Country report **Germany**

Authors: **Nina Dethloff & Felix Leven**

In the new series National Reports at the Family & Law forum (https://www.familyandlaw.eu/) a first series of national reports is published.

FL-EUR (https://fl-eur.eu/), Family Law in Europe: An Academic Network, was established at a Founding Meeting in Amsterdam on 1-2 February 2019. FL-EUR currently unites over 35 prominent experts, both academics and public officers, in the field of family & law from 32 European jurisdictions. The purpose of FL-EUR is close academic cooperation amongst the experts, and between the experts and other stakeholders in the field of family and law, aimed at:

1. accumulation and dissemination of knowledge of both family law in the books and in action;
2. promotion of comparative and multidisciplinary research and education in the field of family and law;
3. learning from one another's experiences; and finally,
4. providing up-to-date comparative data for European, supranational and national bodies.

The FL-EUR members selected 'Empowerment and Protection of Vulnerable Adults' as its first working field, since this is a highly topical field of law. Ageing societies in Europe are confronted with an many legal issues arising out of the empowerment and protection of vulnerable adults. Based on initial quick scans of all jurisdictions, FL-EUR's coordinating group has drafted a questionnaire in close cooperation with the FL-EUR's members. The coordinating group consists of Prof. Masha Antokolskaia, Prof. Nina Dethloff, Prof. Jane Mair, Prof. Maria Donata Panforti, Prof. Wendy Schrama, Dr. Katrine Kjærheim Fredwall, Prof. Frederik Swennen, Prof. Paula Távora Vítor, Dr. Velina Todorova and Prof. Michelle Cottier. They are supported by the Secretary Rieneke Stelma-Roorda.
Country reports for all jurisdictions have been produced by country reporters. The country reports have been reviewed by at least one Member of the Coordinating Group. Language and contents of the countries reports fall under the responsibility of the country reporters. The reports are representing the law as it stands in 2022.

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

GERMANY

NINA DETHLOFF and FELIX LEVEN*

SECTION 1 - GENERAL

1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and *ex lege* measures if applicable. Also address briefly any interaction between these measures.

For clarification on the scope of this country report: The following descriptions and explanations focus on the core of civil law protection and empowerment of vulnerable adults in Germany, which is mainly regulated by the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).[1] In addition, there are a number of further legal and other aids and measures in Germany, especially for persons with disabilities, which cannot be discussed in detail here, e.g. with regard to labour law and social law.

The legal protection and empowerment of vulnerable adults is currently comprehensively regulated in the BGB, and thus in the central provisions of German civil law, mainly in its fourth book dedicated to family law. It foresees state-ordered, voluntary and *ex lege* measures, most of which can be found in §§ 1814–1881 BGB, dealing with legal custodianship (*rechtliche Betreuung*, i.e. legal assistance, hereinafter referred to as custodianship).[2] The current law has been fundamentally changed with effect from 1 January 2023.[3]

---

* We are grateful to the team of the Institute for German, European and International Family Law, in particular Leonie Groß-Usai, for valuable support in the preparation of this report.

[1] The references include literature published until December 2022. Case law was considered until mid-2023.

[2] In general, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78; see also V. LIPP, *Legal Protection of Adults in Germany – An Overview*, (2016) <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

[3] The report presents the legal situation as of 01.01.2023. For the then effective norms of the custodianship law, see the proclamation in the German Federal Law Gazette (Bundesgesetzblatt, BGBl.), BGBl. I 2021, pp. 882–937, available at <http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0882.pdf> accessed

The statutory system of custodianship provides for the state-ordered measure of a court-appointed legal custodian (*rechtlicher Betreuer*, i.e. legal assistant, hereinafter referred to as custodian) as legal representative/support person. In accordance with the principle of necessity (*Erforderlichkeitsprinzip*), i.e. a standard of subsidiarity and proportionality, it allows for such an appointment *if* and *to the extent* that this is necessary because the adult cannot *legally* take care of their[4] own affairs due to illness or disability (§§ 1814, 1815, 1871 BGB). The vulnerable adult does not have to be limited in their legal capacity, nor do they become so through the order of custodianship; rather, a *de facto* inability to take care of legal affairs themself is sufficient. The custodianship merely concerns legal affairs and not the actual caring for the person. A custodian can only be appointed for an adult; however, an advance appointment is possible upon reaching the age of 17, which then takes effect upon majority (§ 1814 (5) BGB). The procedure is laid down in the Family Procedure Act (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, FamFG).[5] Additional regulations on the custodian, the custodianship authority and custodianship associations can be found in the Custodianship Organisation Act *(Betreuungsorganisationsgesetz*, BtOG).[6] These Acts are federal law.

The appointment of a custodian is not necessary and therefore impermissible to the extent that the affairs may be taken care of by a person authorised by a power of attorney (§ 1814 (3) 2nd s. no. 1 BGB). However, in this case the court may appoint a custodian with the task of supervising the attorney (so called monitoring custodian, *Kontrollbetreuer*) (§§ 1815 (3), 1820 (3) BGB). A precautionary power of attorney that has the objective of protecting and empowering the granter, i.e. the vulnerable adult, in the event that they are no longer able to take care of their own affairs, is called continuing power of attorney (also referred to as enduring or

02.11.2022 (only in German). The current provisions of the BGB are available at <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> accessed 02.11.2022 (only in German). For the unofficial English translation of the BGB (as of 2013) see <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 02.11.2022.

[4] Particularly against the background of the current discussion in German jurisprudence, politics and legislation on gender identities, the following text refrains as far as possible from gender attribution by using neutral pronouns (they/them/their).

[5] For the provisions of the FamFG effective as of 01.01.2023, see the proclamation in the German Federal Law Gazette (Bundesgesetzblatt, BGBl.), BGBl. I 2021, pp. 882–937, available at <http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0882.pdf> accessed 02.11.2022 (only in German). The current provisions of the FamFG are available at <https://www.gesetze-im-internet.de/famfg/> accessed 02.11.2022 (only in German).

[6] For the provisions of the BtOG effective as of 01.01.2023, see the proclamation in the German Federal Law Gazette (Bundesgesetzblatt, BGBl.), BGBl. I 2021, pp. 882–937, available at <http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s0882.pdf> accessed 02.11.2022 (only in German).

lasting power of attorney, *Vorsorgevollmacht*).[7] In principle, the continuing power of attorney follows the general law on power of attorney (§§ 164–181 BGB). However, additional regulations apply to protect the vulnerable adult. Since 1 January 2023, these supplementary provisions are comprehensively regulated in § 1820 BGB.[8] The law on custodianship – deliberately – does not define continuing power of attorney in order not to create obstacles for powers of attorney granted e.g. before the reform.[9] Instead, it tends to stick to general terms, even if continuing powers of attorney are meant (e.g. § 1814 (3) 2nd s. no. 1 BGB), and specifies them at the appropriate place (e.g. § 1820 (5) BGB). Thus, as powers of attorney are addressed in a more general way in many cases, we use the term '(continuing) power of attorney' in the following, unless there is specific mention of continuing powers of attorney.

The necessity of a custodianship can also be excluded by sufficient 'other assistance' (§ 1814 (3) 2nd s. no. 2 BGB), provided that there is no need for legal representation. Thus, apart from the purely *legal* protection and empowerment of vulnerable adults, other assistance is also taken into account by the law of custodianship (see also §§ 5 (1), 8 BtOG). This encompasses, for example, assistance services for disabled persons as per § 78 Ninth Code of Social Law (*Sozialgesetzbuch 9*, SGB IX), but also purely factual support, e.g. from family,[10] friends, acquaintances or neighbours, which ensures that the vulnerable adult can manage daily life.[11] If there are indications of a need for custodianship, the custodianship authority (*Betreuungsbehörde*) must provide the vulnerable adult with advice on continuing powers of attorney and other assistance in order to avoid the necessity of a custodianship order as state-ordered measure. Furthermore, it must establish contact with the social welfare advisory and support system and help with applications (§§ 5 (1), 8 (1) BtOG). In addition, with the consent of the adult, *extended* support by the custodianship authority or a custodianship association (*Betreuungsverein*) is possible, which does not include legal representation (§§ 8 (2) and (4), 11 (3) and (4) BtOG). Enhancing the consideration of 'other assistance'

[7] Cf. BT-Drs. 19/24445, 245; see also the Recommendation CM/Rec(2009)11: 'A "continuing power of attorney" is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity.'

[8] On the reformed legal situation regarding the continuing power of attorney, see G. MÜLLER-ENGELS, 'Vorsorgevollmacht und Betreuung – Update und Ausblick' *DNotZ* 2021, 84, 94–99.

[9] Cf. BT-Drs. 19/24445, 150, 245; D. KURZE, 'Reform ist gut - Kontrolle ist besser? Kontrollbetreuung und Vorsorgevollmacht nach der Reform des Vormundschafts- und Betreuungsrechts' *FamRZ* 2021, 1934.

[10] For example OLG (Higher Regional Court) Köln, 13.05.1998 – 16 Wx 68/98, *FamRZ* 1999, 891 (assistance from mother).

[11] Cf. BT-Drs. 19/24445, 233; A. JÜRGENS, '§ 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 21.

in order to support the vulnerable adult's decision-making, and to avoid the intrusive state-ordered measures, was a focus of the recent reform.[12]

Since 1 January 2023, spouses are allowed to represent each other *ex lege* in matters of health care (§ 1358 BGB). Prerequisite is that one spouse cannot legally take care of their health care affairs due to unconsciousness or illness. The other spouse is entitled in particular to consent to examinations of the state of health, medical treatment or interventions and to conclude the necessary contracts. To the extent that representation by the spouse is sufficient for taking care of the adult's affairs, a custodian cannot be appointed in accordance with the principle of necessity according to § 1814 (3) 1st s. BGB.

In all of this, the wishes and the (presumed) will of the vulnerable adult remain the overriding yardstick.[13] Thus, the state-ordered measure of appointing a custodian is a means of protecting and empowering the vulnerable adult, primarily through supported decision-making, but also, if unavoidably necessary, through substituted decision-making. However, this state-ordered measure is preceded by individual precautions through powers of attorney and less intrusive 'other assistance', as well as support from the spouse. Only to the extent that these other means are not sufficient in the individual case is the appointment of a custodian necessary and thus permissible. This reflects the requirements of the fundamental rights of the vulnerable adult. Only the gradation of measures in strict compliance with the principle of necessity and supplemented by procedural safeguards make the state-ordered protective measure of custodianship tolerable in terms of the rule of law.[14]

With regard to preserving autonomy the vulnerable adult is given a right to prepare a so-called custodianship directive (*Betreuungsverfügung*), legally defined in § 1816 (2) 4th s. BGB, expressing the wish that a certain person should or should not be appointed custodian.[15] This wish is to be followed by the custodianship court unless the requested person is not suitable to conduct the custodianship (§ 1816 (2) 1st s. BGB). In the directive, the adult may also state wishes regarding the exercise of custodianship.

Furthermore, the vulnerable adult can stipulate in writing in a living will (*Patientenverfügung*), in case they are incapable of giving consent, whether they consent to or prohibit certain examinations of their state of health, medical treatments or operations that are not yet imminent at the time of the stipulation (§ 1827 (1) 1st s. BGB). The custodian or an attorney must give expression and effect to the will of the person under custodianship.

---

[12] See BT-Drs. 19/24445, 149–50; for details, see A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1013–14; G. WALTHER and I. BÜRKEL, 'Das BtOG – Neue Aufgaben für Betreuungsbehörden. Eine kritische Analyse' *BtPrax* 2021, 123–27.

[13] Cf. BT-Drs. 19/24445, 3.

[14] See BVerfG (Federal Constitutional Court), 23.03.2016 – 1 BvR 184/13, *NJW* 2016, 2559.

[15] For details, see A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 25.

2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *опека - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.

The following key terms will be used throughout the report:

- Adult (*Erwachsener*): an adult is a person who has reached the age of 18 years, i.e. the age of majority in Germany.
- Adult protection measures (*Erwachsenenschutzmaßnahmen*): all measures and instruments, including *ex lege* representation by the spouse; state-ordered representation by a custodian; voluntary measures; and any other measures used for the purpose of adult protection, support or legal representation.
- Advance directive (*Vorausverfügung*): instructions given or wishes made by a capable adult concerning issues that may arise in the event of their incapacity.
- Attorney (*Bevollmächtigter*): representative/support person appointed by means of a (continuing) power of attorney by the adult.
- Capacity to contract (*Geschäftsfähigkeit*): the ability to effectively conduct legal transactions through one's own actions.
- Continuing power of attorney (*Vorsorgevollmacht*): an authorisation given by an adult with the purpose that it shall either be effective immediately, or enter into force in the future, and shall remain in force in the event of the granter's incapacity. The power of attorney is based on a relationship between the attorney and the granter, e.g. a mandate.
- Custodian (*rechtlicher Betreuer*, i.e. legal custodian): state-ordered representative/support person appointed by the court.
- Custodianship (*rechtliche Betreuung*, i.e. legal custodianship): state-ordered representation/support through the appointment of a legal representative/support person (the custodian) by the court.
- Custodianship association (*Betreuungsverein*): private-law association that is state-approved (§ 14 BtOG) and can be appointed as a custodian. In particular, it provides information on custodianship issues, continuing powers of attorney, custodianship directives, living wills and, in some cases, other assistance (§ 15 (1) 1st s. no. 1 and (3) BtOG). In addition, it has the task of attracting and supporting voluntary custodians as well as supporting attorneys (§ 15 (1) 1st s. no. 2 to 5 BtOG).

- Custodianship authority (*Betreuungsbehörde*): state authority responsible for custodianships. In particular, it supports the custodianship court (§ 11 BtOG), custodians and attorneys (§ 5 (2) BtOG) and provides information about custodianship issues, continuing powers of attorney and other assistance (§ 5 (1) BtOG).
- Custodianship directive (*Betreuungsverfügung*): directive in which the vulnerable adult expresses their wishes in case a custodianship is ordered.
- Declaration of intent (*Willenserklärung*): according to the German legal doctrine, declarations of intent are private expressions of will that are directed towards a legal result, e.g. the conclusion of a contract.
- *Ex lege* representation (*gesetzliche Vertretung*): an adult protection measure providing legal authority to other persons to act *ex lege* (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority *nor* a voluntary measure by the adult.
- Free will (*freier Wille*): the capacity to apprehend and assess aspects in favour of and against a measure/legal act (so-called capacity to understand, *Einsichtsfähigkeit*) and to act according to this assessment (so-called capacity to act, *Handlungsfähigkeit/Steuerungsfähigkeit*).[16]
- Granter (*Vollmachtgeber*): an adult giving the (continuing) power of attorney.
- Guardian ad litem (*Verfahrenspfleger*): court-appointed party to the proceedings who safeguards the interests of the vulnerable adult.
- Legal capacity (*Rechts- und Handlungsfähigkeit*[17]): the ability to hold rights and duties (passive legal capacity or legal standing) and to exercise those rights and duties (active capacity or legal agency).
- Living will (*Patientenverfügung*): directive in the event that the vulnerable adult is incapable of giving consent, stating whether the adult consents to or prohibits certain examinations of their state of health, medical treatments or operations that are not yet imminent.
- Mental capacity (*Geistestätigkeit*[18]): the *de facto* decision-making and decision-communication skills of a person; see also 'free will'.

---

[16] See BGH (Federal Court of Justice), 14.03.2012 – XII ZB 502/11, *NJW-RR* 2012, 773; J. NEUNER, 'Natürlicher und freier Wille' *AcP* 218 (2018), 1, 23–30; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 29 (with further references).

[17] This is the terminology used in the official translation of the CRPD, cf. BEAUFTRAGTER DER BUNDESREGIERUNG FÜR DIE BELANGE VON MENSCHEN MIT BEHINDERUNGEN, Die UN-Behindertenrechtskonvention: Übereinkommen über die Rechte von Menschen mit Behinderungen – Die amtliche, gemeinsame Übersetzung von Deutschland, Österreich, Schweiz und Lichtenstein, 2018.

[18] There is no exact equivalent of the concept of mental capacity in the German legal system or legal doctrine. The term 'Geistestätigkeit' (cf. § 104 no. 2 BGB) must be understood as an approximation.

