of People with Disabilities*, General Comment No. 1 Art. 12 CRPD 2014, No. 21; many states in the U.S.A., and provinces of Canada.

3 Yokohama Declaration No. 3 (1).

4 Link to the Custodian Law; Sec. § 1896 - § 1908 f German Civil Code, English translation, Initial state parties report Germany, 19. September 2011. <http://www.ge>

lation seems just as inappropriate. Custody in law is often used in the context of minors and parental custody. In this respect, using the term custodianship can also produce misunderstandings from the very beginning.

That is why I will use the term “*BETREUUNG*” in this article to give a perspective without the effect of a terminological classification from the very beginning. I will examine whether the German system conforms to Art. 12 CRPD, and also the principle of supported decision-making.

II. *The obligations of Art. 12 CRPD and the General Comment No. 1*

The Committee on the Rights of Persons with Disabilities published the General Comment No. 1 regarding Art. 12 CRPD in April 2014.⁵ The Comment provides very important guidelines for reviewing existing systems. The General Comment elucidates the abolition of substitute decision-making regimes. Such regimes can have many different forms, including plenary guardianship, judicial interdiction and partial guardianship. What is crucial for a classification is not so much the term but the common characteristics of substitute decision-making regimes: “they can be defined as systems where

- (i) legal capacity is removed from a person, even if this just applies to a single decision;
- (ii) a substitute decision-maker can be appointed by someone other than the person concerned,
- (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences.”⁶

This ‘will and preference’ paradigm must replace the existing ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.⁷

setze-im-internet.de/englisch_bgb/; Haußner, *Guardian Law – Support Systems in Germany* in Arai/Becker/Lipp (Ed.) 2013, p. 77 ff.

5 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> (accessed: 18.05.2015).

6 General Comment No. 1, No. 27.

7 General Comment No. 1, No. 18bis.

The Comment also emphasizes that the type and intensity of support to be provided will vary significantly from one person to another due to the diversity of persons with disabilities. This is in accordance with article 3 (d), which sets out "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity" as a general principle of the Convention. Art. 12, paragraph 3, does not specify what form the support should take. "Support" is a broad term that encompasses both informal and formal support arrangements of varying types and intensity.⁸ That is why the Committee advises that states should provide a wide range of measures which respect the person's autonomy, "will and preferences".⁹

The CRPD Committee's General Comment No. 1¹⁰ has observed "that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach)."¹¹

In contrast, the supported decision-making regime comprises various support options which give primacy to a person's will and preferences and respect human rights norms. It should provide protection of all rights, including those related to autonomy (right to legal capacity, right to equal recognition before the law, right to choose where to live, etc.) and rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity, etc.).

With regard to people supporting people, we will have to deal with the question whether the supported decision-making paradigm opens an irreconcilable antagonism between the adult's self-determination and his/her security. The supported decision-making paradigm is an obligation, which in any case should not be casually asserted because of possible risks for the person. Art. 12 CRPD and the General Comment No. 1 oblige the states and the stakeholders to review conventional approaches and to im-

⁸ General Comment No. 1, No. 17.

⁹ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of New Zealand, 3.

¹⁰ <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> (accessed: 18.05.2015).

¹¹ General Comment No. 1, No. 15.

plement alternatives. Does the German approach comply with these determinations?

III. General Information concerning the Law of *BETREUUNG*

With regard to all principles and obligations resulting from Art. 12 CRPD and the General Comment No. 1, the German Law of *BETREUUNG* follows the principle of supported decision-making to assure the adult's autonomy and the right to self-determination. Another formal support arrangement is the enduring power of attorney, where an adult appoints a representative. The representative is given power of attorney by the adult on authorized matters. As to informal support, representation without power of attorney is also possible for family and friends, even for court and administrative procedures¹², counseling and social services. There should be much more effort made to implement informal support arrangements, such as support networks, all over the country. In this article I will focus on the formal arrangements which have been criticized regarding Art. 12 CRPD in the report concerning the civil law.¹³

1. No declaration of incapacity as such

As mentioned above, German guardian law was fundamentally reformed in 1992 after a process of several years of discussion which started in the early 1970s. One of the most important modifications was the separation between appointing a *Betreuer* and the declaration of legal and mental capacity to act. The appointment of a *Betreuer* is made by a specialized court and has no influence on the person's legal capacity. Legal capacity became a question of the adult's current capability¹⁴ and not of a status as a result of a court decision. The adult is presumed to have capacity and the ability to make decisions.

