

# ASPECTS OF THE DISCUSSION REGARDING THE REFORM OF THE GERMAN LEGISLATION OF BETREUUNG IN LIGHT OF THE UN-CRPD

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**Abstract:** the abolition of incapacitation and guardianship with the introduction of the Law of Betreuung in 1992 has already brought the right of self-determination of affected adults with impairments into focus. Through the CRPD and the participation of persons with disabilities, quality and implementation deficits in legal representation/Betreuung have been scientifically investigated. This has made it clear that the right of self-determination must be strengthened and must be expressed more clearly in the wording of the law. The article presents the current Law of Betreuung and the reform debate on it.

**Keywords:** self-determination; supported decision-making; legal representation; power of attorney; legal protection of adults; legal capacity.

## INTRODUCTION

In Germany there are two systems for the legal protection of adults who are not able to manage their own affairs: One is the statutory system, the other is the enduring power of attorney (“Vorsorgevollmacht”), equivalent to the English “enduring power of attorney”.

The main statutory instrument for the support and the protection of adults who are in need of support in handling their own affairs is a court-appointed legal representative, employed to manage the adult’s affairs (“rechtlicher Betreuer”). There are also other instruments available to protect an adult in the absence of such a legal representative, for instance measures provided by the welfare state such as independent living.

## OVERVIEW

In 1992, an import paradigm shift was introduced in the German adult protection law, establishing the Law of Betreuung (*Betreuungsrecht*). Abolishing the term and the regime of adult guardianship (*Vormundschaft für Volljährige*) the new law focused on the principle of the adult’s self-determination. Adult guardianship (*Vormundschaft*) was accompanied by a high level of interference in the rights of the adult. 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 “Betreuung”, which could be translated as legal caretaking or legal caring. 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 adult guardianship (*Vormundschaft*) had been abolished.

Influenced by the CRPD, in 2009 a new debate began in Germany. A number of activists contested “Betreuung” being a measure of support in accordance with Art. 12 CRPD because of the instrument of legal representation, which is an element of “Betreuung”. Furthermore, a large number of persons affected by “Betreuung” reported violations of their rights.

In 2015, the Federal Ministry of Justice and Consumer Protection commissioned a research project, also with regard to the CRPD Committee’s criticism concerning Art. 12 CRPD (2015)<sup>1</sup> and the German Law of Betreuung (*Betreuungsrecht*). The research project was concerned with questions of how the Law of Betreuung is implemented; what the guiding principles for quality standards are; whether structural quality deficits exist, and if so, what the possible causes for these deficits are.

## OUTLINE DATA

The research project produced data. In 2015, court-appointed legal representation/Betreuung was registered for approx. 1.25 million persons, which is equivalent to about 1.8 % of the population above the age of 18. Based on the resurvey results and statistical outline data, it can be assumed that approx. 590,100 of these legal representations are performed by professionals and approx. 658,800 by volunteers. On a professional level, legal representations are performed by approx. 13,100 independent professional court appointed legal representatives/Betreuer; approx. 2,800 by representatives from state-approved associations; and a smaller number by civil service representatives. On a voluntary basis, court-appointed legal representations are performed by approx. 537,300 family members and approx. 48,600 by external volunteer representatives.

## GENERAL INFORMATION LAW OF “BETREUUNG”

### 1. No incapacitation

According to the law, the appointment of a Betreuer is a question of the necessity of support in managing one’s legal affairs in part or entirely<sup>2</sup>. Accord-

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<sup>1</sup> Concluding Observations 2015, UN-Committee No 25 and No 26.

<sup>2</sup> § 1896 I Civil Code.

ing to the phrasing of the law, the need of support must be based on impairment and inability. The decision to appoint a legal representative/*Betreuer* is made by a specialized court (*Betreuungsgericht*). This court decision has no influence on the person's legal capacity. Legal capacity is generally a question of a concrete situation and of the adult's current capability in this situation<sup>3</sup> and not of a status as a result of a court decision. The adult is presumed to have legal and mental capacity. In general, under German law a person becomes fully legally capable when s/he reaches the age of majority at 18. Consequently, from that age onwards adults are held responsible for their legal affairs such as concluding contracts, marrying or giving consent. The provision on a legal rule for a "natural incapacity" provides an exception to this general rule in § 104 of the Civil Code. If an adult, due to his/her mental condition, cannot understand what s/he is doing or cannot make his/her own decisions, his/her actions are considered legally invalid, and s/he is not liable for her/his behavior.