– Principle of necessity (*Erforderlichkeitsgrundsatz*): a standard of subsidiarity and proportionality, and the basic legal mechanism that ensures self-determination of the vulnerable adult to the greatest extent possible by grading the measures and ensuring proportionality with regard to the type and scope of the protection measure. Preference is given to the autonomy of the person concerned, support over substitution of decision-making and less severe interventions over severe ones.
– Representative (*Vertreter*): a natural or legal person who acts on behalf of the adult.
– Reservation of consent (*Einwilligungsvorbehalt*): state-ordered measure, in addition to the appointment of a custodian, that makes the vulnerable adult's ability to enter into contracts subject to the custodian's consent.
– State-ordered measures (*staatlich angeordnete Maßnahmen*): adult protection measures, ordered by a competent state (judicial or administrative) authority, at the request of the adult or others.
– Support person (*Unterstützungsperson*): a natural or legal person who assists the adult to legally act or who acts together with the adult.
– Voluntary measures (*freiwillige Maßnahmen*): any measure initiated by the adult without external compulsion *ex lege* or a decision by any competent state authority.
– Vulnerable adult (*vulnerabler Erwachsener*): adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.

In 2021, nearly 18.5 million people in Germany, i.e. about 22.15 % of the German population, were 65 years and older.[19] The forecast until 2030 is that by then a third of the total population will be 60 and older.[20] In Germany in 2021, 7,596,955 persons aged 18 and older (about 9.13% of the total population) were recognised as severely disabled (*schwerbehindert*); about 59,40% of them

[19] STATISTISCHES BUNDESAMT, 'Altersstruktur der Bevölkerung in Deutschland zum 31. Dezember 2021' (21.06.2022) <https://de.statista.com/statistik/daten/studie/1351/umfrage/altersstruktur-der-bevoelkerung-deutschlands/> accessed 07.09.2022, based on own calculation.

[20] BUNDESAMT FÜR JUSTIZ, 'Statistiken der Rechtspflege: Betreuung' <https://www.bundesjustizamt.de/DE/Service/Justizstatistiken/Justizstatistiken_node.html#AnkerDokument44016> accessed 07.09.2022.

(4,512,565) were aged 65 and older.[21] 57,97% (4,519,105) of all severely disabled people in Germany were physically disabled, 22,97% (1,790,490) suffered from cerebral disorders, mental and/or psychological disability and 19.06% (1,485,740) had other disabilities.[22]

The total number of custodianship proceedings increased until 2012, but decreased again somewhat in the following years.[23] In 2015, it amounted to 1,276,538.[24] In 2016, about 47% of all custodians were family members, 10% other volunteers, 8% lawyers and 34.5% other professional custodians; the remaining share was carried out by custodianship associations and authorities.[25] More recent figures currently do not exist due to a change in the recording requirements for the statistics. At the end of the year 2021, a total of 5,366,795 continuing powers of attorney were registered.[26] Since 2018 the amount has increased by about 350,000–400,000 every year.[27] Approximately three quarters of the powers of attorney include a living will with directives regarding medical measures.[28]

5. Briefly address the historical milestones in the coming into existence of the current framework.

Germany has ratified both the CRPD and its Optional Protocol on 24 February 2009, without any reservations. The Hague Convention 2000 has entered into force on 1 January 2009. Moreover, since 1994 the German Constitution, the Basic

---

[21] STATISTISCHES BUNDESAMT, 'Schwerbehinderte Menschen am Jahresende' (22.06.2022) <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Behinderte-Menschen/Tabellen/geschlecht-behinderung.html> accessed 07.09.2022, based on own calculation.

[22] STATISTISCHES BUNDESAMT, 'Schwerbehinderte Menschen am Jahresende' (22.06.2022) <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Behinderte-Menschen/Tabellen/geschlecht-behinderung.html> accessed 07.09.2022, based on own calculation.

[23] BUNDESVERBAND DER BERUFSBETREUER/INNEN, 'Rechtliche Betreuung: Daten und Fakten' <https://www.berufsbetreuung.de/berufsbetreuung/was-ist-rechtliche-betreuung/daten-und-fakten/> accessed 10.09.2022; see also Combined second and third reports submitted by Germany, p. 14 (No. 121) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FDEU%2F2-3&Lang=en> accessed 10.09.2022.

[24] BUNDESVERBAND DER BERUFSBETREUER/INNEN, 'Rechtliche Betreuung: Daten und Fakten' <https://www.berufsbetreuung.de/berufsbetreuung/was-ist-rechtliche-betreuung/daten-und-fakten/> accessed 10.09.2022.

[25] BUNDESAMT FÜR JUSTIZ, Betreuungsverfahren. Zusammenstellung der Bundesergebnisse für die Jahre 1992 bis 2016, 3 <https://www.bundesjustizamt.de/SharedDocs/Downloads/DE/Justizstatistik/Betreuungsverfahren.pdf?__blob=publicationFile&v=1> accessed 07.09.2022.

[26] BUNDESNOTARKAMMER, 'Zentrales Vorsorgeregister: Jahresbericht 2021' <https://www.vorsorgeregister.de/fileadmin/user_upload_zvr/Dokumente/Jahresberichte_ZVR/2021-JB-ZVR.pdf > accessed 07.09.2022.

[27] BUNDESNOTARKAMMER, 'Jahresbericht und Statistik' <https://www.vorsorgeregister.de/footer/jahresbericht-und-statistik> accessed 07.09.2022.

[28] BUNDESNOTARKAMMER, 'Zentrales Vorsorgeregister: Jahresbericht 2021' <https://www.vorsorgeregister.de/fileadmin/user_upload_zvr/Dokumente/Jahresberichte_ZVR/2021-JB-ZVR.pdf > accessed 07.09.2022.

Law (*Grundgesetz*, GG), provides that nobody may be discriminated against on the ground of disability, Art. 3 (3) GG.

In Germany the fundamental reform of the law relating to vulnerable persons already dates back to the introduction of the Law of Custodianship (*Betreuungsgesetz*, BtG) of 1990[29] which led to significant changes in the BGB as of 1 January 1992. It eliminated the legal institution of judicial incapacitation (*Entmündigung*) both for reason of mental illness as well as for mental weakness, addiction and waste, which had been in effect since the enactment of the BGB in 1900. Simultaneously, it abolished the previously existing guardianship over adults (*Vormundschaft über Volljährige*) as well as the infirmity guardianship (*Gebrechlichkeitspflegschaft*). Instead, a new system was instituted which provides both for protection and empowerment of adults who are not able to (fully) take care of their own affairs: The law introduced the new statutory regime of custodianship. The judicial appointment of a custodian no longer affects the legal capacity of the person concerned.[30]

6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.

Most of the important current discussions are related to the so-called Major Reform of the Guardianship and Custodianship Law (*Große Reform des Vormundschafts- und Betreuungsrechts*)[31], which entered into force on 1 January 2023. The focus of the reform of the law of custodianship is the 'optimal implementation' of the standards of Art. 12 CRPD in the law of custodianship and custodial practice.[32] It is linked to two studies commissioned by the Federal Ministry of Justice and Consumer Protection.[33] In the combined second and third reports to the Committee on the Rights of Persons with Disabilities Germany states that, with regard to these two research projects:

[29] BGBl. I 1990, p. 2002.

[30] For details, see W. BIENWALD, 'Vorbemerkung BGB § 1896' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 1–48; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 1–2.

[31] BGBl. I 2021, 882, Gesetz zur Reform des Vormundschafts- und Betreuungsrechts vom 4.5.2021.

[32] BT-Drs. 19/14445, 120.

[33] V. MATTA et al., *Qualität in der rechtlichen Betreuung*, Bundesanzeiger Verlag, Cologne 2017; H.-D. NÖLTING et al., *Umsetzung des Erforderlichkeitsgrundsatzes in der betreuungsrechtlichen Praxis im Hinblick auf vorgelagerte „andere Hilfen*", Bundesanzeiger Verlag, Köln 2018.

> While the research results identify shortcomings in certain areas, they are not so severe as to warrant a fundamental rethink of legal guardianship as a legal instrument, or major structural changes among the current actors in the guardianship system.[34]

However, the reform of the law on custodianship constitutes its biggest change since it came into force. It aims to emphasise even more clearly the constitutionally guaranteed position of the vulnerable adult as a self-determined and autonomous subject in the run-up to as well as during custodianship and, concomitantly, the wishes of the vulnerable adult as the overriding yardstick of custodianship. The notion of the best interests of the person under custodianship is completely banished from the wording of the law. The focus is on strengthening the participation and involvement of the vulnerable adult in the procedure and on emphasising subsidiarity and proportionality as expressed in the principle of necessity. Greater consideration is also to be given to 'other assistance' that avoids the appointment of a custodian. Thus, 'support before representation' ('*Unterstützen vor Vertreten*')[35] is to be further promoted, even if the instrument of substituted decision-making is not completely abolished (which is not intended in the future either)[36]. Deficits, which lie primarily in the practical implementation of custodianship, are to be eliminated in this way and through stronger quality control.[37]

Despite the concerns of the Committee on the Rights of Persons with Disabilities,[38] it is the prevailing perception in German jurisprudence, legislation and politics that the law of custodianship – even before the reform – generally complied with the requirements of Art. 12 CRPD.[39] Individual aspects are addressed at appropriate points in this report.

7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.

---

[34] *Combined second and third reports submitted by Germany*, CRPD/C/DEU/2-3, p. 13.

[35] BT-Drs. 19/24445, 2.

[36] *Combined second and third reports submitted by Germany*, CRPD/C/DEU/2-3, p. 14.

[37] On the main points of the reform, see BT-Drs. 19/24445, 2–4; for details, see, among many others, C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204–216; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022; D. KURZE, *Die Reform des Vormundschafts- und Betreuungsrechts*, zerb Verlag, Bonn 2022.

[38] Cf. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *Concluding observations on the initial report of Germany*, CRPD/C/DEU/CO/1, p. 5.

[39] Cf. BT-Drs. 19/24445, 120; D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 5; V. LIPP et al., 'Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany' in M. GANNER et al. (eds), *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 117, 121–22; V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 675–679; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 6–10.

The Major Reform of the Guardianship and Custodianship Law took effect on 1 January 2023.[40] This report addresses the new law. (For the main points of the reform, see 6. For the evaluation, see 67. and 68.)

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. If your system allows limitation of the legal capacity of an adult, *please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.*
a. on what grounds?
b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?
c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?
d. can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?
e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?
f. are there any other legal instruments,[41] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

The application of an adult protection measure itself, e.g. the order of custodianship and appointment of a custodian for a vulnerable adult, does *not* automatically result in a limitation of legal capacity, nor is such a limitation a prerequisite for an adult protection measure. An *ex lege* incapacity to contract exists under general civil law provisions in the case of pathological mental disturbance, i.e. with regard to mental capacity, according to §§ 104 no. 2, 105 BGB (see 14.). Yet it is examined in individual cases when the mental capacity to engage in legal transactions is concretely in question. The incapacity to contract is thus assessed independently of specific adult protection measures. Within the scope of an appointed custodian's tasks, however, a reservation of consent (*Einwilligungsvorbehalt*) can be ordered, i.e. in addition to custodianship. That is, according to § 1825 (1) 1st s. BGB, the custodianship court may order that a person under custodianship requires the custodian's consent to conclude a contract. The reservation of consent can only be ordered if and to the extent that this is *necessary* to prevent a substantial danger for the person or the property of the person under custodianship.[42] A

[40] BGBl. I 2021, 882, Gesetz zur Reform des Vormundschafts- und Betreuungsrechts vom 4.5.2021.
[41] Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts.
[42] On the prerequisite of substantial danger, see BGH (Federal Court of Justice), 20.06.2018 – XII ZB 99/18, *FamRZ* 2018, 1360, 1361; BGH, 28.07.2015 – XII ZB 92/15, *DNotZ* 2015, 854.

close and careful examination of proportionality is required here.[43] There must be a link between the danger to be prevented and the ground for ordering custodianship (illness or disability), i.e. that the vulnerable adult is, precisely for this reason, considerably limited in their capacity for understanding and control of will, and *as a result* the considerable danger exists.[44] This is an important restriction, because the vulnerable adult has in principle the right to voluntarily harm themself. Furthermore, the recent reform transfers the case law of the Federal Court of Justice (*Bundesgerichtshof*, BGH) into the wording of the law; this required that a reservation of consent may not be ordered against the free will of a person under custodianship (see § 1825 (1) 2nd s. BGB).[45] However, the reservation of consent can be ordered contrary to the declaration of the person concerned if it is determined that the vulnerable adult can no longer *form* a free will. Ultimately, this means that the reservation of consent can only be considered as an *ultima ratio* measure.[46] If a reservation of consent pursuant to § 1825 BGB is ordered for a person under custodianship, one can speak of their legal capacity being limited, at least to the extent that they cannot legally act on their own, but their actions are subject to reservation.[47]

The scope of the limitation by means of the reservation of consent depends on the specific circumstances of the individual case. The reservation can only be ordered for matters that are already part of the custodian's tasks. A custodian may only be appointed for those matters where custodianship is necessary (§§ 1814 (3) 1st s., 1815 (1) 3rd s. BGB). Moreover, according to § 1825 (1) 1st s. BGB, the reservation must only be ordered to the extent that this is necessary to prevent a substantial danger for the person or the property of the person under custodianship. It is therefore to be restricted in terms of time as well as scope.[48] Thus, within the limiting framework of the tasks assigned to the custodian, a reservation of consent

---

[43] See BGH (Federal Court of Justice), 18.07.2018 – XII ZB 167/18, *FamRZ* 2018, 1691, 1692; cf. A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 17.

[44] Cf. W. BIENWALD, 'BGB § 1903' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 24; A. LOER, '§ 1903', in A. JÜRGENS (ed), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 2; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 8, 13.

[45] Cf. BGH (Federal Court of Justice), 17.05.2017 – XII ZB 495/16, *NJW-RR* 2017, 964, 965; BGH, 24.02.2021 – XII ZB 503/20, *NJW* 2021, 2508, 2509; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 273.

[46] On the prevalence of the reservation of consent, see D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243.

[47] Cf. T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, p. 123; V. LIPP, *Legal Protection of Adults in Germany – An Overview*, (2016) p. 6 <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

[48] Cf. V. LIPP et al., 'Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany' in M. GANNER et al. (eds), *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 117, 122.

can be confined to only certain aspects.[49] For other matters, the person under custodianship remains legally competent, unless §§ 104 no. 2, 105 BGB apply (see 14.). However, the reservation may also be subsequently extended to other areas of responsibility of the custodian if this is necessary (§ 1871 (3) and (4) BGB. Thus, the limitation of legal capacity by means of reservation of consent is a tailor-made decision.

The reservation of consent cannot encompass certain areas. § 1825 (2) BGB exempts entering into marriage (no. 1); dispositions mortis causa, contestation of an inheritance contract and annulment of an inheritance contract by contract (nos. 2–4); and declarations of intent (*Willenserklärungen*)[50] for which a person with limited capacity to contract under the provisions of Books Four (Family Law) and Five (Law of Succession) of the BGB does not need the consent of their legal representative (no. 5).[51] Thus, these highly personal declarations can only be made by the vulnerable adult themself and are legally effective if the person is not incapable of contracting according to §§ 104 no. 2, 105 BGB (see 14.). Where a reservation of consent is ordered, the consent of the custodian is, however, according to § 1825 (3) BGB not required if the declaration of intent merely confers a legal advantage on the person under custodianship (or if the legal transaction is at least legally neutral)[52]. To the extent that the court does not order otherwise, this also applies if the declaration of intent relates to a trivial matter of everyday life. Furthermore, pursuant to § 1825 (1) 3rd s. BGB, some of the provisions on capacity to contract apply accordingly, namely §§ 108–113, 131 (2) and 210 BGB.[53]

If the requirements of § 1825 (1) BGB are no longer met the court may revoke the reservation of consent according to § 1871 (1) and (4) BGB. In some cases, the reservation may be restricted to part of the custodian's scope of tasks or to certain declarations of will instead of being revoked.

The court must decide at the latest seven years after the order of the reservation of consent whether it is to be revoked or extended (§§ 294 (3), 295 (2) FamFG). A shorter period may also be determined in the initial order (§ 286 (3) FamFG). If the measure has been ordered against the declared will of the adult, a decision as to whether to extend it for the first time must be taken after no more than two years (§§ 294 (3) 2nd s., 295 (2) 2nd s. FamFG).

---

[49] BGH (Federal Court of Justice), 28.07.2015 – XII ZB 92/15, *FamRZ* 2015, 1793; cf. A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 18.

[50] Declarations of intent according to the German legal doctrine are private expressions of will that are directed towards a legal result.

[51] For details, see W. BIENWALD, 'BGB § 1903' in J. v. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 87–97.1.

[52] Cf. N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 38; A. LOER, '§ 1903' in A. JÜRGENS (ed), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 23.

[53] For details, see W. BIENWALD, 'BGB § 1903' in J. v. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 100–116.

9. Briefly describe the effects of a limitation of legal capacity on:
a. property and financial matters;
b. family matters and personal rights (e.g. marriage, divorce, contraception);
c. medical matters;
d. donations and wills;
e. civil proceedings and administrative matters (e.g. applying for a passport).