According to the law, the appointment of a *Betreuer* is dependent upon the necessity for support of the adult concerned in exercising his or her le-

¹² The German term is *Beistand*. For an example § 90 Code of Civil Procedure.

¹³ German CRPD-Allianz <http://www.brk-allianz.de/index.php/parallel-bericht.html> (accessed: 18.05.2015).

¹⁴ § 104 No. 2 Civil Code.

gal affairs in part or in whole.¹⁵ The phrasing of the law is deficit-oriented; the need of support must be based on impairment and inability.

2. The precedence of an enduring power of attorney

Adults in general can avoid a *BETREUUNG* by giving another person an enduring power of attorney, and having an agreement with the attorney concerning the form and substance of support and representation. This *Vorsorgevollmacht* became very popular. In 2013, there were 2.3 million enduring powers of attorney registered in Germany.¹⁶ On the other hand we have about 1.3 million ongoing proceedings regarding *BETREUUNG*.¹⁷ The primary provision of a power of attorney is successful only if the adult has someone who is willing and trustful, and takes on the mandate voluntarily.

3. The precedence of social services

Apart from the precedence given to the power of attorney, the principle of necessity bars the court from issuing a legal support order if the person can manage with the support of social services. Therefore a local authority is responsible both for advising and for providing social services and social benefits for the adult concerned. The local authority has to report to the court in a given court procedure. This extension of responsibility became law in July 2014.¹⁸

To avoid a *BETREUUNG*, several social services provide support:

- community psychiatric centers;
- assisted living;
- advisory services concerning social insurance policies (health or long-term care insurance), and social services provided by public authorities;
- visiting nurses;

¹⁵ § 1896 I Civil Code.

¹⁶ *Zentrales Vorsorgeregister*: <http://www.vorsorgeregister.de>.

¹⁷ *Bundesamt für Justiz* (Federal Office of Justice), *Betreuungszahlen* 2013.

¹⁸ *Gesetz zur Stärkung der Funktion der Betreuungsbehörde*.

- social services in hospitals and nursing homes;
- youth welfare services for young adults up to the age of 21;
- debt counselling;
- direct payments for people with impairments.

Reports state that people with impairments have problems receiving their rights and benefits. The German legislature should create a better support system for adults concerned claiming benefits. The procedures are often complicated, and set up many barriers to their being understood. Hopefully the reform of the law and the benefits of rehabilitation and inclusion¹⁹ will meet the need for supported decision-making in these administrative procedures.

The involvement of the local authority is very important for investigating the necessity of a *BETREUUNG*. There should be a wide range of services in the municipalities. Nevertheless, the need for support varies. The necessity for a person-centered individual *BETREUUNG* has to be investigated. It is also important that the adult concerned be involved early on when the adult receives an explanation of the *BETREUUNG* and of the adult's rights. Many people continue to be prejudiced, believing that *BETREUUNG* is tied to a denial of rights and capacity. To ensure the compliance of the adult concerned, it is important that *BETREUUNG* is explained in a way that is comprehensive and easy to understand. It is also a requirement that an agreement of *BETREUUNG* be entered into between the adult and the *Betreuer*.²⁰

4. Legal representation

Nevertheless, the *Betreuer* functions as a representative with a defined set of duties and powers prescribed by the court, and the court determines the necessity for support. In Germany the function of legal representation is being questioned as to whether it is an interference in the autonomy of the adult.²¹

¹⁹ *Reform der Eingliederungshilfe*.

²⁰ § 1901 IV Civil Code calls the idea a *Betreuungsplan*.

²¹ German CRPD- Allianz <http://www.brk-allianz.de/index.php/parallel-bericht.html> (accessed: 18.05.2015).