Concerning the appointment of a court appointed representative/*Betreuer* by the court the law offers one exception. In addition to the appointment of a court appointed representative/*Betreuer*, the German Law of *Betreuung* allows for a special instrument which limits the adult's legal capacity to act (§ 1903 Civil Code). It is called a reservation of consent (*Einwilligungsvorbehalt*). The law requires a substantial danger for the person's estate or the person as a threshold (§ 1903 Civil Code). The jurisdiction determined an additional element, it must be determined if the adult lacks free will regarding substantial danger<sup>4</sup>.

## 2. Court procedure

It is the court's obligation to appoint a legal representative at the request of the adult or ex officio. After the appointment, the courts are also responsible for supervising the legal representative. The independence of courts should guarantee the protection of the adult's rights better than the local public authorities, who are also involved in the procedure. Court proceedings to

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<sup>3</sup> § 104 No. 2 Civil Code.

<sup>4</sup> Jurisdiction: BayObLG, *Zeitschrift für das gesamte Familienrecht, FamRZ* 1993, pp. 998, 999; OLG Hamm, *FamRZ* 2000, pp. 494, 496; OLG Frankfurt, *Betreuungsrechtliche Praxis, BtPrax* 1997, p. 123.

[*Coordination note*: BayObLG is the diminutive of Bayerisches Oberstes Landesgericht, which stands for Supreme Court of Bavaria, while OLG is the acronym for Oberlandesgericht, which means Superior Regional Court, equivalent to the Courts of Appeal (in Portugal, "Tribunais da Relação"), followed by the indication of the region, as follows OLG Hamm or OLG Frankfurt.]

[*Nota da coordenação*: BayObLG é o diminutivo de Bayerisches Oberstes Landesgericht, que significa Tribunal Supremo da Baviera, enquanto OLG é o acrónimo de Oberlandesgericht, Tribunal Regional Superior, o equivalente aos Tribunais da Relação, seguindo-se depois a indicação da região, como seja OLG Hamm ou OLG Frankfurt.]

appoint a legal representative/Betreuer are regulated in the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG). The concerned person has the right to a fair trial and the right to be heard, which are constitutional rights. If the adult requires, the judge must involve his/her partner and closely affiliated persons in the hearing<sup>5</sup>. During the procedure, the judge must appoint an independent representative ad litem to safeguard the interests of the adult and to guarantee that the person's will and wishes are heard and considered. It is also the judge's obligation to investigate the case by obtaining an expert medical report on the medical condition<sup>6</sup>. To obtain a social report on the adult's personal situation and his/her resources and needs, the local authority (*Betreuungsbehörde*) should be involved<sup>7</sup>. Due to these aspects, the principle of necessity is an important issue. The local authority submits a proposal concerning the choice of the legal representative. The wishes of the adult must be respected.

### 3. Precedence of enduring power of attorney

Adults in general can avoid a court-appointed legal representative (*Rechtliche Betreuung*) by giving another person enduring power of attorney and having an agreement concerning the form and structure of support and representation. This power of attorney (*Vorsorgevollmacht*) has priority over a court-appointed measure and has become very popular. In 2019 there were 4.3 million enduring powers of attorney registered in Germany<sup>8</sup>. Powers of attorney only work on the condition that the adult can appoint somebody who is willing and trustworthy and takes on the mandate voluntarily.

### 4. Precedence of social services

The principle of necessity is an important part of the threshold to the court appointing a legal representative. The judge has to consider the person being able to manage his/her life with the support of social services/"other assistance". The local authority (*Betreuungsbehörde*) is responsible to advise and to procure social services and social benefits for the adult concerned. The local authority is obliged to report to the court in the court procedure.

To avoid a measure of court appointed representation (*Betreuung*), several social services provide support:

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<sup>5</sup> § 278 FamFG.

<sup>6</sup> § 289 FamFG.

<sup>7</sup> § 279 FamFG.

<sup>8</sup> Zentrales Vorsorgeregister: "www.vorsorgeregister.de".