According to § 1825 (1) 1st s. BGB, in matters for which custodianship and – in addition – a reservation of consent have been ordered, the vulnerable adult can, in principle, only act legally, i.e. make declarations of intent that are directed towards a specific legal result (e.g. the conclusion of a contract), with the consent of their custodian. But the custodian must base their decision on the wishes and (presumed) will of the vulnerable adult (§ 1821 (2) to (4) BGB) (see 25.).[54] Therefore, the result is generally supported decision-making by the vulnerable adult according to their subjective wishes. The reservation of consent only forms an additional safety barrier. In exceptional cases, however, when consent is denied by the custodian, this constitutes substitute decision-making as *ultima ratio* to protect the vulnerable adult.[55] According to § 1825 (1) 3rd s. BGB in conjunction with § 108 (1) BGB, the validity of a contract concluded without the required consent depends on whether the consent is granted subsequently. Unilateral legal transactions without the required consent are void (§§ 1825 (1) 3rd s., 111 1st s. BGB).

A reservation of consent cannot extend to certain family matters, in particular the entering into a marriage (§ 1825 (2) no. 1 BGB). Moreover, according to § 1825 (2) no. 5, declarations of intent for which a person with limited capacity to contract does not require the consent of their legal representative under the provisions of family law cannot be subject to a reservation of consent. For example, the reservation cannot be ordered for a contestation of paternity (§ 1600a (2) 2nd s. BGB) or the parents' consent to the adoption of the child by others (§§ 1747, 1750 (3) 2nd s. BGB). Meanwhile, the acknowledgement of paternity according to § 1596 (3) BGB may be subject to reservation of consent.[56] Without this being explicitly stated in the law, the reservation of consent is also not possible for other highly personal decisions, such as entering into an engagement. It is not permissi-

[54] For the application of this standard also in the case of a reservation of consent, see D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243, 246; V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 677; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 8.

[55] Cf. D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243, 246.

[56] For details, see W. BIENWALD, 'BGB § 1903' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 96–96.3.

ble to assign the decision in these highly personal matters to a custodian, and consequently also not to order a reservation of consent in this regard.[57] This also applies to the decision to divorce.[58]

According to § 1825 (1) 1st s. BGB, a reservation of consent can be ordered for *declarations of intent*, i.e. expressions of will that are directed towards a *legal* result. The prevailing opinion is that, in addition, acts similar to legal transactions (*geschäftsähnliche Handlungen*), i.e. factual acts that have consequences determined by law, can also be covered, e.g. setting a period for performance of a contract.[59] On the other hand, *purely factual* acts cannot be subject to a reservation of consent. Against this background, the *use* of contraceptives, for example, is a decision made solely by the vulnerable adult. Furthermore, the consent of the vulnerable adult to violations of their legal interests cannot be placed under a reservation of consent, e.g. the consent of the person concerned to medical treatment or surgery (which constitute bodily harm without this consent), or the consent to a measure involving a deprivation of liberty. This consent *sui generis*[60] (called *Einwilligung*) cannot be covered by a reservation within the meaning of § 1825 BGB. In this respect, in principle, consent to medical treatment can only be given by the vulnerable adult (unless they are incapable of giving their *Einwilligung*, see 14.). For example, it depends solely on the adult's decision to be sterilised. The financial side, however, e.g. the contract for treatment or the purchase contract regarding the contraceptives, may be subject to a reservation of consent.[61] It should be noted that an accommodation or fixation of the vulnerable adult under deprivation of liberty and/or the execution of compulsory medical measures are only possible under the restrictive preconditions of §§ 1831, 1832 BGB (see 28.), in the event that they are unable to understand the necessity of such measures due to a mental illness or mental or psychological disability or to act in accordance with this understanding.

---

[57] For details, see W. BIENWALD, 'BGB § 1903' in J. v. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2017, mn. 97; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 27.

[58] Cf. A. ROTH, 'BGB § 1903' in H.P. WESTERMANN, B. GRUNEWALD and G. MAIER-REIMER (eds), *Erman BGB Kommentar*, 16th ed., Verlag Dr. Otto Schmidt, Cologne 2020, mn. 29.

[59] Cf. A. LOER, '§ 1903' in A. JÜRGENS (ed), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 7; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 21.

[60] On the distinction between *Einwilligung* and capacity to contract (§§ 104–113 BGB), see S. KLUMPP, 'Vorbemerkung zu BGB § 104 ff.' in J. v. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2021, mn. 38.

[61] Cf. A. LOER, '§ 1903' in A. JÜRGENS (ed), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 7; A. ROTH, 'BGB § 1903' in H.P. WESTERMANN, B. GRUNEWALD and G. MAIER-REIMER (eds), *Erman BGB Kommentar*, 16th ed., Verlag Dr. Otto Schmidt, Cologne 2020, mn. 39–40; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 27.

Donations may be subject to a reservation of consent, but not dispositions mortis causa (§ 1825 (2) BGB). For the latter, the testamentary capacity according to § 2229 (4) BGB is decisive, which depends on the mental capacity.

As far as the reservation of consent extends, the person does not have the capacity to sue under § 52 of the Code of Civil Procedure (ZPO). Furthermore, to this extent, the vulnerable adult is in principle not capable of acting in administrative proceedings (§ 12 (2) Administrative Procedure Act (VwVfG)), as well as of acting in administrative proceedings under social law (§ 11 (2) SGB X).[62] In proceedings concerning custodianship matters, the adult participates irrespective of their capacity to contract (§ 275 (1) FamFG) and can exercise their rights there themself.[63]

10. Can limitation of legal capacity have retroactive effect? If so, explain?

The limitation of legal capacity by way of reservation of consent applies from the time of announcement of the court order to the custodian (§ 287 (1) FamFG). It cannot have a retroactive effect.

11. Which authority is competent to decide on limitation or restoration of legal capacity?

The custodianship court is the competent authority to order a reservation of consent (§ 1825 (1) 1st s. BGB) and also to extend or revoke it (§ 1871 (1), (3) and (4) BGB) (see also § 23a (1) 1st s. no. 2, (2) no. 1 GVG).

The custodianship court is a division of the local court (§ 23c (1) GVG).[64] The court where the custodianship is pending has jurisdiction if a custodian has already been appointed, otherwise the court at the habitual residence of the person concerned. If the habitual residence cannot be determined, the court in whose district the need for assistance arises has jurisdiction, subsidiarily, in the case of German nationals, the Berlin-Schöneberg Local Court (§ 272 (1) FamFG).[65]

12. Who is entitled to request limitation or restoration of legal capacity?

---

[62] See furthermore § 79 (2) AO, § 62 (2) VwGO, § 58 (3) FGO; cf. A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 64.

[63] Cf. BGH (Federal Court of Justice), 04.05.2011 – XII ZB 632/10, *FamRZ* 2011, 1049, 1050.

[64] Custodianship court judges have legal training, but are not required to follow any specialized training in adult protection.

[65] For further details, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 41; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 160–62; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 30.

A limitation of legal capacity by way of reservation of consent or the restoration of legal capacity cannot be requested. The custodianship court decides *ex officio*. However, suggestions may be made to the court. The custodian has a duty to inform the court of relevant circumstances (§ 1864 (2) 2nd s. no. 1 and 5 BGB).[66] Likewise, to avert a substantial danger within the meaning of § 1821 (3) no. 1 BGB, the custodianship authority may inform the court of such circumstances in accordance with § 9 (1) BtOG, taking into account the legitimate interests of the vulnerable adult.

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:
a. a requirement of legal representation of the adult;
b. participation of family members and/or of vulnerable adults' organisations or other CSO's;
c. requirement of a specific medical expertise / statement;
d. hearing of the adult by the competent authority;
e. the possibility for the adult to appeal the decision limiting legal capacity.

The proceedings regarding the reservation of consent are initiated *ex officio* by the custodianship court.[67] The reservation of consent can be ordered together with the custodianship, or later in a separate procedure. The vulnerable adult participates in the proceedings irrespective of their capacity to contract (§§ 274 (1) no. 1, 275 (1) FamFG) and can exercise their rights there themself.[68]

According to the prevailing opinion, they can also appoint a lawyer as a representative in the proceedings, even if they are incapable of contracting (§§ 104 no. 2, 105 BGB, see 14.).[69] A reservation of consent is a serious encroachment on the rights of the vulnerable adult.[70] It is therefore generally to be assumed that a lawyer is appointed by the vulnerable adult as their procedural representative. If no legal representative is appointed, according to § 276 (1) 1st s. FamFG, the court must appoint a suitable guardian ad litem (*Verfahrenspfleger*) if this is necessary to

[66] Cf. A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 32.

[67] For details regarding the procedure, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 41–44; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 28–40; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 58–63; G. MÜLLER-ENGELS, 'BGB § 1903' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 26–27; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 159–240.

[68] Cf. BGH (Federal Court of Justice), 04.05.2011 – XII ZB 632/10, *FamRZ* 2011, 1049, 1050.

[69] BGH (Federal Court of Justice), 30.10.2013 – XII ZB 317/13, *FamRZ* 2014, 110, 111–12; J. KRETZ, 'FamFG § 275' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 4 (with further references).

[70] Cf. BGH (Federal Court of Justice), 18.07.2018 – XII ZB 635/17, *FamRZ* 2018, 1692, 1693.

safeguard the interests of the vulnerable adult.[71] With regard to the issue of when the appointment of a guardian ad litem is necessary, § 276 (1) 2nd s. FamFG only mentions two situations as standard cases, namely the waiving of the personal hearing of the person concerned (no. 1) or the appointment of a custodian or the ordering of a reservation of consent against the declared will of the vulnerable adult (no. 2). In all other cases, the court must examine and decide on a case-by-case basis whether the appointment is nevertheless necessary.[72] Legal representation or at least support is therefore not mandatory and additional safeguarding of the vulnerable adult's interests by a guardian ad litem does not have to be ordered in every case. The guardian ad litem is *not* a legal representative who acts in place of the vulnerable adult. They should, as an independent party to the proceedings, determine the adult's wishes or, alternatively, their presumed will; promote and safeguard them; and support the vulnerable adult in exercising their rights, especially procedural rights, the right to be heard, participation rights and appeal rights (cf. § 276 (3) FamFG).[73] The guardian ad litem must also inform the person concerned in an appropriate manner about the subject matter, course and possible outcome of the proceedings.

When initiating the custodianship proceedings, the court shall inform the vulnerable adult as appropriately as possible about the tasks of a custodian, the possible course of the proceedings and the costs that may generally result from the appointment of a custodian (§ 275 (2) FamFG). They are to be heard by the court (§ 278 (1) 1st s. FamFG). It has to get a firsthand impression of the vulnerable adult (§ 278 (1) 2nd s. FamFG). However, this may be dispensed with if there is reason to fear considerable disadvantages for the health of the person concerned (§§ 278 (4), 34 (2) FamFG). But this decision may only be taken on the basis of a medical expert opinion. In this case, if there is no legal representative, the appointment of a guardian ad litem is by rule necessary according to § 276 (1) 2nd s. no. 1 FamFG to safeguard the persons' interests. The hearing may also be dispensed with if the vulnerable adult is obviously unable to express their will (§ 34 (2) FamFG).[74]

A specific expert opinion on the necessity of the measure, i.e. the reservation of consent, must always be obtained (§ 280 (1) 1st s. FamFG). The expert, a doctor of psychiatry or with experience in the field of psychiatry (§ 280 (1) 2nd s. FamFG), must personally examine and interview the vulnerable adult before providing the expert opinion and take into account the statement of the custodianship authority (see § 279 (2) 2nd s. FamFG) (§ 280 (2) FamFG). According to § 280 (3) FamFG, the expert opinion must cover the illness or disability including its development,

---

[71] For details, see A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1016.

[72] E.g. BGH (Federal Court of Justice), 09.05.2018 – XII ZB 577/17, *FamRZ* 2018, 1193 (reservation of consent for the entire property of the person concerned).

[73] For details, see A. SCHMIDT-RECLA, 'FamFG § 276' in T. RAUSCHER (ed), *Münchener Kommentar zum FamFG*, 3rd ed., C.H. Beck, Munich 2019, mn. 3–3b.

[74] For details, see A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1015–16.

the examinations carried out, the physical and mental condition of the person concerned, the need for assistance required from a medical point of view due to the illness or disability and the expected duration of the measure. In the case of an order contrary to the vulnerable adult's expressions, the determination regarding the exclusion of free will must be substantiated by the expert opinion.[75] For the purpose of the expert opinion, summoning for examination and accommodation may be ordered by the custodianship court (§§ 283, 284 FamFG).

Parties to the proceedings (*Beteiligte*) are, in addition to the vulnerable adult, in particular the custodian and, if present, an attorney who has been authorised by a (continuing) power of attorney as well as a guardian ad litem (§ 274 (1) no. 2 and 3 and (2) FamFG). Furthermore, all persons whose rights are directly affected by the proceedings must be involved as parties (§ 7 (2) no. 1 FamFG), e.g. the person who is to be appointed as custodian but has not yet been appointed.[76] Likewise, the spouse, parents, foster parents, grandparents, descendants and siblings of the adult as well as a person of the vulnerable adult's trust (§ 274 (4) no. 1 FamFG) or a representative of the State Treasury (no. 2) may participate.

Pursuant to § 279 (1) and (3) FamFG, these other parties and to a limited extent, at the vulnerable adult's request, persons close to the them must be heard. The competent custodianship authority may already have to be heard because, at its request, it is party pursuant to §§ 279 (1), 274 (3) FamFG. In any case, it must be heard prior to an order for the reservation of consent (§ 279 (2) FamFG). As part of its investigation *ex officio* pursuant to § 26 FamFG, the court may have to hear other persons.

The order for the reservation of consent is issued by the custodianship court (§§ 38, 286 (2) and (3) FamFG) and becomes effective pursuant to § 287 (1) FamFG upon notification of the custodian. If this notification is not possible or if there is imminent danger, the court may order its immediate effectiveness. In this case, the order becomes effective if the person concerned or the guardian ad litem *in persona* are notified or if it is handed over to the office of the court (*Geschäftsstelle*) for the purpose of such notification (§ 287 (2) FamFG).

The vulnerable adult can appeal against the order to limit their legal capacity by means of a reservation of consent in accordance with §§ 58–69 and in accordance with §§ 70–75 FamFG.

14. Give a brief account of the general legal rules with regard to mental capacity in respect of:

---

[75] For details, see T. FRÖSCHLE, 'FamFG § 280' in H. PRÜTTING and T. HELMS (eds), *FamFG Kommentar*, 6th ed., Verlag Dr. Otto Schmidt, Cologne 2023, mn. 25–31; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 61.

[76] Cf. BT-Drs. 16/6308, 265; A. SCHMIDT-RECLA, 'FamFG § 274' in T. RAUSCHER (ed), *Münchener Kommentar zum FamFG*, 3rd ed., C.H. Beck, Munich 2019, mn. 6.

a. property and financial matters;
b. family matters and personal rights (e.g. marriage, divorce, contraception);
c. medical matters;
d. donations and wills;
e. civil proceedings and administrative matters (e.g. applying for a passport).

The mental capacity of adults is in principle assumed (§ 104 no. 2 BGB *e contrario*). According to § 104 no. 2 BGB, however, anyone who is in a state of pathological mental disturbance, which prevents the free exercise of will, is incapable of contracting, unless the state by its nature is a temporary one.[77] This is called 'natural incapacity' ('*natürliche Geschäftsunfähigkeit*').[78] In this context, it is essentially the incapacity of the person concerned to form and exercise a free will that is assessed.[79] If the vulnerable adult lacks the required abilities, i.e. the capacity for understanding or the ability to act according to this understanding, *free* will is no longer present.[80] One then only speaks of a 'natural will' ('*natürlicher Wille*') (e.g. § 1830 (1) no. 1 and § 1832 (1) BGB).[81] The relevance of § 104 no. 2 BGB is increasing due to demographic change and rising numbers of dementia.[82] A declaration of intent of a person incapable of contracting is void according to § 105 (1) BGB and also a declaration of intent that is made in a state of temporary mental disturbance (§ 105 (2) BGB). The same applies to acts similar to legal transactions, e.g. setting a period for performance.[83] Thus, in principle, depending on a certain severity of the impairment of mental capacity in the individual case, those legal

[77] For details, see S. KLUMPP, 'BGB § 104' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2021, mn. 6–30; A. SPICKHOFF, 'BGB § 104' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich 2021, mn. 42–59.