The court procedure is conducted with the participation of the adult, a medical expert, the local authority and, if needed, with a special supporter, or procedural advocate, or an attorney for the adult.²² *BETREUUNG* follows the principle of necessity for the adult's self-expression. There is not only a *BETREUUNG* of the estate, or a *BETREUUNG* of the person, to be decided upon, the court has to determine in a person-centered manner the extent of the support and representation needed.

The principle of necessity does not provide a guideline for the court only, but also as a major guideline for the *Betreuer*, guaranteeing the precedence of supported decision-making in the law.

5. The rights of the adult concerned

Adults with impairments have a right to have a *Betreuer* appointed by the court if they cannot in whole or in part take care of their legal affairs and if this is necessary. The adult concerned has the right to make a suggestion (at the time or in advance²³) as to who should be appointed as the *Betreuer*. In general the court has to follow this wish. Mostly family members (65%) or professionals (such as social workers or lawyers; 30%) function as *Betreuer*. The professional *Betreuer* is paid by the adult concerned or, as in most cases, if she/he is without means, the *Betreuer* is paid by the state.²⁴

Also, adults have the right to refuse a *BETREUUNG*. Hence it is also the adult's right that the court have the authority to withhold consent to the appointment of a *Betreuer*.²⁵ The law provides that a *Betreuer* may not be appointed against the wishes (or free will) of an adult.²⁶ The constitutional principle of self-determination²⁷ gives every adult the right to refuse support. On the other hand, there is a constitutional right of adults to be safeguarded. If the adult faces substantial danger, there can be a need for safeguarding. The CRPD also creates the obligation that appropriate mea-

sures be taken to protect persons with disabilities from all forms of exploitation, violence and abuse (Art. 16 CRPD).

The law of *BETREUUNG* is in alignment with this responsibility, and requires a *Betreuer* to be appointed for the adult concerned if the appointment is necessary, meaning,

- the adult concerned cannot recognize a personal need of support and representation,
- the *BETREUUNG* must be adequate to fulfill the need of protection,
- the protection cannot be provided by another service, such as granting another person a power of attorney, and
- there is a proportionality regarding the extent of interference and the need for protection.

The law uses a threshold in § 1896 Ia Civil Code: A *Betreuer* may not be appointed against the wishes of the adult. In the overall effort to prevent interference in the rights of the person, it is an appointment of the last resort.

a) Free will

Free will is a legal term. The court's decision to deny free will has to be based on a psychiatrist's expertise. The adult concerned has no free will regarding the necessity of a *Betreuer* if she/he cannot understand the nature and consequences of her/his decisions and/or when she/he cannot utilise or weigh the information needed for decision-making.²⁸ The court is obliged to support the adult concerned²⁹ and to remove barriers to the adult's protection. The court's order does not decide on the legal capacity of the adult even if legal capacity and *BETREUUNG* have points of intersection and are basically congruent. German law has abolished the legal incapacity as a status. The issue of free will in court procedure is always focused on a specific concern. In this case it is free will regarding the necessity for the appointment of a *Betreuer*. There may be no necessity other

²² §§ 271 ff. FamFG = procedural rules.

²³ The formal advance care directive is called *Betreuungsverfügung*.

²⁴ §§ 1908 I, 1836 ff. Civil Code.

²⁵ § 1908 d Civil Code.

²⁶ § 1896 Ia Civil Code.

²⁷ Art. 2 Abs. 2 Basic Constitutional Law (*Grundgesetz*).

²⁸ BGH XII ZB 526/10, BtPrax 2011, p.127; BGH XII ZB 577/13, BtPrax 2014, p. 131.

²⁹ § 276 FamFG: Verfahrenspfleger, Brosey, in: Aichele (ed.), *Das Menschenrecht auf gleiche Anerkennung vor dem Recht*, p. 355, 361.

than the appointment of a *Betreuer* who functions as a legal representative within a defined range of duties and powers.