- \* community psychiatric centers;
- \* assisted living;
- \* advisory services of social insurances (health or long-term care insurance) and social public authorities;
- \* visiting nurses;
- \* 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.

The involvement of the local authority is very important for investigating the necessity of a court-appointed representative (*Betreuer*). There should be a wide range of services available in the municipalities. Nevertheless, the need for support varies. The necessity of a person-centered individual *Betreuung* has to be investigated. This is also important with regard to involving the adult concerned early on to explain the *Betreuung* and her/his rights to her/him. A lot of people are still prejudiced, believing that *Betreuung* is tied to a denial of rights and capacity. To ensure the compliance of the adult concerned, it is important to explain *Betreuung* in a way which is comprehensible and barrier-free.

## 5. The instrument of legal representation

The appointment of a “*Betreuer*” goes hand in hand with the instrument of representation. This instrument is not to be equated with substitution. The legal representative must by law follow the principle of necessity and give the adult with support the priority of legal action. If it is necessary to act legally on behalf of the adult, the representative must follow the will and the wishes of the adult. *Betreuung* may only be used if it is necessary in the situation. The principle of necessity provides a guideline for the court but also a major guideline for the legal representative (*Betreuer*), guaranteeing the precedence of supported decision-making in the law.

Furthermore, the representative (*Betreuer*) is responsible for a selected scope of affairs prescribed by the court, which determines the necessity of support. If the *Betreuer* follows his/her legal obligations, legal representation should not be interference with the autonomy of the adult.

Moreover, the principle of necessity binds the judge to a tailored measure rather than prescribing only a *Betreuung* of the estate or a *Betreuung* of the person. The court must examine the scope of support and representation in a person-centered manner.

## 6. The rights of the adult in need of support

Adults with impairments have a right to have a representative (*Betreuer*) appointed by the court if they cannot entirely or in part take care of their legal affairs and if this is necessary<sup>9</sup>. The adult concerned has the right to suggest who should be appointed as their *Betreuer*. In general, the court must follow his/her wish. Mostly family members (65 %) or professionals (often social workers) function as representatives (*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<sup>10</sup>.

On the other hand, adults have the right to refuse a court-appointed legal representation (*Betreuung*). The law defines that a *Betreuer* may not be appointed against the free will of an adult<sup>11</sup>. The principle of self-determination is a constitutional right<sup>12</sup> and gives every adult the right to refuse support. On the other hand, there is a constitutional obligation of safeguarding vulnerable adults<sup>13</sup>. If adults face severe danger there can be the need of protection. Art. 16 CRPD also determines the obligation to take appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse.

The law uses a threshold in § 1896 I a Civil Code: A *Betreuer* may not be appointed against the free will of the adult. It is a decision of the last resort to interfere in the rights of the person.

The free will is a legal term and related to the adult concerned who has no free will regarding the necessity of a *Betreuer* if she/he cannot understand the nature and consequences of her/his decision and/or when she/he cannot use or weigh the relevant information<sup>14</sup>. The issue of the free will in the court procedure has to be focused on a specific concern. In this case, it is the free will regarding the necessity of a *Betreuer*. There should be no further consequence than the appointment of a *Betreuer* who functions as a legal representative within a specific scope. This decision does not deny his/her legal or mental capacity. The *Betreuer* does not become a substitute decision-maker in the sense that s/he can decide on the basis of a best interest. The decision-making process follows the legal obligation 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 appointment of a *Betreuung* by the court gives the *Betreuer* the power of legal representation. Consequently, it is a risk that the *Betreuer* uses the power of representation for (substitute) decision-making.

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<sup>9</sup> § 1896 Civil Code.

<sup>10</sup> §§ 1908 I, 1836 ff Civil Code.

<sup>11</sup> § 1896 I a Civil Code.

<sup>12</sup> Art. 2 Abs. 2 Basic Law (*Grundgesetz*).

<sup>13</sup> Federal Constitutional Court, Order of 26 July 2016 — 1 BvL 8/15.

<sup>14</sup> BGH XII ZB 526/10, BtPrax 2011, p.127; BGH XII ZB 577/13, BtPrax 2014, p. 131.

The appointment of a Betreuer is a potential interference in the adult's right of self-determination<sup>15</sup>. The consequence of the court appointment is the delegation of responsibility to the Betreuer. The Betreuer must follow legal obligations and is controlled and monitored by the court. In general, he/she must comply with the wishes of the adult concerned (§ 1901 III Civil Code).