[78] Cf. V. LIPP, *Legal Protection of Adults in Germany – An Overview*, (2016) p. 1 <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

[79] Cf. BGH (Federal Court of Justice), 18.09.2018 – XI ZR 74/17, *MDR* 2019, 692, 694; BGH, 14.03.2017 – VI ZR 225/16, *FamRZ* 2017, 1149, 1150; S. KLUMPP, 'BGB § 104' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2021, mn. 6 (with further references).

[80] Cf. A. SPICKHOFF, 'BGB § 104' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich 2021, mn. 48.

[81] Cf. J. NEUNER, 'Natürlicher und freier Wille' *AcP* 218 (2018), 1, 14–23; A. SPICKHOFF, 'BGB § 104' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich 2021, mn. 48.

[82] With regard to dementia, see M. SCHMOECKEL, 'Die Geschäfts- und Testierfähigkeit von Demenzerkrankten' *NJW* 2016, 433–39; S. KLUMPP, 'BGB § 104' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2021, mn. 6 (with further references).

[83] Cf. A. SPICKHOFF, 'BGB § 105' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich 2021, mn. 9.

acts of the vulnerable adult that are affected by this are *ex lege* invalid.[84] Furthermore, according to § 827 1st s. BGB, the vulnerable adult in this state is not held responsible for their conduct.[85] However, if the person incapable of contracting enters into an everyday transaction that can be effected with funds of low value, the contract they enter into is effective with regard to performance and, if agreed, consideration, as soon as performance has been effected and consideration rendered. But this exception does not apply in the case of considerable danger to the person or the property of the person incapable of contracting (§ 105a BGB). Therefore, in cases of incapacity to contract, a representative is often required, be it an attorney, an *ex lege* representative or a custodian (§ 1823 BGB).

With regard to family matters and personal rights, if the vulnerable adult is incapable of contracting, some legal acts can be carried out by a representative;[86] sometimes only with the authorisation of the court.[87] With regard to divorce, the decision to divorce must come from the vulnerable adult, but the divorce proceedings can be conducted by the custodian in accordance with § 125 (2) FamFG with the authorisation of the custodianship court.[88] Other acts cannot be performed at all, as they can only be undertaken personally by the vulnerable adult, e.g. entering into marriage (§ 1304 BGB). However, the marriage of a person incapable of contracting only leads to the possible annulment of the marriage (§ 1314 (1) BGB); it does not lead to nullity.

With regard to medical treatments of the vulnerable adult, their capacity to consent to violations of legal interests must be considered again (see 9.). Thus, compared to the incapacity to contract, a stricter standard is to be applied, namely that of the capacity to consent *sui generis*[89] (*Einwilligungsfähigkeit*), specifically with regard to the (medical) intervention, which is dependent on the capacity to understand (*Einsichtsfähigkeit*) and to act according to this understanding (so-called capacity to act; *Handlungsfähigkeit*) in the specific individual case.[90] That is, someone who is already in a state of incapacity to contract can still have the

---

[84] As an exception, see § 4 (2) 1st s. Residential and Care Contracts Act (Wohn- und Betreuungsvertragsgesetz, WBVG) regarding contracts for residential homes with nursing or care services in particular that serve to cope with a need for assistance due to old age or disability.

[85] Cf. V. LIPP, *Legal Protection of Adults in Germany – An Overview*, (2016), p. 1 <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

[86] E.g. contestation of the paternity (§ 1600a (2) 3rd s. BGB).

[87] E.g. recognition of paternity (§ 1596 (1) 3rd s. BGB).

[88] See A. ROTH, 'BGB § 1896' in H.P. WESTERMANN, B. GRUNEWALD and G. MAIER-REIMER (eds), *Erman BGB Kommentar*, 16th ed., Verlag Dr. Otto Schmidt, Cologne 2020, mn. 66.

[89] On the distinction between *Einwilligung* and capacity to contract (§§ 104–113 BGB), see S. KLUMPP, 'Vorbemerkung zu BGB § 104 ff.' in J. V. STAUDINGER, *Kommentar zum BGB*, Otto Schmidt – De Gruyter, Berlin 2021, mn. 38.

[90] Cf. BGH (Federal Court of Justice), 05.12.1958 – VI ZR 266/57, *NJW* 1959, 811; A. SCHNEIDER, 'BGB § 1904' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 16 (with further references).

capacity to understand and thus to consent in medical treatments.[91] Since the principle of informed consent applies regarding healthcare decisions in German law, medical treatment is only lawful if the patient has consented (§§ 630d (1) 1st s. and (2), 630e BGB). If the patient themself is not capable of giving consent, presumed consent is only sufficient in urgent emergencies (§ 630d (1) 4th s. BGB).[92]

With regard to contraception, several aspects need to be emphasised.[93] Sterilisation is in principle a decision that can only be made by the vulnerable adult. If the adult is *in the long term* incapable of giving their consent to sterilisation, this consent can only be given as *ultima ratio* under the very strict conditions of § 1830 BGB by a custodian specifically appointed by the custodianship court for the area of sterilisation (§ 1817 (2) BGB, *Sterilisationsbetreuer*).[94] The court must approve this consent (§ 1830 (2) BGB).[95] A critical aspect is the tendency observed in practice to use the three-month injection (*Dreimonatsspritze*) as a method of birth control for female vulnerable adults who are incapable of giving consent.[96] Compulsory use is not permitted.[97]

The vulnerable adult who is incapable of contracting pursuant to §§ 104 no. 2, 105 BGB cannot make any donations. Dispositions mortis causa depend on testamentary capacity. According to § 2229 (4) BGB, a person who is incapable of realising the importance of a declaration of intent made by them and of acting in accordance with this realisation on account of pathological mental disturbance, mental deficiency or derangement of the senses may not make a will.

The vulnerable adult who is incapable of contracting pursuant to §§ 104 no. 2, 105 BGB does not have the capacity to sue under § 52 ZPO. They are also not capable of actions in administrative proceedings (§ 12 (1) no. 1 and 2 VwVfG *e contrario*), as well as of actions in administrative proceedings under social law

---

[91] See BGH (Federal Court of Justice), 16.06.2021 – XII ZB 554/20, *NJW-RR* 2021, 1086, 1087; A. SCHNEIDER, 'BGB § 1904' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 16.

[92] Cf. V. LIPP, *Legal Protection of Adults in Germany – An Overview*, (2016), p. 3 <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

[93] For details, see C.-M. LEEB and M. WEBER, 'Die Dreimonatsspritze zur Schwangerschaftsverhütung bei betreuten Frauen' *BtPrax* 2015, 45-48; J. ZINSMEISTER, 'Zur Einflussnahme rechtlicher Betreuerinnen und Betreuer auf die Verhütung und Familienplanung der Betreuten' *BtPrax* 2012, 227–32.

[94] It should be noted that the sterilisation of minors is prohibited under § 1631c BGB.

[95] For details, see A. JÜRGENS, 'BGB § 1905' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; G. MÜLLER-ENGELS, 'BGB § 1905' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022; A. SCHNEIDER, 'BGB § 1905' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

[96] See C.-M. LEEB and M. WEBER, 'Die Dreimonatsspritze zur Schwangerschaftsverhütung bei betreuten Frauen' *BtPrax* 2015, 45–48 (with further references).

[97] Cf. C.-M. LEEB and M. WEBER, 'Die Dreimonatsspritze zur Schwangerschaftsverhütung bei betreuten Frauen' *BtPrax* 2015, 45, 47–48.

(§ 11 (1) no. 1 and 2 SGB X *e contrario*).[98] In proceedings concerning custodianship matters, the adult can in principle participate irrespective of their capacity (§ 275 (1) FamFG) and can exercise their rights there themself.

15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?

(See 67. and 68.)

SECTION III – STATE-ORDERED MEASURES

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure. Pay attention to:
a. can different types of state-ordered measures be applied simultaneously to the same adult?
b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;
c. does your system provide for interim or ad-hoc state-ordered measures?

In the German legal system, there are two possible state-ordered measures for the protection and empowerment of vulnerable adults that can only be applied to one and the same adult in stages. Firstly, there is custodianship, i.e. the legal assistance for a vulnerable adult provided by a court-appointed custodian who acts as a support person and, if necessary, also as a representative. It can be ordered according to § 1814 BGB if this is necessary because the adult cannot take care of their affairs in whole or in part due to an illness or a disability. Secondly, to the extent that this is necessary to prevent a substantial danger for the person or the property of the person under custodianship, pursuant to § 1825 (1) 1st s. BGB a reservation of consent can be ordered (see 8.).

If the preconditions are met, custodianship is to be ordered for vulnerable adults regardless of their legal capacity. In the case that §§ 104 no. 2, 105 BGB (see 14.) do not apply and a reservation of consent is not additionally ordered (see 8.), the custodian acts in addition to and as support for the vulnerable adult who continues to have full legal capacity, i.e. the custodian mainly supports them in their own decision-making (§ 1821 (1) 2nd s. BGB).[99] The custodian can represent

[98] See furthermore § 79 (1) AO, § 62 (1) VwGO, § 58 (1) FGO.
[99] BT-Drs. 19/24445, 251; on the principle of support, see V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 9.

the person under custodianship in their area of responsibility (§ 1823 BGB), but they must act in accordance with the wishes and (presumed) will of the vulnerable adult (§ 1821 (2) to (4) BGB) (see 25.).[100] They must only make use of their power of representation to the extent that this is necessary (§ 1821 (1) 2nd s. BGB).

Only if and to the extent that it is additionally necessary to prevent a substantial danger to the person or the property of the person under custodianship can a reservation of consent be ordered, which then in any case limits the legal capacity of the adult (see 8.).[101] A reservation of consent without custodianship is not possible. Against the background of the principle of necessity, the reservation of consent thus remains an *ultima ratio* remedy.

Pursuant to § 300 FamFG, the court may appoint an interim custodian or order interim reservation of consent by means of an interim order. The prerequisite is, in particular, that urgent reasons exist for the assumption that the preconditions for custodianship or the reservation of consent are met as well as an urgent need for immediate action. A custodian may also be dismissed by such interim order (§ 300 (2) FamFG). In the event of imminent danger, the court may issue an interim order pursuant to § 300 FamFG even before the person concerned has been heard and before the guardian ad litem has been appointed (§ 301 (1) 1st s. FamFG). However, the hearing and appointment must be carried out without delay in accordance with § 301 (1) 2nd s. FamFG. The interim order can be in effect for a maximum of six months, but may be extended by further interim orders, after hearing an expert, for a total period of up to one year (§ 302 FamFG). Furthermore, § 1867 BGB stipulates that in absolutely exceptional cases, if a delay would result in a disadvantage for the person under custodianship, and if a custodian cannot yet be appointed or is prevented from acting, the court may take action on its own initiative.

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

According to § 1814 (1) BGB, custodianship can be ordered for a person of full age if the exhaustively named causes, that is illness or disability, lead to the fact (causality) that the vulnerable adult cannot in whole or in part take care of

[100] See also the decision of the BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814.

[101] On the legal relationship between incapacity to contract and the reservation of consent, see A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 19–20.

their affairs. Furthermore, the appointment of a custodian must be necessary (§§ 1814 (3) 1st s., 1815 (1) 3rd s. BGB). Essential is the need for legal, not factual assistance (cf. § 1815 (1) 3rd s. BGB).[102]

The new provision, § 1814 (1) BGB, now generally names *illness* and *disability* as causes of need for assistance. Previously, 'mental illness or a physical, mental or psychological disability' were mentioned as causes of the need for assistance in § 1896 (1) BGB old version. In order to avoid discrimination, the wording of the law was revised here with the reform as of 1 January 2023. The new wording is not intended to change the group of persons for whom custodianship can be considered.[103] However, compared to the former wording, it clarifies that there are *physical* illnesses that can cause a need for assistance without being a disability, and it also eliminates problems of theoretical classification, e.g. in the case of organic illnesses with mental symptoms.[104] Furthermore, the reform emphasises the *existence of a definable need for assistance* as a prerequisite for custodianship more than the medical causes of this need.[105]

'Illness', as possible causal reason for the need for assistance, continues to encompass mental illness. This includes the recognised clinical pictures of psychiatry, especially psychoses as well as neuroses and psychopathies.[106] But physical illness is also covered.[107]

'Disability' includes psychological, mental or physical impairments (cf. § 2 SGB IX).[108] A psychological disability is a permanent impairment resulting from

[102] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 29–30; N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 6–15; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 15–27 (both on the law before the reform).

[103] Cf. BT-Drs. 19/24445, 230–31; critically T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 32; D. SCHWAB, 'Die große Paragraphenwanderung und mehr' *FamRZ* 2020, 1321, 1325.

[104] Cf. BT-Drs. 19/24445, 231.

[105] Consideration had also been given to completely waiving the medical causes, see BT-Drs. 19/24445, 230; see also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 33; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1013.

[106] Cf. BT-Drs. 11/4528, 116; for details see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 9–10; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 18; A. JÜRGENS, 'BGB § 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 4; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 9–14.

[107] Cf. BT-Drs. 19/24445, 231.

[108] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 34.

mental illness.[109] Mental disability is the term used to describe congenital or acquired intelligence defects.[110] Particular attention should be paid to physical disability, that is any limitation of a person's physical abilities compared to the 'condition typical for the age of life'[111], especially functional disorders of the musculoskeletal system, the internal organs or the sensory organs.[112] This can also include age-related weaknesses.[113] Old age alone, however, is not a sufficient ground for ordering custodianship. Blindness and deafness must be mentioned as physical disabilities that are particularly relevant in terms of family law.[114] If the vulnerable adult is unable to take care of their affairs solely due to a *physical* impairment, a custodian may only be appointed at the adult's request, unless the adult is unable to express their will (§ 1814 (4) 2nd s. BGB). Physical disability may, however, be combined with mental illness or with mental and/or psychological impairments or have a causal relationship with them.[115]

Dementia as a result of Alzheimer's disease or similar health impairments that often occur at an older age also fall under the aforementioned terms of § 1814 (1) BGB.[116] At the end of the year 2021, about 1.8 million people in Germany suffered

[109] Cf. BT-Drs. 11/4528, 116; for details see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 9–10; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 17; A. JÜRGENS, 'BGB § 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 6; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 15.

[110] Cf. BT-Drs. 11/4528, 116: 'congenital or early acquired intelligence defects' ('angeborene oder frühzeitig erworbene Intelligenzdefekte'); however, no restriction is made in legal practice to *early* defects, cf. BayObLG (Bavarian Supreme Regional Court), 07.10.1993 – 3Z BR 193/93, *FamRZ* 1994, 318. For details see J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 16; A. JÜRGENS, 'BGB § 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 7.

[111] Cf. § 2 (1) 2nd s. SGB XI; see also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 34.

[112] Cf. J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 15; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 17.

[113] Cf. A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 17.

[114] For details see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 10; A. JÜRGENS, 'BGB § 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 8; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 17.

[115] A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 18.

[116] In the literature, failure symptoms due to old-age diseases were previously partly assigned directly to mental illnesses, partly to psychological disabilities. In the end, the classification to one or the other cause made no difference. The new wording is intended to avoid such classification problems.

from dementia. If the trend continues without a breakthrough in prevention or therapy, up to 2.8 million people with dementia are expected in 2050.[117]

A controversial issue is the topic of addiction. The prevailing opinion is that addiction to alcohol or drugs alone is not sufficient for a custodianship order. Instead, an illness or disability is required as a cause or consequence of the addiction.[118]

Prodigality in itself is also not a sufficient reason for a custodianship order. The vulnerable adult has the right to harm themself. Precondition for legal relevance with regard to § 1814 (1) BGB is that the prodigal behaviour is based on a mental or psychological illness or disability. If custodianship is ordered on the basis of one of the aforementioned causes, a reservation of consent can also be ordered to the extent that there is a substantial danger to the property of the adult (see 8.). The orders are impermissible against the free will of the person concerned (§§ 1814 (2), 1825 (1) 2nd s. BGB).

The custodianship order must comply with the principle of necessity (see 1.). That is, the custodian may only be appointed for matters for which custodianship is necessary, §§ 1814 (3) 1st s., 1815 (1) 3rd s. BGB. Hence, it is required that the vulnerable adult is not able to take care of their own affairs, i.e. a subjective need for custodianship (*subjektive Betreuungsbedürftigkeit*). Furthermore, objectively, the management of the specific matter in question *by a custodian* must be necessary (objective need for custodianship; *objektiver Unterstützungsbedarf*).[119] According to § 1814 (3) 2nd s. no. 1 BGB, custodianship may not be necessary in the case of an existing (continuing) power of attorney, unless the attorney is in dependent or close relationship with an institution or service provider involved in the care of the adult (§§ 1814 (3) 2nd s. no. 1, 1816 (6) BGB) (regarding powers of attorney see 32.–49.). The same applies if the adult's affairs can be taken care of with the support of 'other assistance', § 1814 (3) 2nd s. no. 2 BGB (regarding 'other assistance see 1.).