What is important is that the *Betreuer* does not become a substitute decision-maker. The decision-making process follows the commitment of the law (§ 1901 Civil Code). The adult concerned is still presumed to have legal and mental capacity. The *Betreuer* functions primarily as a supporting decision-maker.

Nonetheless, the invocation of a *BETREUUNG* gives the *Betreuer* the power of legal representation. Consequently there is a risk that the *Betreuer* uses the power of representation for (substitute) decision-making. The appointment of a *Betreuer* is a potential interference in the adult's right of self-determination.³⁰ The consequence of the court appointment is the delegation of responsibility to the *Betreuer*. The *Betreuer* has to fulfill legal obligations and is controlled and monitored by the court. In general the *Betreuer* must comply with the wishes of the adult concerned (§ 1901 III Civil Code).

b) Limitation of legal capacity: Reservation of consent

In addition to the appointment of a *Betreuer*, the German law of *BETREUUNG* allows for another instrument which limits the adult's legal capacity to act (§ 1903 Civil Code). It is called a reservation of consent. In the first place the law requires a substantial danger to be threatening the person's estate or the person (§ 1903 Civil Code). As an additional threshold created by the jurisprudence, it must be determined whether the adult concerned lacks the ability to respond to the substantial danger.³¹

Because of the existence of the reservation of consent, the adult concerned needs the consent of the *Betreuer* in advance or after the fact regarding entering into contracts or taking other legally binding actions. Until the *Betreuer* gives consent, there is only a pending contract (§§ 1903, 108 Civil Code). After his/her consent is given, the contract is legally effective. It has to follow the will and the wishes of the person concerned, so the emphasis is that consent be given, the contract is legally effective. But in this case, following the principle, the *Betreuer* is not a substitute deci-

30 Lipp, Freiheit und Fürsorge: Der Mensch als Rechtsperson, 2000, p. 132.

31 BayObLG, FamRZ 1993, 998, 999; ebenfalls: OLG Hamm, FamRZ 2000, 494, 496; OLG Köln, FamRZ 2000, 908; OLG Frankfurt, BtPrax 1997, p. 123.

sion-maker. The decision-making process also follows the guidelines of the law (§ 1901 Civil Code). The adult concerned does not have the status of being incapable. A decision with the *Betreuer*'s consent is legally accepted as the adult's decision. In general the adult has a right to be given a consent,³² the only exception being an act or omission on the part of the adult that causes substantial danger which the adult concerned is not able to recognize.³³

Even so, the reservation of consent constitutes an interference with the right of equal recognition before the law (Art. 12 CRPD). This needs a special justification which is in accordance with international human rights law.

With the *BETREUUNG* being a potential interference, and the reservation of consent constituting an existing interference, with the right of equal recognition before the law, do these instruments comply with the CRPD's principles?

IV. Compliance of the *BETREUUNG* with Art. 12 CRPD

BETREUUNG is a very flexible measure with regard to people with impairments exercising legal capacity. The decision-making process is the most important element in the law of *BETREUUNG*. What makes this very different from the guardianship system in other countries is the complete abolishment of the denial of capacity in the context of the appointment of a representative. Many jurisdictions³⁴ have a system which provides three or four categories of representation, and the "last resort" remains as the possibility that partial guardianship or plenary guardianship may be imposed.

Even the appointment of a *Betreuer* against the wish (that is not a free will) of the adult, or the reservation of consent, is no denial of capacity for adult as to the future. 23 years of experience in Germany have demonstrat-

32 Brosey, Wunsch und Wille bei Einwilligungsvorbehalt und Aufenthaltsbestimmungsrecht 2009, p. 77; Brosey, BtPrax 2014, p. 211, 214 f.

33 Brosey, Wunsch und Wille bei Einwilligungsvorbehalt und Aufenthaltsbestimmungsrecht 2009, p. 77.

34 Examples are: Japan, Korea, Netherlands, Switzerland, Ontario (in Canada), Pennsylvania (in the U.S.A.).

ed that there is no necessity of denial of legal capacity in the context of an arrangement of support or representation.