#### *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. The law requires a substantial danger for the person's estate or the person as a threshold (§ 1903 Civil Code). As an additional threshold created by the jurisdiction, it must be determined if the adult lacks free will regarding substantial danger<sup>16</sup>.

As a consequence of the order of the reservation of consent the adult concerned needs the consent of the Betreuer regarding contracts or other legal actions in advance or after the fact. Until the Betreuer gives consent, we have a pending contract (§§ 1903, 108 Civil Code). After his/her consent the contract is legally effective. However, in this case the Betreuer is also not a substitute decision-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. The decision with consent is legally accepted as the adult's decision. In general, the Betreuer must follow the will and the wishes of the person concerned and must obtain his/her consent. The adult has a right of consent<sup>17</sup>, with the only exception of her/his legal action causing substantial danger while he/she is not able to recognize the danger<sup>18</sup>. This is the result of an interpretation of the law according to the German constitution.

#### *The Betreuer's obligation*

In any case, the Betreuer must follow the principle of necessity and she/he has to comply with the wishes of the person concerned. The Betreuer is obliged to support the person concerned as far as possible in making her/his own decisions. The Betreuer must respect the rights, will and preferences of the adult concerned.

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<sup>15</sup> LIPP, Volker, *Freiheit und Fürsorge: Der Mensch als Rechtsperson*, Tübingen: Mohr Siebeck, 2000, p. 132.

<sup>16</sup> BayObLG, *FamRZ* 1993, pp. 998, 999; OLG Hamm, *FamRZ* 2000, pp.494, 496; OLG Köln, *FamRZ* 2000, p. 908; OLG Frankfurt, *BtPrax* 1997, p. 123.

<sup>17</sup> BROSEY, *Wunsch und Wille bei Einwilligungsvorbehalt und Aufenthaltsbestimmungsrecht*, Hamburg: Verlag Dr. Kovač, 2009, p.77; BROSEY, „Einwilligungsvorbehalt und Art. 12 der UN-BRK“, *BtPrax* 2014, pp. 214 f.

<sup>18</sup> BROSEY (footnote 17) 2009, p. 77.

a) Priorities of supported decision-making  
Explaining the circumstances of a decision in a comprehensible way (removing barriers)

- \* Finding out the person's will 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 needs to explain relevant details and comply with the current wishes of the adult concerned, using his/her power of representation to transfer the decision to third parties. Every appropriate form of communication must be applied.

c) Best interpretation of will judgment<sup>19</sup>

If it is not possible to communicate with the adult concerned, the Betreuer needs to verify the need for a decision to be made at the given 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 refer 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 will judgment is interpreted in the best way possible, this is supported decision-making and not substituted decision-making.

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 substitute decision has to be justified in accordance with Art. 12, paragraph 4 CRPD and human rights. In individual cases there can be a contradiction between the rights, the will and the preferences of an adult, which he/she cannot resolve and which can have severe consequences for the person's health or mean the loss of the apartment the person is living in. Protection without consent or against the current wishes of the person is only allowed and required when the person is in substantial danger, there is a risk of serious harm and he/she cannot recognize the need for the protective decision or measure. Under German law, every adult can revoke the decision or can make a decision in advance<sup>20</sup>.

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<sup>19</sup> FLYNN, CDLP Submission September 2014, [www.nuigalway.ie](http://www.nuigalway.ie) (accessed:19.02.2020).

<sup>20</sup> § 1901 a I Civil Code.



However, if the adult concerned has no free will regarding the decision, what matters is if the decision needs to be made and interference legitimate. Prior to taking this step, every effort of supported decision-making needs to have failed.

The intention of the substitution must be focused on the adult's rights related to freedom from abuse and ill-treatment (right to life, right to physical integrity). In any case, the *Betreuer* has to make an effort to obtain the 'best interpretation' of will judgment and not a substituted judgment based on what is called the best interest decision. The best interpretation of will judgment has to consider all consequences for the adult, also regarding his/her psyche and must be proportionate.