(For the reservation of consent, see 8.)

---

[117] DEUTSCHE ALZHEIMER GESELLSCHAFT E. V., 'Informationsblatt 1: Die Häufigkeit von Demenzerkrankungen' p 1 <https://www.deutsche-alzheimer.de/fileadmin/Alz/pdf/factsheets/infoblatt1_haeufigkeit_demenzerkrankungen_dalzg.pdf> accessed 14.09.2022.

[118] BGH (Federal Court of Justice), 27.04.2016 – XII ZB 7/16, *FamRZ* 2016, 1070–71; BayObLG (Bavarian Supreme Regional Court), 28.03.2001 – 3Z BR 71/01, *FamRZ* 2001, 1403, 1404; AG (Local Court) Garmisch-Partenkirchen, 30.05.2008 – XVII 211/08, *FamRZ* 2009, 148; A. JÜRGENS, 'BGB § 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 5; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 11; opposite view H. BÖHM, 'Haben die Betreuungsgerichte ein Alkoholproblem?' *FamRZ* 2017, 15, 17–18.

[119] BVerfG (Federal Constitutional Court), 23.06.1999 – 1 BvL 28/97, *FamRZ* 1999, 1419, 1420; BGH (Federal Court of Justice), 19.04.2023 – XII ZB 462/22, *NJW-RR* 2023, 853; BGH, 21.01.2015 – XII ZB 324/14, *FamRZ* 2015, 649; BGH, 01.04.2015 – XII ZB 29/15, *FamRZ* 2015, 1016; for further details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 37.

18. Which authority is competent to order the measure?

The competent authority to order custodianship (§ 1814 (1) BGB) as well as the reservation of consent is the custodianship court (see 11.).

19. Who is entitled to apply for the measure?

According to § 1814 (4) 1st s. BGB, custodianship can be ordered by the court *ex officio*. Additionally, only the vulnerable adult is entitled to apply for custodianship. Despite the application, however, all legal requirements for the custodianship order must be met.[120] Since in matters of custodianship the person concerned is entitled to participate in the proceedings regardless of their capacity to contract (§ 275 (1) FamFG), the adult can apply even if they are incapable of contracting.[121] Third persons cannot request custodianship. However, suggestions may be made to the court, which the latter then has to examine *ex officio*.

(For the reservation of consent see 12.)

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

According to § 1814 (2) BGB a custodian cannot be appointed against the free will[122] of the vulnerable adult.[123] The same holds for the reservation of consent (§ 1825 (1) 2nd s. BGB) (see 8.). This is an expression of the fundamental right to the free development of one's personality according to Art. 2 (1) GG,[124] which includes that everyone has the right to live their life according to their own ideas to the extent that they do not violate the rights of others or offend against the constitutional order or the moral law.[125]

---

[120] Cf. A. JÜRGENS, '§ 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 14.

[121] Cf. BT-Drs. 19/24445, 234.

[122] On the capacity of the person concerned to form a free will about the order of custodianship, see BGH (Federal Court of Justice), 07.12.2022 – XII ZB 158/21, *NJW-RR* 2023, 579; BGH, 26.02.2014 – XII ZB 577/13, *FamRZ* 2014, 830, 831.

[123] Cf. BayObLG (Bavarian Supreme Regional Court), 25.11.1993 – 3Z BR 190/93, *FamRZ* 1994, 720, 721; for details, see A. JÜRGENS, '§ 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 13–14; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 39–40; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 23–38.

[124] Cf. BVerfG (Federal Constitutional Court), 20.01.2015 – 1 BvR 665/14, *NJW* 2015, 1666.

[125] Cf. the unofficial translation of the German Basic law available at <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0023> accessed 21.09.2022.

Custodianship and reservation of consent against the will of the person concerned can, however, be ordered if the court finds, as evidenced by an expert opinion, that the person concerned cannot form a free will.[126] No excessive requirements are to be placed on the ability of the person concerned to understand; however, the adult must be able to intellectually grasp the ground, meaning and consequences of the measure, which presupposes that they are essentially able to correctly identify their deficits.[127] If there is no free will, one can still speak of a so-called natural will, i.e. a will related to the task, which does not have to be freely formed. This natural will is sufficient, for example, to apply for custodianship in accordance with § 1814 (4) 1st s. BGB.[128]

Moreover, if the adult is solely affected by physical impairments and is still able to express their will, the custodianship may only be ordered at the adult's request (§ 1814 (4) 2nd s. BGB).

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:
a. a requirement of legal representation of the adult;
b. availability of legal aid;
c. participation of family members and/or of vulnerable adults' organisations or other CSO's;
d. requirement of a specific medical expertise / statement;
e. hearing of the adult by the competent authority;
f. the possibility for the adult to appeal the order.

The procedure regarding the custodianship is initiated *ex officio* by the custodianship court or by application of the adult to the court (§ 1814 (4) 1st s. BGB).[129] In general, the procedure follows the same legal provisions as the ordering of a reservation of consent as these apply to both measures (see 13.), but with some further particularities: The adult participates in the proceedings irrespective of their capacity to contract (§§ 274 (1) no. 1, 275 (1) FamFG) and can appoint a lawyer as a representative in the proceedings (for details see 13.). If no legal representative

[126] Cf. BGH (Federal Court of Justice), 11.01.2023 – XII ZB 277/22, *FamRZ* 2023, 725; BGH, 22.01.2014 – XII ZB 632/12, *NJW-RR* 2014, 772; BGH, 21.11.2012 – XII ZB 114/12, *BeckRS* 2012, 25406, mn. 13.

[127] Cf. BGH (Federal Court of Justice), 22.01.2014 – XII ZB 632/12, *NJW-RR* 2014, 772.

[128] For details see A. JÜRGENS, '§ 1896' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 13; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 23–38.

[129] For details regarding the procedure, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 41–44; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 28–40; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 58–63; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 159–240.

is appointed, according to § 276 (1) 1st s. BGB, the court must, if necessary, appoint a suitable guardian ad litem (for details see 13.).[130] When initiating the proceedings, the court shall inform the adult as appropriately as possible about the tasks of a custodian, the possible course of the proceedings and the costs that may generally result from the appointment of a custodian (§ 275 (2) FamFG). The adult is to be heard by the court (§ 278 (1) 1st s. FamFG) (for details see 13.). In suitable cases, the court will also point out the option of a continuing power of attorney (§ 278 (2) 2nd s. FamFG), by which the order for custodianship may be averted. An expert opinion on the necessity of the measure, i.e. custodianship, must be obtained in principle (§ 280 (1) 1st s. FamFG) (see 13.). According to § 281 (1) FamFG, however, a medical certificate is sufficient instead of an expert opinion if the adult applied for custodianship, they waived the expert opinion and such would be disproportionate. In addition, there is the option of using existing expert opinions on the determination of the need for long-term care (§ 282 FamFG). Pursuant to § 279 (1) and (3) FamFG, other parties and, to a limited extent at the adult's request, persons close to the vulnerable adult may also be heard (for details see 13.). The competent custodianship authority must be heard prior to an order for custodianship (§ 279 (2) FamFG). As part of its investigation *ex officio* pursuant to § 26 FamFG, the court may have to hear other persons. The order for the custodianship is issued by the custodianship court (§§ 38, 286 (1) and (3) FamFG) and becomes effective pursuant to § 287 (1) FamFG upon notification to the custodian (for details see 13.). The adult may appeal against the order in accordance with §§ 58–69 and in accordance with §§ 70–75 FamFG.

The court must decide at the latest seven years after ordering custodianship whether it is to be revoked or extended (§§ 294 (3), 295 (2) FamFG). A shorter period may also be determined in the initial order (§ 286 (3) FamFG). If the measure has been ordered against the declared will of the adult, a decision as to whether to extend it for the first time must be taken after no more than two years (§ 295 (2) 2nd s. FamFG).

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

All parties must be notified of all court decisions, i.e. the vulnerable adult and the other parties (§ 41 (1) FamFG).[131] The competent custodianship authority must always be notified of the decision to appoint a custodian or of a reservation of consent (§ 288 (2) 1st s. FamFG). Pursuant to § 288 (1) FamFG, the court may

[130] With regard to sterilisation, medical measures and accommodation cases, see §§ 297 (5), 298 (2) and 317 FamFG.

[131] For details, see G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 62; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 211–213.

refrain from disclosing the reasoning for an order to the vulnerable adult concerned if, according to medical testimony, this is necessary in order to avoid considerable detriment to their health. Under these conditions, the expert opinion may also be withheld from the person concerned. Where this possibility is used, that is only in exceptional cases, particular attention must be paid to proportionality and milder means, such as a careful and empathetic explanation of the reasons addressed to the vulnerable adult, since this is a serious encroachment on the rights of the adult.[132]

In the cases of §§ 308–311 FamFG and under the prerequisites specified therein, the court informs other bodies, for example courts or authorities, of the decision.

Appointment of representatives/support persons

23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:
a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?
b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?
c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?
d. what are the safeguards as to conflicts of interests at the time of appointment?
e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?
f. is a person obliged to accept appointment as representative/support person?

According to § 1816 (1) BGB, the custodianship court appoints a custodian who is suitable to legally take care of the affairs of the vulnerable adult for which the custodianship has been ordered by the court. In particular, the custodian must act in accordance with the stipulations of § 1821 BGB (see 16. and 25.), and they must maintain personal contact with the vulnerable adult to the extent necessary. The assessment of whether a particular person is suitable as a custodian of a concrete person concerned requires a prognosis.[133] Regarding the suitability of the person, the Federal Court of Justice considers, among other things, intellectual and

[132] Critically A. SCHMIDT-RECLA, 'FamFG § 288' in T. RAUSCHER (ed), *Münchener Kommentar zum FamFG*, 3rd ed., C.H. Beck, Munich 2019, mn. 3–4.
[133] Cf. BGH (Federal Court of Justice), 30.09.2015 – XII ZB 53/15, *NJW-RR* 2016, 1, 2.

social skills, mental and physical condition and personal circumstances, e.g. geographical distance from the vulnerable adult, occupational workload or financial circumstances. In addition, existing family or other relationships with the vulnerable adult are taken into account, as well as special knowledge or attitudes to issues relevant to the performance of the tasks of a custodian.[134] An adult who is incapable of contracting, a minor or a person subject to custodianship themself is probably not suitable.[135] Suitability is particularly lacking if considerable conflicts of interest can be identified or if there is a concrete risk of abuse of an existing relationship of trust with the vulnerable adult by the potential custodian, e.g. the doctor or lawyer of the person concerned.[136] Pursuant to §§ 11 (1) 2nd s. no. 2, 12 (1) BtOG, the custodianship authority must propose a suitable custodian to the court and give reasons for this proposal.

Any wishes of the vulnerable adult regarding a specific person who should or should not be appointed as custodian must be complied with according to § 1816 (2) BGB, unless the person is not suitable.[137] Wishes expressed by the vulnerable adult prior to the initiation of custodianship proceedings are to be followed unless the adult clearly does not wish to adhere to them. These wishes can be laid down in a custodianship directive (§ 1816 (2) 4th s. BGB) (see 1., 32.–49.). The incapacity to contract is irrelevant in this respect.[138]

If no one is suggested by the vulnerable adult or if the suggested person cannot be appointed, the family relationships, in particular with spouses, parents or children,[139] as well as other personal relationships, must be taken into account when selecting the custodian in accordance with § 1816 (3) BGB. It is a selection decision of the custodianship court. In 2021, the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) clearly stated that, due to the protection of Art. 6 (1) GG, family members are to be given *preferential consideration* at least if there

---

[134] Cf. BGH (Federal Court of Justice), 30.09.2015 – XII ZB 53/15, *NJW-RR* 2016, 1, 2; see also A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 34.

[135] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 127–28; A. JÜRGENS, '§ 1897' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019, mn. 7.

[136] Cf. BT-Drs. 19/24445, 237.

[137] Cf. BGH (Federal Court of Justice), 01.03.2023 – XII ZB 285/22, *NJW-RR* 2023, 782, 784; BGH, 18.08.2021 – XII ZB 151/20, *FamRZ* 2021, 1822; BGH, 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1014; for details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 150–53 (with further references); A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 24–32.

[138] Cf. BGH (Federal Court of Justice), 01.03.2023 – XII ZB 285/22, *NJW-RR* 2023, 782, 784; BGH, 18.08.2021 – XII ZB 151/20, *FamRZ* 2021, 1822; BGH, 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1014; N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 17; A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 24.

[139] See BVerfG (Federal Constitutional Court), 20.03.2006 – 1 BvR 1702/01, *NJW-RR* 2006, 1009; BGH (Federal Court of Justice), 31.05.2017 – XII ZB 550/16, *NJW* 2017, 2622.

is an *actual* closer bond by family ties.[140] Here, too, the risk of conflicts of interest under § 1816 (3) BGB must be taken into account.[141] A person who is in a dependent relationship or other relationship with a provider of institutions or services active in the care of the adult may not be appointed as custodian unless there is no concrete risk of conflict of interest in the individual case (§ 1816 (6) BGB).

Priority is given to non-professional custodianship by natural persons as voluntary custodians.[142] These should either have a personal or family relationship with the adult (so-called relative custodians (*Angehörigenbetreuer*))[143] or be connected to a custodianship association or authority (§ 1816 (4) BGB, see also the definition in § 19 (1) BtOG).[144] The quality of the voluntary custodianship is to be ensured by the connection to a custodianship association.[145] For example, the voluntary custodian is supposed to participate in introductory and further training events and to be supported by the custodianship association (§ 15 (2) BtOG). In addition, § 21 BtOG states general criteria of suitability and reliability for the appointment of a voluntary custodian.[146]

According to § 1816 (5) 1st s. BGB, as a secondary option, a professional custodian may be appointed (defined in § 19 (2) BtOG). Professional custodians must be registered and prove their personal suitability, reliability and expertise as a prerequisite (§ 23 (1) BtOG).[147] According to the legislator, the subsidiarity to voluntary custodianship also applies in principle if the vulnerable adult wishes to appoint a professional custodian; however, this may be dispensed with in individual cases in order to take sufficient account of the vulnerable adult's right to self-determination.[148] Regarding a professional custodian, the actual choice of the person depends on the individual's workload (§ 1816 (5) 2nd s. BGB).[149]

---

[140] Cf. BVerfG (Federal Constitutional Court), 31.03.2021 – 1 BvR 413/20, *NJW* 2021, 2355.

[141] See N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 17.

[142] On the guiding principle of voluntary custodianship, see BT-Drs. 19/24445, 238; see also BGH (Federal Court of Justice), 22.01.2020 – XII ZB 329/19, *FamRZ* 2020, 628; BGH, 11.07.2018 – XII ZB 642/17, *NJW* 2018, 3385; A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 6.

[143] See T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 168–69.

[144] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 170–73.

[145] See BT-Drs. 19/24445, 238–39; V. MATTA et al., *Qualität in der rechtlichen Betreuung*, Bundesanzeiger Verlag, Cologne 2017, pp. 565–67 (Handlungsempfehlung 8).

[146] Cf. BT-Drs. 19/24445, 368; for details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 162–66.

[147] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 175–202.

[148] See BT-Drs. 19/24445, 239 with regard to BGH (Federal Court of Justice), 11.07.2018 – XII ZB 642/17, *NJW* 2018, 3385: for details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 148; A. SCHNEIDER, 'Die Neuregelung des Betreuungsrechts' *FamRZ* 2020, 1796, 1799.

[149] Cf. BT-Drs. 19/24445, 239–40; for details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 203.

The choice of the custodian is not limited to natural persons. Thus, according to § 1818 BGB, a custodianship association or a custodianship authority can also be appointed. However, the custodianship association can only be appointed at the request of the vulnerable adult or in the case that the adult cannot be adequately cared for by other voluntary or professional custodians, and if the association agrees (§ 1818 (1) BGB). Finally, the custodianship authority can only be appointed if the adult cannot be adequately cared for by a custodianship association either (§ 1818 (4) 1st s. BGB) – that is, when all other options are ruled out. The custodianship association and the custodianship authority assign the tasks to individual persons.[150] The vulnerable adult's suggestions are to be complied with unless important reasons oppose this (§ 1818 (2) 1st and 2nd s., (4) BGB).