But in jurisdictions that have developed what is called an "alternative system", such as the representation agreement in British Columbia or the "enduring power of attorney" in Germany, the power of attorney by no means extends to the representative the ability to impose substituted decision-making.

However, legal representation and substituted decision-making are in no way the same if the representative recognizes her/his legal obligation to accord precedence to the will of the adult, to adult preference, and the principle of necessity and participation. Art. 12, paragraph 3 CRPD was formulated with the conscious intention of giving "access to support" and not of giving "access to substitute decision-making" as the states originally intended.³⁵ Supported and substitute decision-making exclude one another, though support to the exercise of legal capacity may include legal representation.

Systems that include the delegation of the power of attorney to another person always carry the potential risk of substituted decision-making. The power of legal representation can give third parties the impression that the donee of the power is permitted to do whatever the donee chooses to do. On the other hand, systems without a power of representation carry the risk of substitute decision-making by the employment of coercion or threat, being dishonest or abusive towards the adult concerned. That is why the CRPD deals with safeguards in the context of instruments that relate to the exercise of legal capacity (Art. 12, paragraph 4 CRPD).

Quite apart from the issue of the compatibility of the retention of legal capacity and the function of a legal representative, the *Betreuer* is able to infringe upon the person's right of self-determination if the adult concerned does not respect the law. In this case, there is an interference with the adult's will and preferences, and the principle of necessity. But in line with principle, the adult's rights should be interfered with as little as possible.

³⁵ Lachwitz, Aichele (Fn. 29) p. 67, 81.

1. How does the law deal with risk and harm incurred by adults?

The Civil Code uses a particular term which is important for the context of supported decision-making. As a guideline for the *Betreuer*, we have the term, "*Wohl*", which can be translated as well-being or best interests. § 1901 III Civil code provides that the *Betreuer* must comply with the wishes of the person concerned to the extent that this is not inconsistent with the best interests of the person.

In the literature on the law of *BETREUUNG* as well as in the jurisprudence we find different interpretations of the term. The dominant opinion³⁶ argues that the decision of a *Betreuer* has to be reached by balancing the concerned adult's wishes and well-being/best interests with the object of protecting the person from substantial self-damage.³⁷ However, this interpretation does not consider the adult's current capabilities for decision-making, and it does not consider the importance of her/his preferences. I do not agree with this most widely held interpretation because it is not in accordance with the adult's right of self-determination, nor the principles of Art. 12 CRPD. This interpretation is the result of a paternalistic understanding of *BETREUUNG* which considers the adults concerned as being "under *BETREUUNG*".³⁸

2. The *Betreuer's* obligation

The *Betreuer* has to follow in all circumstances the principle of necessity, and to comply with the wishes of the person concerned. The *Betreuer* is obligated to support personal decision-making by the adult concerned, so far as that can be achieved.

³⁶ BGH 22.09.2009, BtPrax 2009, 290 ff, Schwab in: MünchKomm BGB § 1901 BGB paras. 14.

³⁷ BGH 22.09.2009, BtPrax 2009, 290 ff, Schwab in: MünchKomm BGB § 1901 BGB paras. 14.

³⁸ The term 'under *BETREUUNG*' is still used very often.

a) Priorities of supported decision-making

- Explaining the circumstances of a decision in a comprehensible way (that is, removing barriers to understanding)
- Finding out the person's will (or intention) and preferences
- Counseling/advising with regard to will and preferences
- Giving support in making the decision and realizing self-determination of the adult concerned
- Helping to communicate a decision to third parties
- Clarifying that this is a decision which is recognized as the decision of the supported person.

b) Supported decision-making in the form of shared decision-making

The *Betreuer* has to explain relevant details and comply with the current wishes of the adult concerned, using the *Betreuer*'s power of representation to convey the decision to third parties. Every appropriate form of communication must be applied.

c) Best interpretation of will judgment ³⁹

If it is not possible to communicate with the adult concerned, the *Betreuer* needs to verify if a decision has to be made at that time. If it is indeed necessary, the *Betreuer* must resort to guided decision-making based on former wishes, values, beliefs and preferences of the adult concerned, trying to interpret the person's presumed will. The General Comments No. 1 refers to this, stating that the 'will and preference' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others. If the person's intention is interpreted as assiduously as is possible, this is supported decision-making and not substituted decision-making.