The legal situation presented here follows a jurisprudential interpretation that draws on the Basic Law and the CRPD. The practice is partly oriented exclusively to the concrete wording of the laws. This leads to misjudgments that do not take sufficient account of the self-determination of the persons concerned. The debate regarding the CRPD has therefore also made the question more relevant of how *Betreuer* and specialized courts (*Betreuungsgerichte*) act in practice. Due to a lack of significant data, which the CRPD Committee requested, the Federal Ministry of Justice and Consumer Protection (BMJV) commissioned a respective study.

## **REALITY CHECK: STUDY QUALITY IN LEGAL REPRESENTATION (RECHTLICHE BETREUUNG) 2017**

The research project was concerned with questions of how the Law of *Betreuung* is implemented; which guiding principles for quality standards are involved; if there are any structural quality deficits and if so, what possible causes could be. The research project titled "Qualität in der rechtlichen *Betreuung*" (Quality in court appointed Legal Representation) was conducted on behalf of the Federal Ministry of Justice and Consumer Protection (BMJV) by a research team of the ISG Institute for Social Research as well as me and my team at TH Köln, University of Applied Sciences. The concluding report was published in April 2018<sup>21</sup>.

For the research project, a quality concept was used to deduce relevant quality criteria and, in a next step, these were put to an empirical test while differentiating between structural, process and results quality. In the process, standardized interviews were conducted with all relevant protagonists in the practice of *Betreuung*; persons concerned as well as their legal representatives/*Betreuer* were personally interviewed and experts evaluated the results.

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<sup>21</sup> Published with Bundesanzeiger-Verlag and available at "[http://www.bmju.de/SharedDocs/Downloads/DE/Service/Fachpublikationen/Forschungsbericht\\_Qualitaet\\_rechtliche\\_Betreuung.pdf?\\_\\_blob=publicationFile&v=2](http://www.bmju.de/SharedDocs/Downloads/DE/Service/Fachpublikationen/Forschungsbericht_Qualitaet_rechtliche_Betreuung.pdf?__blob=publicationFile&v=2)".

The report provides detailed and relevant information to all groups of persons involved in legal representation (Betreuung), therefore enhancing the debate around the quality of Betreuung. It not only identifies successful practices but also calls attention to structural quality deficits — partly in crucial areas of the system of Betreuung.

A large number of measurable quality criteria can be derived from the Law of Betreuung, the CRPD, and already existing quality guidelines applied in practice. At the same time, the consensus remains unchanged that quality in the management of Betreuung cannot be reduced to these criteria. Through empirical surveys with regard to a selection of quality criteria, the research project was able to identify structural quality deficits which are outlined in detail in the research report.

## **THE PERSPECTIVE OF THE PERSONS CONCERNED: CASE STUDIES**

The analysis of the quality of legal representation/Betreuung also incorporated the persons represented themselves in order to take into consideration their experiences and subjective assessment of the quality of Betreuung. Within the framework of case studies, qualitative interviews were conducted with persons concerned as well as legal representatives/Betreuer and some other closely affiliated persons in order to be able to chart the specific course of processes of Betreuung and examine relevant influencing factors on the quality of Betreuung from multiple perspectives. Based on these — not representative — impressions and case studies gained through qualitative research, no general statements about the quality of legal representation/Betreuung can be made.

The *multi-perspective case analyses* underline that those persons concerned questioned in the context of the case studies perceive their current legal representation/Betreuung as largely positive. However, apart from many positive statements and general satisfaction, indications for quality deficits in Betreuung also become apparent. Overall, the case studies show that stereotype cases do not exist, but that each case has its specific features that require the legal representative to act in a qualified and person-centered way.

In the evaluated cases, Betreuung has effectuated an improvement of the living conditions of the persons concerned in many ways. This ranges from an improvement of the health condition of persons with mental illnesses to the promotion of opportunities for participation in society and work. Occasionally, however, there were some doubts as to whether all possibilities for rehabilitation were actually taken advantage of.

In the case analyses, several factors that have a positive effect on the quality of Betreuung could be identified. These include involving the person concerned in the process of appointing a legal representative as well as informing him or her in an appropriate, target-group-oriented way so as to reduce fears and reservations regarding Betreuung. Based on the examined cases it

is however questionable whether this always takes place. Concerning the institutions for *Betreuung*, results show that for the persons concerned it is important that they feel they have an authentic say, trust the person proposing *Betreuung*, and experience a procedure without elements of coercion. The authorities for *Betreuung* should therefore ensure that prior to the appointment of the legal representative the person concerned is given the opportunity to get to know the suggested representative and to voice her/his opinion on the suggestion.