If the affairs of the vulnerable adult can be better managed in this way, several custodians can be appointed to whom the custodianship court assigns individual areas of responsibility (§ 1817 (1) BGB). Several custodians can also be appointed for the same area of responsibility, who can then in principle only act jointly. However, the court can order otherwise and in the event of danger the custodians can act individually (§ 1817 (3) BGB). The law does not (or not any longer) contain any further rules for the management of custodianship by more than one custodian. Only the general means of supervision by the court remain (see 27.).[151]

As a substitute for the appointed custodian, i.e. as a second custodian who supports and represents the vulnerable adult independently of the first custodian, the court can appoint a 'custodian in case of hindrance' (*Verhinderungsbetreuer*) according to § 1817 (4) BGB (also as a precautionary measure) if the first custodian is prevented from acting for factual reasons, such as illness.[152] If the custodian is prevented for legal reasons, e.g. due to a prohibition of representation resulting from a conflict of interest pursuant to §§ 181, 1824 BGB, the custodianship court appoints a 'supplementary custodian' (*Ergänzungsbetreuer*) pursuant to § 1817 (5). For the decision on consent to sterilisation, a so-called 'sterilisation custodian' (*Sterilisationsbetreuer*) must always be appointed as a special custodian (§ 1817 (2) BGB). This decision may not be assigned to a custodianship association or authority (§ 1818 (5) BGB). Outside of the appointment of a custodian in case of hindrance or the appointment of a supplementary or sterilisation custodian, several professional custodians are not to be appointed (§ 1817 (1) 3rd s. BGB).

The selected person is obliged to accept appointment as custodian (§ 1819 BGB). However, this is subject to the condition that the person can reasonably be

[150] On the relationship between the institution (so-called legal custodian (*Legalbetreuer*)) and the individual person (so-called real custodian (*Realbetreuer*)), cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 215–19.

[151] Critically T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 279–81.

[152] See already the recommendations before the reform V. MATTA et al., *Qualität in der rechtlichen Betreuung*, Bundesanzeiger Verlag, Cologne 2017, pp. 565 (Handlungsempfehlung 6) and 568 (Handlungsempfehlung 10).

expected to take over the custodianship, taking into account their family, professional and other circumstances. An appointment may only be made when the person has declared that they are ready to take over. The obligation to accept the appointment thus only has the character of an appeal.[153] Employees of a custodianship association or a custodianship authority, so-called association custodians (*Vereinsbetreuer*) or authority custodians (*Behördenbetreuer*) (§ 1819 (3) BGB), may only be appointed with the consent of the institution.

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

The custodianship order does not affect the legal capacity of the adult.
(For the reservation of consent, see 9.)

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:
a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:
• property and financial matters;
• personal and family matters;
• care and medical matters;
b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
c. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?
d. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?
e. is there any right to receive remuneration (how and by whom is it provided)?

According to § 1815 BGB, the court assigns specific areas of responsibility to the custodian and thus determines the scope of the custodianship. An area must only be assigned if and to the extent that its *legal administration by the custodian* is necessary (§ 1815 (1) 3rd s. BGB).[154] In order for the custodian to be allowed to

[153] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 157.
[154] Cf. BGH (Federal Court of Justice), 19.04.2023 – XII ZB 462/22, *NJW-RR* 2023, 853.

make a certain group of – particularly intrusive – decisions, they must be explicitly assigned to the custodian (§ 1815 (2) BGB).[155] The appointment of a custodian for 'all matters'[156] is impermissible after the law reform (§ 1815 (1) BGB, see also Art. 229 § 54 (3) EGBGB).[157] However, there will still be custodianships in the future that cover almost all matters; but the areas of responsibility must then be determined individually (§ 1815 (1) 2nd s. BGB).[158] Thus, the principle of necessity is emphasised.

Within this scope, the appointed custodian carries out all activities that are necessary to *legally* take care of the affairs of the person under custodianship according to § 1821 (1) 1st s. BGB. § 1821 BGB is the centrepiece of the most recent reform and the new 'Magna Charta' of custodianship law, which is intended to comply with the requirements of Art. 12 (2) and (3) CRPD, in particular due to this provision.[159] The custodian can represent the vulnerable adult in the area of responsibility assigned to them (§ 1823 BGB), but should then act in accordance with the wishes and (presumed) will of the vulnerable adult (§ 1821 (2) to (4) BGB).[160] On the one hand, if the person concerned is not capable of contracting (§§ 104 no. 2, 105 BGB) (see 14.), only the custodian can make legal declarations representing the vulnerable adult. On the other hand, if the person concerned has capacity to contract themself and no reservation of consent has been ordered (see 8.), the custodian acts in addition to and as support for the vulnerable adult. In this event, the custodian – in accordance with the principle of necessity – supports the adult in their own decision-making, i.e. primarily in taking care of their legal affairs autonomously (§ 1821 (1) 2nd s. and (6) BGB).[161] Priority is therefore given to supported decision-making by the vulnerable adult. The custodian may only represent the person concerned to the extent absolutely necessary, as has been emphasised even more strongly since 1 January 2023 under § 1821 (1) 2nd s. BGB.[162]

---

[155] See A. SCHNEIDER, 'Bestimmungsbefugnisse des Betreuers im Lichte der Reform des Betreuungsrechts (insbesondere Aufenthalts- und Umgangsbestimmung)' FamRZ 2022, 1, 3–4; also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 105–117.

[156] See BGH (Federal Court of Justice), 13.05.2020 – XII ZB 61/20, *NJW-RR* 2020, 1073; BGH, 10.06.2020 – XII ZB 25/20, *NJW-RR* 2020, 1009.

[157] Cf. BT-Drs. 19/24445, 234.

[158] Cf. BT-Drs. 19/24445, 234; for details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 99–104; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1014.

[159] Cf. BT-Drs. 19/24445, 249; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 244.

[160] See also the decision of the BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814.

[161] Cf. BT-Drs. 19/24445, 251; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1015; on the principle of support, see V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 9.

[162] It should be noted that representation by the custodian according to the wishes and the (presumed) will of the adult is also to be regarded as supported decision-making.

Nevertheless, the custodian has the power to represent the vulnerable adult vis-à-vis third parties in any case, also if this is not necessary or even against the will of the person concerned. The representation is then effective, but may constitute a breach of duty of the custodian (for the possible consequences, see 27.). This can lead to contradictory legal transactions by the custodian and the vulnerable adult.[163] An exception to the effectiveness of the representation for the vulnerable adult according to German legal doctrine is the abuse of the power of representation, i.e. in particular the deliberate cooperation of the custodian and the business partner to the detriment of the vulnerable adult.[164]

Regarding property and financial matters, the aforementioned applies in principle. *If necessary*, the custodian may act as a representative. Pursuant to § 1824 BGB, representation by the custodian is excluded in legal transactions involving certain persons, e.g. the spouse, children or parents of the custodian. The idea of this provision is that conflicts of interest are particularly likely in those cases.[165] In addition, regulations on legal transactions requiring the approval of the custodianship court must be observed (see 28.). A vulnerable adult under custodianship who is not incapable of contracting (§§ 104 no. 2, 105 BGB) (see 14.) and for whom no reservation of consent has been ordered (see 9.) is capable of taking legal action (§ 53 (1) ZPO) unless they are represented by a custodian who declares that they alone will conduct the litigation (§ 53 (2) BGB).[166]

In personal and family matters, it strongly depends on the individual case. With regard to highly personal affairs, the vulnerable adult cannot be represented even if they lack capacity to contract (cf. 9. and 14.).[167]

In care and medical matters, with regard to the financial side, the general rules outlined above apply. Regarding the vulnerable adult's legal interest, the following applies: As long as the vulnerable adult is capable of giving their consent *sui generis* called *Einwilligung* (cf. 9. and 14.) and can thus declare themself, the custodian cannot make a decision on consent to interventions in the physical integrity of the vulnerable adult, e.g. operation or other medical treatment. If the adult is no longer able to make their own decisions, an existing living will[168] must first be

---

[163] For details, see A. SCHNEIDER, 'BGB § 1902' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 21.

[164] For details, see A. SCHNEIDER, 'BGB § 1902' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 16–17.

[165] For details, see G. VON CRAILSHEIM, 'BGB § 1795' in A. JÜRGENS (ed), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; A. SPICKHOFF, 'BGB § 1795' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

[166] For details, see P. GOTTWALD, 'Die neue Prozessfähigkeit bei rechtlicher Betreuung' *FamRZ* 2022, 331–334; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1017.

[167] For details, see A. SCHNEIDER, 'BGB § 1902' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 25–46.

[168] For details, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 25; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 69.

complied with (§§ 1827 (1), 630d (1) 2nd s. BGB), which is to be enforced by the custodian. If such a living will has not been made or does not cover the situation, the custodian must identify the wishes of the vulnerable adult or, secondarily, their presumed will and decide according to this criterion (§ 1827 (2) BGB). They can then consent on behalf of the person concerned (§ 630d (1) 2nd s. BGB). Provisions on the court's approval exist for particularly dangerous medical treatments (§ 1829 BGB), for sterilisation (§ 1830 BGB), for accommodation and measures involving deprivation of liberty (§ 1831 BGB) and for compulsory medical measures (§ 1832 BGB) (see 28.).

Pursuant to § 1821 (2) BGB, the wishes of the person under custodianship are central criterion for decision-making.[169] The custodian must carry out their duties in such a way that the vulnerable adult can organise their life according to their wishes. This also applies to wishes expressed by the adult before the appointment of the custodian, unless they do not wish to adhere to them. The custodian must identify the wishes and comply with them. However, according to § 1821 (3) no. 1 BGB, this does not apply if either the person or the property of the vulnerable adult under custodianship would be significantly endangered by compliance with the wishes.[170] But even then, the custodian may only not follow the wishes if the vulnerable adult cannot recognise the danger due to their illness or disability or cannot act according to this insight. Furthermore, the custodian must not comply with the wishes if it is unreasonable for them to do so (§ 1821 (3) no. 2 BGB), e.g. the wish to engage in unlawful conduct. This ultimately means, *e contrario*, that the wish of the vulnerable adult to endanger themself must be complied with if this wish is based on free will and compliance is reasonable for the custodian. Again, the vulnerable adult has the right to harm themself on their own responsibility. Here, the reformed law abandons the notion of the 'best interests' of the person under custodianship.

If the wishes cannot be identified, or if the custodian may not comply with them in accordance with § 1821 (3) no. 1 BGB, the presumed will of the vulnerable adult must be determined and given effect as a secondary criterion.[171] § 1821 (4) BGB stipulates that earlier statements, ethical or religious views and other personal values of the vulnerable adult are to be taken into account for this purpose. Points of reference can be the statements of relatives and confidants (§ 1821 (4) 3rd s. BGB).

---

[169] For details, see BT-Drs. 19/24445, 249–53; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 248–64; cf. the decision of the BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814.

[170] See BT-Drs. 19/24445, 252–53; critically, among others, C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204, 208; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 257–61; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1015.

[171] For details, see BT-Drs. 19/24445, 253–55; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 265–666.

According to § 1821 (5) BGB, the custodian must regularly talk with the vulnerable adult about their affairs and get a first-hand impression of them. This is also necessary under the maxim of the wishes and, secondarily, the presumed will, in order to adequately identify them.[172]

Pursuant to § 1822 BGB, the custodian is obliged to provide information about the personal circumstances of the vulnerable adult to close relatives and confidants to the extent that this is compatible with § 1821 (2) to (4) BGB, i.e. in principle according to the wishes and the (presumed) will of the vulnerable adult, and is reasonable for the custodian.[173]

Furthermore, the custodianship court must be informed by the custodian upon request (§ 1864 (1) BGB). According to § 1864 (2) BGB, without request, the custodian must immediately report any *substantial* changes in the vulnerable adult's personal or economic circumstances, i.e. in particular those requiring the intervention of the custodianship court. In addition, according to § 1863 BGB, the custodian must report to the custodianship court, initially after appointment and subsequently at least annually, on the personal circumstances of the person under custodianship. The initial report is not mandatory for custodians with family or personal relationships. Annual reports on asset management must be submitted if this is part of the custodian's responsibilities (§ 1865 BGB).[174]

A voluntary custodian can demand reimbursement of their expenses, a lump sum as an expense allowance or remuneration according to §§ 1875–1879 BGB. They are only entitled to remuneration if the custodianship court grants it because of the scope or difficulty of the matters taken care of and if the vulnerable adult is not destitute. For professional and other custodians, the Law on the Remuneration of Guardians and Custodians (*Gesetz über die Vergütung von Vormündern und Betreuern*; VBVG) (in conjunction with § 1875 (2) BGB) regulates remuneration and reimbursement of expenses.

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:
a. if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?
b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

---

[172] Cf. BT-Drs. 19/24445, 250.

[173] See T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 268–70.

[174] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 297–315, 375–84.

(See 23.)

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:
a. what competent authority is responsible for the supervision?
b. what are the duties of the supervisory authority in this respect?
c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;
d. describe the financial liability of the representative/support person for damages caused to the adult;
e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.

The custodianship court (see 11.) is responsible for the supervision of state-ordered measures in accordance with § 1862 (1) BGB. First of all, the court advises the custodian about their rights and duties; in particular, it informs the voluntary custodian and points out sources of support (§ 1861 BGB). Furthermore, it has to supervise the custodian and the compliance with the custodian's duties according to § 1821 (2) to (4) BGB (§ 1862 (1) BGB). The aim is to ensure the implementation of Art. 12 (4) CRPD.[175] Central to the supervision are the criteria that also guide the custodian, namely the wishes and, secondarily, the presumed will of the person under custodianship. The court must in principle hear the vulnerable adult if there is any indication that the court might have to intervene (§ 1862 (2) BGB). Pursuant to § 1862 (3) BGB, the custodianship court may direct commands and prohibitions to the custodian in the event of breaches of duty and, in particular, impose a penalty payment if the custodian fails to comply. If necessary, the custodian is to be dismissed in accordance with § 1868 (1) BGB. The prerequisite is that their suitability is not (or no longer) guaranteed or that there is another important reason. If the requirements for custodianship continue to be met, a new custodian is to be appointed with the dismissal (§ 1869 BGB).[176]

The custodian is liable to the person under custodianship for the damage resulting from their breach of duty, unless they can exculpate themself (§ 1826

[175] Cf. BT-Drs. 19/24445, 141.

[176] For details, see C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204, 211–12; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 282–96.

BGB).[177] Furthermore, the custodian is liable to third parties pursuant to § 832 BGB if damage is due to the behaviour of the vulnerable adult that fell under the supervision of the custodian. The prevailing opinion assumes such a duty of supervision in individual cases.[178]

28. Describe any safeguards related to:
a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;
b. unauthorised acts of the adult and of the representative/support person;
c. ill-conceived acts of the adult and of the representative/support person;
d. conflicts of interests
Please consider the position of the adult, contractual parties and third parties.

Decisions of the vulnerable adult who is in principle capable of contracting can only be restricted by a reservation of consent in relation to third parties. A legal transaction by the adult then depends on the consent of the custodian (§ 1825 BGB) (see 8.–13.).

In numerous cases, the custodian, in turn, must observe specific safeguards and, in particular, obtain the approval of the custodianship court in order to be able to act as a representative. On the one hand, this applies to exceptional representation in the highly personal sphere of the vulnerable adult, e.g. divorce or annulment of marriage (§ 125 (2) 2nd s. FamFG); and serious interventions in legal interests, i.e. in particular risky medical measures (or omissions), measures that deprive the vulnerable adult of their liberty, or acts relating to their residential space. On the other hand, several regulations and safeguards apply in the area of asset management. These safeguards are necessary in view of the substantial legal interests of the vulnerable adult that are protected, but in many cases also with regard to conflicts of interest on the part of the custodian. Moreover, in all these cases, according to § 1821 (2) to (4) BGB, the custodian must make their decisions using the wishes and the (presumed) will of the vulnerable adult as the yardstick – this should be emphasised here.

Consent to life-threatening medical measures or those which carry the risk of serious and prolonged damage to health may only be given by the custodian if the vulnerable adult is not able to do so themself (cf. § 1827 BGB, see 25.), and then only with approval of the custodianship court, unless there is danger in postponement (§ 1829 (1) BGB). The same applies to an omission or revocation of consent by the custodian if the measure is medically indicated (§ 1829 (2) BGB). The

[177] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 275–78 and 282–315.