³⁹ Flynn, CDLP Submission September 2014, www.nuigalway.ie/cdlp/submissions.html (accessed: 18.05.2015).

d) Substitute decision-making as a last resort

As a last resort, substitute decision-making may be necessary and legitimate to protect the adult. Such a substituted decision has to be justified with regard to Art. 12, paragraph 4 CRPD and human rights. Protection without the approval, or contrary to the contemporary wishes, of the adult concerned is only required, and indeed allowed, when the person is exposed to substantial danger and risks suffering serious harm, being unable also to recognize the necessity of the protective decision or measure. Every adult concerned can revoke obligations entered into, or can make a determination in advance of disability.⁴⁰

But if the adult concerned has no personal ability (or free will) regarding the decision at hand, and it is crucial that decision be made, interference is legitimate. Prior to this intervention, every effort towards supported decision-making has to have failed.

The intention of the substitution has to focus on the adult's rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity). In every case the *Betreuer* has to make an effort to obtain the 'best interpretation' of the adult's intention (or will judgment) and to avoid a substituted judgment based on what are called the objective best interest elements. The best surmise as to the adult's personal decision has to reflect all the consequences for the adult, having a proportionate regard for the adult's mental concerns, and needs.

V. Conclusion

In the law of *BETREUUNG* there is often a concentration on the capacities, capabilities and deficits of the adult concerned. Supporter and representative need to have the following abilities:

- to communicate with the concerned adult
- to identify the adult's (former) wishes, preferences and values
- to be prepared and able to change one's perspective
- self-reflection
- patience.

⁴⁰ § 1901 a I Civil Code.

Supporters and representatives need information and training as well as advisory services. Both the supporter and the supported person need monitoring and safeguarding. The attitude and knowledge of every individual supporter and of the stakeholders in the safeguarding system, ensure the success of empowering people with disabilities.

In Germany safeguarding is mostly done by the specialized courts. The *Betreuer* has to report to the court. In addition there is the reservation of court consent permitting legal actions, a consent which has to be obtained in advance. Reservation of court consent is extended also to the enduring power of attorney, though only in matters concerning the person, not the estate. Therefore the court can appoint a special supervising *Betreuer* who functions as a monitor.⁴¹

The German legal code seems to comply with Art. 12 CRPD.⁴² But the parameters for the formal arrangements in Germany urgently need to be improved. More training and more information is needed.⁴³ Interpretation of the law of *BETREUUNG* regarding the priority of supported decision-making and of the adult's intention, will further the reform of 1992. The mindset concerning guardianship lingers on in society, which is why awareness-raising has to be intensified in Germany.

Regarding Art. 12 CRPD, one major question for the future will be whether we need different kinds of formal support arrangements which respect the diversity of persons with disabilities. There may be a need to create various types and intensity levels of support and representation measures, or - we should ask ourselves - is it possible to have one flexible, person-centered measure which respects the diversity of people with impairments? Both approaches carry risks for such persons. We should therefore concentrate our efforts on methods of supported decision-making, and

on the skills of supporters and monitors. A system of safeguarding has arguably to meet the challenge of ensuring that the rights, intentions and preferences of the adults concerned are respected.

41 Kontrollbetreuer § 1986 II Civil Code.

42 After finishing this article the UN Committee on the Rights of Persons with Disabilities wrote in the Concluding observations on the initial report of Germany: "The Committee is concerned that the legal instrument guardianship ("*rechtliche Betreuung*"), as outlined in and governed by the German Civil Code (BGB) is incompatible with the convention.", published in Advance Unedited version, 17 April 2015.

43 Kasseler Forum (Committee consisting of various organizations and professional bodies dealing with issues on legal guardianship) *Eignungskriterien für beruflich tätige Betreuer und Betreuerinnen* (Paper on the selection criteria for professional legal guardians). http://www.bgt-ev.de/kasseler_forum.html (accessed: 10.11.2014).