Support processes will yield a high process and results quality when legal representatives (*Betreuer*) center their activities on the person concerned and there is a relationship of trust between the representative and the person represented. This involves that the expectations, ideas, and wishes of the person concerned are identified with regard to possible courses of action. In view of the goal of facilitating a process of supported decision-making for the person concerned, certain approaches have proven to be especially helpful, e.g. structuring the decision-making situation, pointing out possible alternatives, as well as explaining options for action and their possible consequences. The persons concerned must be offered a time frame within which they can arrive at a decision of their own. Recommendations can support the persons in their decision-making process, provided that the *Betreuer* reflect on the power dynamics and their own interests. However, what happens in some cases is that legal representatives have already independently defined a goal and only aim to attain the person's consent. This approach may potentially be necessary but needs to be particularly examined based on the principle of necessity.

A participatory approach in structuring support processes is key, namely by using the instrument of *Betreuung* in such a way that it does not induce a substitute decision. In some of the cases analyzed, this is handled in such a way that the persons concerned make the actual decision which is then only implemented by the legal representative. Transferring the power of agency to the legal representative carries the risk of a substitute decision by the representative who assumes that this is in the person's interest.

Concerning self-perception and understanding of their role, certain legal representatives/*Betreuer* view themselves as the main problem-solving resource. This kind of perception and practice seems just as obstructive as a paternalistic attitude. Quality deficits also occur when procedures are obscured by the legal representative or when in communication the person concerned may be heard but the representative subsequently imposes his or her own position. A lack of reflecting roles and power structures can therefore result in the legal representatives/*Betreuer* not being able to sufficiently distinguish between the goals and wishes of the persons concerned and their own interests.

Support processes can be compromised by information and communication that is not target-group-oriented; by proposals for action that are achieved without the participatory inclusion of the persons concerned; as well as by a lack of role and power awareness on the part of the legal representatives

(*Betreuer*). Furthermore, the case studies show that some representatives — including professional legal representatives/*Betreuer* — do not base their work on professional concepts of support but consciously act intuitively. This results in considerable compromises in quality for instance regarding the essential identification of the persons' wishes or the assessment of their wishes or behavior. In other cases, legal representatives (*Betreuer*) may not explicitly refer to certain concepts but their descriptions make it clear that they base their actions on them and have the necessary information about which plans of action are helpful in supported decision-making and how they can be applied in a person-centered way.

From a *legal perspective*, the analysis of the case studies was mainly focused on personal contact in *Betreuung*, on how wishes are negotiated, as well as whether the principle of necessity was considered. Results show that apart from the frequency of personal contact it is also important whether legal representatives/*Betreuer* facilitate dialogue situations in which the persons concerned can voice their wishes even without a specific motive for making a decision. What gives us pause for thought is the statement of an external social worker in assisted living according to whom only few legal representatives (*Betreuer*) actively include the persons concerned in the organization of *Betreuung*. This also shows that the case studies evaluated here only represent a fraction of the reality of *Betreuung*.

Concerning the implementation of a persons' wishes, the case analyses indicate both conscientious behavior of legal representatives/*Betreuer* as well as behavior in breach of duty. Many persons concerned are supported by their legal representatives/*Betreuer* in the realization of their wishes. There are, however, also such cases in which evidence indicates that persons concerned are not supported in exercising their legal capacity in the necessary extent or are even prevented from actualizing their wishes.

In the context of an ordered reservation of consent there is evidence for both lawful and unlawful action. For example, reservation of consent is used by some legal representatives/*Betreuer* as a correctional measure, while others use it as a "safety anchor" for justification before the court.

In the case studies some persons concerned expressed their discontent with the fact that they no longer personally receive their mail, especially from public authorities because according to § 53 ZPO (Code of Civil Procedure), when a legal representative enters a procedure, this leads to the person concerned being stripped of their capacity to act in court proceedings. It is questionable whether this regulation is in accordance with Art. 12 CRPD. It is therefore recommended to investigate whether the regulation of § 53 ZPO can be abolished. The recommendation would be that letters relating to legal and administrative procedures are not only sent to the legal representative but also to the person concerned as the one who is represented in the procedure and to ensure this as a legal right. Furthermore, the legislator should examine whether an entitlement to duplicate mailing would also be feasible with private institutions such as banks.