[178] Cf. G. SPINDLER, 'BGB § 832' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 7; G. WAGNER, 'BGB § 832' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 17.

court's approval must be based on the will of the person under custodianship (§ 1829 (3) BGB). However, the approval requirement does not apply if the doctor and custodian agree that the act is in accordance with the will of the vulnerable adult (§ 1829 (4) BGB in conjunction with § 1827 BGB).[179]

Sterilisation – as an *ultima ratio* means – is subject to further preconditions and is to be handled extremely restrictively. An (additional) custodian must be specifically appointed by the custodianship court for the area of responsibility of sterilisation (§ 1817 (2) BGB, *Sterilisationsbetreuer*). Moreover, according to § 1830 (1) BGB, the natural will (see 14.) of the person concerned must not be opposed, they must not be capable of giving consent (i.e. *Einwilligung*, see 9., 14. and 25.) *in the long term*, and there must be a *concrete* risk of pregnancy of the person concerned – or of the partner – which cannot be prevented in any other reasonable way and which would endanger the life or the physical or mental health of the pregnant woman. Furthermore, the approval of the custodianship court is necessary (§ 1830 (2) BGB). Procedural guarantees (§ 297 FamFG) ensure the prohibition of forced sterilisation.[180] Although only a very small number of sterilisations are approved each year (2016: 23 approved and 8 not approved)[181], the legislator did not decide to ban sterilisation for adults who are incapable of giving consent,[182] even in the most recent reform.[183] Nevertheless, however, especially in the case of contraception the principle of necessity should be emphasised (for the three-month injection see 14.).[184]

Special requirements and the reservation of approval by the custodianship court are also in place for accommodation and other measures (but limited to those measures in hospitals, nursing homes, etc.) that involve deprivation of liberty (§ 1831 BGB). Such an accommodation or measure by the custodian is only permissible if and as long as it is necessary to prevent a considerable self-endangerment (§ 1831 (1) no. 1, (3) and (4) BGB) or to perform a medical measure (no. 2). The reason for the vulnerable adult's self-endangerment or refusal to consent to the accommodation or the fixation must lie in their mental illness or mental or

---

[179] For details, see A. JÜRGENS, 'BGB § 1904' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; G. MÜLLER-ENGELS, 'BGB § 1904' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022; A. SCHNEIDER, 'BGB § 1904' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

[180] For details, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 29; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 67; A. JÜRGENS, 'BGB § 1905' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; G. MÜLLER-ENGELS, 'BGB § 1905' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022; A. SCHNEIDER, 'BGB § 1905' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

[181] Cf. N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 29.

[182] It should be noted that the sterilisation of minors is prohibited under § 1631c BGB.

[183] Critically T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 321.

[184] Cf. C.-M. LEEB and M. WEBER, 'Die Dreimonatsspritze zur Schwangerschaftsverhütung bei betreuten Frauen' *BtPrax* 2015, 45–48.

psychological disability due to which they *cannot form a free will*. The accommodation or measure requires the approval of the custodianship court, unless there is danger in postponement (§ 1831 (2) and (4) BGB).[185]

Finally, the considerable encroachment on the rights of the vulnerable adult associated with medical measures being carried out against their natural will (see 14.), i.e. compulsory medical measures, is regulated under § 1832 BGB.[186] According to § 1832 (1) no. 1–3 and 5–6, (3) BGB, the custodian's consent to such a compulsory medical measure is only permissible if and as long as this is necessary because of an imminent considerable health danger that cannot be averted by any other reasonable means, free exercise of the vulnerable adult's will is not possible due to mental illness or mental or psychological disability, the measure complies with the vulnerable adult's will, which must be identified and respected in accordance with § 1827 BGB and the expected benefit clearly outweighs the expected impairment.[187] Furthermore, a compulsory medical measure is only permissible if a serious attempt has been made beforehand to convince the vulnerable adult of the necessity of the medical measure (§ 1832 (1) no. 4 BGB),[188] and compulsory outpatient treatment is not possible (§ 1832 (1) no. 7 BGB).[189] Ultimately, the approval of the custodianship court is required (§ 1832 (2) BGB).[190]

Further safeguards exist in relation to the abandonment of residential space of the person under custodianship (§ 1833 BGB). In particular, the approval of the

---

[185] For details, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 30 and 32; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 66; R. MARSCHNER, 'BGB § 1906' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; G. MÜLLER-ENGELS, 'BGB § 1906' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022; A. SCHNEIDER, 'BGB § 1906' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

[186] For the development of this provision, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 17 mn. 31; see also BVerfG (Federal Constitutional Court), 26.07.2016 – 1 BvL 8/15, *NJW* 2017, 53; BVerfG, 14.07.2015 – 2 BvR 1549/14, *FamRZ* 2015, 1589; BGH (Federal Court of Justice), 01.07.2015 – XII ZB 89/15, *FamRZ* 2015, 1484; BGH, 20.06.2012 – XII ZB 99/12, *NJW* 2012, 2967; BGH, 05.12.2012 – XII ZB 665/11, *NJW-RR* 2013, 321; furthermore, on the compulsory medical treatment of persons placed in a prison for forensic psychiatric treatment, see BVerfG, 23.03.2011 – 2 BvR 882/09, *NJW* 2011, 2113; BVerfGE, 12.10.2011 – 2 BvR 633/11, *NJW* 2011, 3571.

[187] See BGH (Federal Court of Justice), 17.01.2018 – XII ZB 398/17, *FamRZ* 2018, 525.

[188] See BGH (Federal Court of Justice), 12.09.2018 – XII ZB 87/18, *NJW-RR* 2018, 1477; BGH, 13.09.2017 – XII ZB 185/17, *NJW* 2017, 3714; see also J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 62.

[189] See BVerfG (Federal Constitutional Court), 02.11.2021 – 1 BvR 1575/18, *NJW* 2021, 3590; BVerfG, 07.08.2018 – 1 BvR 1575/18, *FamRZ* 2018, 1599.

[190] For details, see J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 65; R. MARSCHNER, 'BGB § 1906a' in A. JÜRGENS (eds), *Betreuungsrecht*, 6th ed., C.H. Beck, Munich 2019; G. MÜLLER-ENGELS, 'BGB § 1906a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022; A. SCHNEIDER, 'BGB § 1906a' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020.

court is required in certain cases (§ 1833 (3) BGB). Determinations of the vulnerable adult's contact and residence are also regulated specifically in § 1834 BGB.[191]

In addition, numerous provisions ensure the lawful management of the vulnerable adult's assets (§§ 1835–1860 BGB). Some key elements should be highlighted here: [192] If the custodian has been assigned the area of responsibility of managing the assets of the vulnerable adult, a list of assets must be drawn up (§ 1835 BGB). The assets of the custodian and the vulnerable adult must in principle be strictly separated and the custodian may not use the vulnerable adult's assets for their own benefit (§ 1836 BGB), specific exceptions are further defined. The custodian's asset management is to be based primarily on the wishes or the (presumed) will of the vulnerable adult and should be guided by the principle of the greatest possible autonomy of the person concerned (§§ 1821, 1838 (1) BGB). Unless the wishes or the (presumed) will of the vulnerable adult stipulate otherwise, §§ 1839–1843 apply (§ 1838 (1) 2nd s. BGB). Provided that wishes or (presumed) will regarding asset management deviating from this can be determined in the individual case, only supervision by the custodianship court takes place in order to avoid endangerment within the meaning of § 1821 (3) no. 1 BGB (cf. §§ 1838 (2), 1862 BGB). According to §§ 1839 and 1841 BGB, a distinction is made between money for current expenses (so-called disposal money (*Verfügungsgeld*)) and investment money (*Anlagegeld*). In principle, investment money, securities and, if applicable (in the case of special asset protection according to § 1844 BGB), valuables are to be kept in safe custody by a credit institution or (in case of § 1844 BGB) a depositary in such a way that disposal is only possible with the approval of the custodianship court (so called 'locking agreement' (*Sperrvereinbarung*), § 1845 BGB). Pursuant to §§ 1846, 1847 BGB, the custodian has special duties of notification to the custodianship court with regard to money and asset management as well as the vulnerable adult's business. Of particular importance are, furthermore, the provisions on legal transactions requiring approval by the custodianship court (§§ 1848–1854 BGB). If the custodian wishes to invest investment money in a manner other than in an investment account, approval by the custodianship court is necessary (§ 1848 BGB). In addition, such approval is required for certain dispositions of rights and securities (§ 1849 BGB), legal transactions concerning real estate and ships (§ 1850 BGB), legal transactions under inheritance law (§ 1851 BGB), legal transactions under commercial and corporate law (§ 1852 BGB) and specific other legal transactions (§§ 1853, 1854 BGB). For

[191] For details, see C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204, 209–10; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 324–48.

[192] For details, see C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204, 210–11; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 349–532; C. MÜNCH, 'Reform des Vormundschafts- und Betreuungsrechts: Vermögensverwaltung' *FamRZ* 2020, 1513, 1515–17.

the custodianship court's approval (§§ 1855–1858 BGB), the wishes and the (presumed) will of the vulnerable adult are the decisive guideline (§§ 1862 (1) 2nd s., 1821 (2) to (4) BGB). Certain custodians, such as an appointed parent, child, sibling or spouse of the vulnerable adult, are legally exempt from specific protection provisions, e.g. from the obligation to enter into a locking agreement pursuant to § 1845 BGB. Further exemptions are possible (§§ 1859, 1860 BGB).

Unauthorised acts of the vulnerable adult can only exist in the case of a reservation of consent (see 9.). Acts of the custodian which lack the required approval by the custodianship court in the individual case are pendingly ineffective and can be authorised by the court (§ 1856 (1) BGB). A unilateral legal transaction is void in this case (§ 1858 (1) BGB).

Ill-conceived acts on the part of the adult may make it necessary to order the reservation of consent under the conditions of § 1825 BGB (see 8.–13.). Such acts by the custodian, with a certain frequency or seriousness, may raise doubts about the custodian's suitability, so that the custodian may have to be dismissed under § 1868 (1) BGB. The same applies to ongoing conflicts of interest.

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

The custodianship ends with cancellation by the custodianship court or death of the person under custodianship (§ 1870 BGB). The measure is to be cancelled *ex officio* to the extent that its prerequisites cease to apply (§ 1871 BGB). If they cease to apply only to a specific area of responsibility, the custodian's area of responsibility must be restricted. If custodianship has been ordered at the request of the vulnerable adult, it is to be cancelled or restricted at their request, unless custodianship is necessary against the adult's will (§ 1871 (2) BGB). The effects are governed by §§ 1872–1874 BGB; in particular, the custodian must hand over the assets and documents and, if applicable, prepare a final account. In addition, a final report must be prepared (§ 1863 (4) BGB).[193]

(For the reservation of consent, see 8.)

Reflection

30. Provide statistical data if available.

(See 3.)

[193] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 533–34,558–94.

31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?

(See 67. and 68.)

SECTION IV – VOLUNTARY MEASURES

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.

Voluntary measures particularly serve to recognise the autonomy of the vulnerable adult. The latter can issue powers of attorney in accordance with general provisions of civil law (§§ 164–181 BGB) to take care of their affairs. Through this, they can authorise a self-chosen representative/support person. To the extent that such attorneys can legally take care of the affairs of the vulnerable adult, the appointment of a custodian is in principle not necessary in accordance with § 1814 (3) 2nd s. no. 1 BGB.[194] A precautionary power of attorney in case of need for assistance is called continuing power of attorney[195] (§§ 164–181, 1820 BGB).[196]

Furthermore, it is possible for the vulnerable adult to prepare a so-called custodianship directive, legally defined in § 1816 (2) 4th s. BGB, expressing wishes

[194] However, on the appointment of a custodian despite a continuing power of attorney for different reasons, see BGH (Federal Court of Justice), 15.06.2022 – XII ZB 85/22, *NJW-RR* 2022, 1300; BGH, 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1013; BGH, 15.08.2018 – XII ZB 10/18, *NJW* 2019, 237, 238; BGH, 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702.

[195] As defined in the Recommendation CM/Rec(2009)11: 'A "continuing power of attorney" is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity.'

[196] On continuing powers of attorney, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 38–94; G. HACK and M. SCHARF, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 27–35; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 50–73; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017.

regarding the selection of the custodian or the exercise of custodianship in the case of the appointment of a custodian.[197]

Finally, the adult can specify in a living will for the case of their incapacity to consent (i.e. *Einwilligung*, see 9., 14. and 25.) in writing (§ 126 BGB) whether they consent to or prohibit certain examinations of their state of health, medical treatments or operations that are not yet imminent at the time of the specification (§ 1827 BGB).[198]

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:
a. the existence of specific provisions regulating voluntary measures;
b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.

Specific provisions apply to the custodianship directive and the living will (custodianship directive: §§ 1816 (2), 1818 (1), (2) and (4), 1821 (2), 1838 (1) 1st s. and 1862 (1) 2nd s. BGB; living will: § 1827 as well as § 630d (1) 2nd s. BGB). The (continuing) power of attorney is basically regulated by general civil law provisions on ordinary powers of attorney (§§ 164–181 BGB) as well as by a specific provision in custodianship law (§ 1820 BGB).

All voluntary measures in German law are unilateral acts. However, the (continuing) power of attorney is based on a legal relationship between the granter and the attorney, such as a mandate (§§ 662–674 BGB), a management (§ 675 BGB) or another legal relationship; it may also be a courtesy relationship (*Gefälligkeitsverhältnis*), i.e. without the intention of being legally binding. Much depends on the concrete form of this relationship in the individual case, in particular the attorney's duties, liability and remuneration.[199]

---

[197] On custodianship directives, see W. ROTH, '§ 3 Das Verfahren im Betreuungsrecht' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 178–202; W. ZIMMERMANN, '3. Kapitel Die Betreuungsverfügung' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017.

[198] On living wills, see F. DOMMERMÜHL, '§ 2 Patientenverfügung' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 78 mn. 69; G. MÜLLER-ENGELS, 'BGB § 1901a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 1–29 and 34–37; A. SCHNEIDER, 'BGB § 1901a' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 8–39 and 52–66; W. ZIMMERMANN, '4. Kapitel Die Patientenverfügung' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017.

[199] Cf. M. SCHARF, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020,

34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.

A distinction is made between (continuing) powers of attorney, custodianship directives and living wills (see 32.). Living wills can be combined with powers of attorney or with custodianship directives.[200] While a self-chosen representative/support person with (continuing) power of attorney in principle takes the place of the appointment of a custodian (cf. § 1814 (3) 2nd s. no. 1 BGB), both the attorney and the custodian must respect and give effect to the will of the vulnerable adult expressed in a living will (§ 1827 (1), (3) and (6) BGB). A custodianship directive, on the other hand, is addressed to the custodianship court and the custodian.

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

A (continuing) power of attorney may cover all matters (so-called general power of attorney (*Generalvollmacht*)) or only certain matters (so-called specific power of attorney (*Spezialvollmacht*)) that can be subject to legal representation under German law, in particular property and financial matters. In addition, on the basis of a continuing power of attorney, an attorney may be empowered to make decisions that could also be made by a custodian, in particular decisions on (compulsory) medical measures and accommodation under deprivation of liberty. Highly personal matters, such as entering into marriage, divorce or the drawing up of a will, cannot, in principle, be performed by an attorney; however, there are borderline cases.[201]

A custodianship directive concerns in particular the suggestion of a specific custodian who can then make decisions regarding the affairs of the vulnerable

mn. 186–201; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 151–79.

[200] Cf. F. DOMMERMÜHL, '§ 2 Patientenverfügung' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 37.

[201] For details, see A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 32; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 68–95.

adult within certain limits (see 25.). In the directive, the vulnerable adult can also express their wishes regarding the management of their affairs.

A living will concerns consent to or prohibition of certain examinations of the state of health, medical treatments or interventions.

Start of the measure

Legal grounds and procedure

36. Who has the capacity to grant the voluntary measure?

In case of a continuing power of attorney, the prevailing opinion is that capacity to contract (see 14.) is required for the effective granting as for any other power of attorney.[202] If doubts remain as to the capacity to contract, pursuant to case law, the effective granting is presumed;[203] but these doubts may hinder acceptance by third parties and thus make the appointment of a custodian necessary.[204] With regard to custodianship directives, the requirement of capacity to contract does not apply; neither capacity to contract nor capacity for understanding is required for the effective granting of the latter.[205] For living wills, the capacity for consent *sui generis* called *Einwilligungsfähigkeit* (see 14.) is decisive.[206]

---

[202] Cf. BGH (Federal Court of Justice), 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1013; BGH, 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 44; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 53; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 41; other opinion G. HACK, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 43.

[203] Cf. BGH (Federal Court of Justice), 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1013; BGH, 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702.

[204] Cf. BGH (Federal Court of Justice), 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702.

[205] Cf. BGH (Federal Court of Justice), 14.03.2018 – XII ZB 589/17, *NJW* 2018, 1878; BGH, 19.07.2017 – XII ZB 57/17, *NJW* 2017, 3301; A. SCHNEIDER, 'BGB § 1897' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 24 (with further references); W. ZIMMERMANN, '3. Kapitel Die Betreuungsverfügung' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 366.