Overall, the case studies do not yield a consistent picture regarding legal representation (*Betreuung*). Rather, in some cases there are strong indications for both conscientious action as well as action in breach of duty. The benefit of this stage of the study lies in the detailed description of specific situations within *Betreuung* in which the methods, attitudes and assessments of the protagonists involved become visible.

## OTHER ASPECTS

As regards content, it should be noted that although both professional legal representatives/*Betreuer* and volunteer representatives are quite aware of the high significance of the autonomy and self-determination of the persons concerned, the practical implementation of lending support to these persons is often difficult. In addition, it has become clear that the hours professional legal representatives/*Betreuer* actually spend doing the work exceed the hours they are paid for. Furthermore, particularly volunteer legal representatives/*Betreuer* do not yet make use of information, counseling and further training as would seem necessary and desirable.

Regarding many of the quality deficits that were identified, it remains unclear how the protagonists concerned would act — therefore, whether the quality deficits would continue to exist — if the identified (partly considerable) deficits in capacity did not exist. Some of the quality deficits that were detected can be resolved through changes in operational procedures or by legal means.

## REFORM PROCESS

On 20th June, 2018 the Federal Ministry of Justice and Consumer Protection began the reform process titled “Selbstbestimmung und Qualität im Betreuungsrecht” (self-determination and quality in the Law of *Betreuung*), which also involves the participation of self-advocates.

In four specialist working groups, interdisciplinary work was carried out between September 2019 and November 2020. The specialized working groups (WG) were concerned with the following topics:

Specialized WG 1: Strengthening the right of self-determination in the selection of *Betreuer*, management and supervision of legal representation (*Betreuung*)

Specialized WG 2: Legal representation (*Betreuung*) as a profession and the remuneration of professional *Betreuer*

Specialized WG 3: Voluntary work and enduring power of attorney (*Vorsorgevollmacht*) including improvement of the financial situation of associations for *Betreuung*

Specialized WG 4: Legal representation (*Betreuung*) and “other assistance” interface between legal representation and social support measures (*andere Hilfen*)

In addition, a workshop for “self-advocacy,” persons affected by legal representation (*Betreuung*), was held on 21 February 2019, focusing on their experiences and expectations.

More than 80 experts from scientific institutions and practice as well as representatives of organizations for persons with impairments as well as the German Institute for Human Rights, professional and other associations active in the field of *Betreuung*, the *Betreuungsgerichtstag* e.V. (BGT), representatives of the federal states, municipal umbrella organizations, the Federal Government Commissioner for Matters relating to Persons with Disabilities and the federal ministries concerned (Federal Ministry of Labour and Social Affairs [BMAS] and Federal Ministry for Family Affairs, Senior Citizens, Women and Youth [BMFSFJ]) were involved in the discussion process.

The concentrated review of the Law of *Betreuung* has revealed a considerable need for change in numerous provisions of the German Civil Code (BGB), the Act on Proceedings in Family Matters and in Matters of Voluntary Jurisdiction (FamFG) and the Act on Local Authorities/ *Betreuungsbehörden* (BtBG), which relates to the fulfilment of the tasks of all actors involved in the Law of *Betreuung* (*Betreuer*, association for *Betreuung*, local authority (*Betreuungsbehörde*) and specialized courts for *Betreuung*). At the same time, it became clear that all actors continue to be essential cornerstones in the implementation of the Law of *Betreuung* and that there is no need for a fundamental shift of tasks between the institutional actors in the Law of *Betreuung*. What is needed is a targeted improvement in the respective fulfilment of tasks, oriented towards the overarching reform goals of strengthening the right of self-determination of persons concerned and the quality of legal representation/*Betreuung*, as well as optimizing their interaction. In some cases, an expansion of the tasks of individual actors is also envisaged, insofar as this is absolutely necessary to achieve the reform goals.

On the basis of the results of the consultations that took place in the discussion process and between federal states and the federal government, the Federal Ministry of Justice and Consumer Protection has announced that it will prepare a draft bill to strengthen self-determination and quality in the Law of *Betreuung*. This draft is expected in spring 2020.