[206] Cf. F. DOMMERMÜHL, '§ 2 Patientenverfügung' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 8; G. MÜLLER-ENGELS, 'BGB § 1901a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 19; A. SCHNEIDER, 'BGB § 1901a' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 10.

37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.

With regard to formalities, a living will must be written (§§ 1827 (1), 126 (1) BGB). Furthermore, it must refer to specific[207] measures, i.e. describe a concrete treatment situation and name specific medical measures; however, the requirements for the specificity of a living will must not be overstretched.[208] It is open to legal interpretation.[209] Finally, the living will only constitutes effective consent to the medical measure if the patient was informed by a doctor while still in a state of capacity to consent (§§ 630d (2), 630e (1) and (2) BGB) or if the information is dispensable pursuant to § 630e (3) BGB, e.g. through a waiver expressly declared in the living will; the rejection of a medical measure in a living will, on the other hand, is effective even without prior information.[210]

(Continuing) powers of attorney and custodianship directives in principle do not require any form. A declaration by the vulnerable adult is sufficient. However, regarding (continuing) powers of attorney, the authorisation to consent to risky or life-threatening medical measures or to refrain from or revoke such consent (§ 1829 (1) 1st s. and (2) BGB); to compulsory medical measures (§ 1832 BGB); and to accommodation or other measures that involve deprivation of liberty (§ 1831 BGB) requires that the measure is expressly mentioned and that the power of attorney is granted in writing (§§ 1820 (2), 126 BGB). Furthermore, in certain other matters, e.g. with regard to real estate (§ 29 (1) 1st s. *Grundbuchordnung* GBO)[211], the power of attorney must take the form of a public or publicly certified

[207] See BGH (Federal Court of Justice), 14.11.2018 – XII ZB 107/18, *NJW* 2019, 600; BGH, 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737; BGH, 06.07.2016 – XII ZB 61/16, *NJW* 2016, 3297; BGH, 17.09.2014 – XII ZB 202/13, *NJW* 2014, 3572; see also G. MÜLLER-ENGELS, 'BGB § 1901a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 9–12.

[208] Cf. BGH (Federal Court of Justice), 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1738.

[209] Cf. BGH (Federal Court of Justice), 14.11.2018 – XII ZB 107/18, *NJW* 2019, 600.

[210] For details, see F. DOMMERMÜHL, '§ 2 Patientenverfügung' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 7, 11; A. SCHNEIDER, 'BGB § 1901a' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 12–13 and 18–19; A. SPICKHOFF, 'BGB § 630d' in A. SPICKHOFF (ed), *Medizinrecht*, 4th ed., C.H. Beck, Munich 2022, mn. 10; W. ZIMMERMANN, '4. Kapitel Die Patientenverfügung' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 388–93.

[211] See BGH (Federal Court of Justice), 03.02.2016 – XII ZB 454/15, *NJW* 2016, 1516.

deed. In any case, at least a written form is advisable for evidentiary purposes, while recording by a notary public may also increase acceptance by third parties.[212]

All continuing powers of attorney, living wills and custodianship directives can be registered in the Central Register of Continuing Powers of Attorney (*Zentrales Vorsorgeregister*) (§ 78a BNotO and §§ 1, 9 VRegV). This registration is neither a prerequisite nor proof of effectiveness, but instead serves the purpose of discoverability. For example, the custodianship court is supposed to obtain information on registered continuing powers of attorney or custodianship directives of the vulnerable adult in accordance with § 285 (1) FamFG before appointing a custodian.

38. Describe when and how the voluntary measure enters into force. Please consider:
a. the circumstances under which voluntary measure enters into force;
b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?
c. who is entitled to initiate the measure entering into force?
d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?

With regard to the effectiveness of the (continuing) power of attorney, it depends on the will of the granter as expressed in the power of attorney. It can be directly effective, or it can be made conditional on certain circumstances, such as the granter's inability to take care of their affairs, i.e. possibly a medical declaration of diminished capacity or even a court decision. In the latter case, there are considerable uncertainties, as the fulfilment of the condition can be questioned in many cases. Therefore, there are recommendations not to place the effectiveness of the (continuing) power of attorney under a condition. Thus, it is effective vis-à-vis third parties after it has been issued by the granter. In the relationship between the granter and the attorney, the latter is then to be instructed to make use of the power of attorney only in case of the granter's inability.[213] The custodianship court

[212] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 47; G. HACK, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 13–15 and 41–42; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 46–54.

[213] See G. HACK, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 26–33; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 58–59; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 58–67.

must be informed of such powers of attorney without delay by a person in possession of such a document when custodianship proceedings are initiated (§ 1820 (1) 1st s. BGB). In principle, the revocation of the power of attorney is always possible by the granter who has capacity to contract.[214]

A custodianship directive first takes legal effect when the custodianship court appoints the custodian. The court must then comply with the custodianship directive when selecting the custodian to be appointed, unless the person is unsuitable or the vulnerable adult recognisably does not want to abide by this directive (§ 1816 (2) BGB). In addition, according to § 1821 (2) BGB, the custodian must in principle take the wishes regarding the execution of the custodianship into account as the decisive criterion for their actions, unless the vulnerable adult recognisably does not want to adhere to them or § 1821 (3) BGB applies (see 25.). A custodianship directive must be transmitted to the custodianship court without delay by a person in possession of such a document when the custodianship proceedings are initiated (§ 1816 (2) 4th s. BGB).

Pursuant to § 1827 (1) BGB, the living will records the patient's will and serves to enforce it in the event that examinations of their state of health, medical treatment or operations are imminent and the vulnerable adult is incapable of giving consent *sui generis* (i.e. if they are *einwilligungsunfähig*, (see 14.)). A custodian or an attorney must then give effect to the living will according to the following steps: They examine whether the specifications in the living will correspond to the current life and treatment situation (§ 1827 (1) and (6) BGB). The basis for the decision is a discussion with the attending doctor (§ 1828 (1) and (3) BGB). In case of disagreement between the attending doctor and the custodian/attorney regarding the fact that a *risky* or *life-threatening* medical measure or omission corresponds to the will of the vulnerable adult as laid down in the living will, court approval is necessary (§ 1829 (4) BGB *e contrario* (see 28.)). In addition, in principle, the custodian should give close relatives and other persons of trust the opportunity to make a statement (§ 1828 (2) and (3) BGB). If the stipulations in the living will match the life and treatment situation, the determination in the living will is binding for all parties involved.[215] Against the background of the guarantee of self-determination of the vulnerable adult (Art. 2 (1) GG), it follows from this direct binding effect that in the case that a custodian or attorney does not exist, the living will must nevertheless be observed. Insofar as the vulnerable adult has made a *clear* and, thus, binding decision themself, a custodian is not called upon to make

[214] Cf. A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 56.

[215] Cf. BGH (Federal Court of Justice), 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1738; BGH, 17.09.2014 – XII ZB 202/13, *NJW* 2014, 3572, 3574.

the decision and is therefore not to be appointed for this decision.[216] A living will can be revoked informally at any time by the vulnerable adult (§ 1827 (1) 3rd s. BGB).

Appointment of representatives/support persons

39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:
a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?
b. what are the safeguards as to conflicts of interests?
c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?

By means of the (continuing) power of attorney, both a natural person and a legal person can be authorised to act as a representative. However, it has not been conclusively clarified how a continuing power of attorney in favour of a legal person is to be assessed.[217] The (continuing) power of attorney only prevents the order of custodianship if the attorney can *equally* (*gleichermaßen*) take care of the affairs of the vulnerable adult (§ 1814 (3) 2nd s. no. 1 BGB). Therefore, there are doubts about the possibility of authorising a legal person in particular with regard to personal matters as opposed to financial matters, since a special relationship of trust is necessary for the former. In addition, this legal threshold places certain demands on the person of the attorney. They should have the capacity and suitability[218] to manage the affairs of the granter *equally* to a custodian;[219] which in particular may not be the case if there is a risk of abuse of the power of attorney.[220] However, the reform replaces the wording 'equally good' (*ebenso gut*) with the term 'equally', which is intended to imply that the power of attorney should not have a certain

[216] Cf. W. HINDERMIT, 'Die Patientenverfügung in der notariellen Praxis' *RNotZ* 2022, 1, 12–15; A. SCHNEIDER, 'BGB § 1901a' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 36; reluctant A. SPICKHOFF, 'BGB § 1827' in A. SPICKHOFF (ed), *Medizinrecht*, 4th ed., C.H. Beck, Munich 2022, mn. 17; other opinion G. MÜLLER-ENGELS, 'BGB § 1901a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 29.

[217] Cf. DEUTSCHES NOTARINSTITUT (DNotI), 'Anerkannter Betreuungsverein als Vorsorgebevollmächtigter' *DNotI-Report* 2012, 183–84; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 70; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 137.

[218] Critically, considering the new wording, T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 54.

[219] But see BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 851–52.

[220] Cf. BGH (Federal Court of Justice), 15.06.2022 – XII ZB 85/22, *NJW-RR* 2022, 1300; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 70 (with further references).

'good' quality, but must be comparable to custodianship.[221] The Federal Court of Justice emphasizes that the selection of the authorized attorney is a decision of the granter of the power of attorney, 'which in principle is to be respected even if – when viewed objectively – the matters to be taken care of could possibly be better managed by a custodian'.[222] According to the Court, it must be taken into account that the granter has usually considered the abilities of the selected person. However, the priority of the power of attorney over the appointment of a custodian does not apply if the attorney is in a dependent relationship or other relationship with a provider of institutions or services active in the care of the adult (§ 1814 (3) 2nd s. no. 1 BGB in conjunction with § 1816 (6) BGB).[223] Finally, several attorneys can be appointed simultaneously or as substitutes; for example, the granter may appoint two attorneys for mutual control.[224]

During the measure

Legal effects of the measure

40. To what extent is the voluntary measure, and the wishes expressed within it, legally binding?

(See 38.)

41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

It does not.

Powers and duties of the representative/support person

42. Describe the powers and duties of the representative/support person:
a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:
• property and financial matters;
• personal and family matters;
• care and medical matters?

---

[221] Cf. BT-Drs. 19/24445, 233; but see BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 851–52.

[222] BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 852.

[223] See T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 41–42.

[224] Cf. G. HACK, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 72–82.

b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
c. is there a duty of the representative/support person to inform and consult the adult?
d. is there a right to receive remuneration (how and by whom is it provided)?

With regard to representation by an attorney, the attorney can act in place of the vulnerable adult to the extent that they have been effectively authorised by a (continuing) power of attorney (see 35.); however, regarding medical measures, the attorney can only decide if the vulnerable adult is not capable of giving consent *sui generis* (i.e. if they are *einwilligungsunfähig*, see 14.) (cf. § 1827 (1), (2) and (6) BGB). An effective living will is to be enforced and, subsidiarily, the treatment wishes and the presumed will of the vulnerable adult (in principle, what has been said concerning the custodian applies here, see 25.).

In general, the decision-making of the attorney must be based on the agreement with the granter as well as on their expressed or presumed will[225] (cf. § 1820 (3) no. 2 BGB *e contrario*) – otherwise, protective measures by the custodianship court are possible. Ultimately, the guiding principle of the 'wishes of the vulnerable adult' also applies here (cf. § 1820 (4) no. 1 BGB *e contrario*). The legislator probably assumes that agreements on (continuing) power of attorney have been made which correspond to the principles laid down in § 1821 BGB. The attorney's duties to inform and consult with the granter generally arise from the relationship between the attorney and the granter on which the power of attorney is based, i.e. the mandate, management or other legal relationship (see 33.).[226]

Remuneration depends largely on whether it has been agreed between the granter and the attorney. In principle, there is neither the obligation nor the right to remuneration.[227]

43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:
a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?
b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among

[225] See BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 852.
[226] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 60.
[227] For details, see M. SCHARF, '§ 4 Die Vergütung im Vorsorge- und Betreuungsrecht' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 11–14; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 171–77, 321.

them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

If the vulnerable adult has appointed several attorneys as their representatives by means of (continuing) powers of attorney, a distinction must be made as to whether these can act with individual power of attorney or whether they can only act jointly. Decisive is the determination by the granter. For example, they can assign each attorney an individual area of responsibility with their own power of representation, or prescribe joint action only for important transactions. They can also empower several attorneys individually for the same areas of responsibility, so that each attorney can act alone in these areas. On the other hand, they may also order joint representation for all areas. Here, much is left to the vulnerable adult's decision.[228]

If several attorneys block or obstruct each other and the representation of the granter's interests is thereby concretely impaired, first of all, the granter has to react. If this is not possible, supervisory measures may have to be taken by a monitoring custodian (to be appointed) and the custodianship court (see 45.).[229] If the problems cannot be resolved, the appointment of a custodian for the relevant matters may be necessary.[230]

44. Describe the interaction with other measures. Please consider:
a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?
b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?

According to the principle of necessity laid down in §§ 1814 (3) 2nd s. no. 1, 1815 (1) BGB, a custodian does not have to be appointed for matters that can equally be taken care of by an attorney. However, a power of attorney may only be granted for certain areas of responsibility, while there is also a need for custodianship in other areas. This can lead to the appointment of the custodian for area A, while area B is taken care of by an attorney, so that both act independently of each other. If a custodian is appointed by the custodianship court for tasks for

[228] For details, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 53; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 121–26.

[229] Cf. BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 852.

[230] Cf. BGH (Federal Court of Justice), 31.01.2018 – XII ZB 527/17, *NJW* 2018, 1257; BGH, 30.03.2011 – XII ZB 537/10, *NJW* 2011, 2137.

which the vulnerable adult has validly granted power of attorney to another person, for example because the power of attorney was unknown to the court or there are doubts about the validity of the power of attorney (see 36.), both the attorney and the custodian can perform these tasks individually (dual responsibility).[231] The power of attorney remains effective. However, it can be revoked by the vulnerable adult who has capacity to contract. Under strict conditions, the custodian can also revoke the power of attorney as *ultima ratio* (§ 1820 (5) BGB (see 45.).

Third parties may ask to see the power of attorney or the custodian's certificate (§ 290 FamFG) in order to find out the scope of the power of representation.

Safeguards and supervision

45. Describe the safeguards against:
a. unauthorised acts of the adult and of the representative/support person;
b. ill-conceived acts of the adult and of the representative/support person;
c. conflicts of interests
Please consider the position of the adult, contractual parties and third parties.

Against dangers based on conflicts of interest or ill-conceived acts of the authorised representative, an extended graded protection exists. First of all, pursuant to § 181 BGB, the attorney cannot, in principle, conclude contracts with themself in the name of the granter; however, this may be dispensed with[232] in the power of attorney. Furthermore, a monitoring custodian can be appointed by the custodianship court in order to supervise the attorney, provided that the vulnerable adult can no longer exercise their rights vis-à-vis the attorney due to their illness or disability and there are substantial indications that the attorney is not taking care of the affairs as agreed or not in accordance with the declared or presumed will of the granter (§§ 1815 (3), 1820 (3) BGB).[233] New since 2023 is the possibility of (temporarily) suspending the power of attorney if there is an imminent risk that the wishes of the vulnerable adult will not be complied with and that their person or assets will be significantly endangered as a result, or if the attorney hinders the

[231] Cf. W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 252.

[232] Cf. BGH (Federal Court of Justice), 21.03.2012 – XII ZB 666/11, *NJW-RR* 2012, 834.

[233] See also BVerfG (Federal Constitutional Court), 10.10.2008 – 1 BvR 1415/08, *FamRZ* 2008, 2260; BGH (Federal Court of Justice), 08.01.2020 – XII ZB 368/19, *NJW-RR* 2020, 449, 450; BGH, 26.07.2017 – XII ZB 143/17, *NJW-RR* 2017, 1217; BGH, 16.07.2014 – XII ZB 142/14, *NJW* 2014, 3237; BGH, 01.08.2012 – XII ZB 438/11, *FamRZ* 2012, 1631; on the reform, see D. KURZE, 'Reform ist gut - Kontrolle ist besser? Kontrollbetreuung und Vorsorgevollmacht nach der Reform des Vormundschafts- und Betreuungsrechts' *FamRZ* 2021, 1934–39.

custodian (§ 1820 (4) BGB). As *ultima ratio*, according to § 1820 (5) BGB, a custodian can permanently revoke[234] the power of attorney with the consent of the custodianship court.[235] In addition, in principle, the specific provisions – in particular the court approval requirements – on medical matters and on accommodation and measures involving deprivation of liberty also apply to the attorney in accordance with § 1820 (2) BGB (§§ 1827 (6), 1828 (3), 1829 (5), 1831 (5), 1832 (5) BGB) – with the exception of consent to sterilisation, which is reserved for a custodian.

For unauthorised acts of the attorney in the name of the granter vis-à-vis third parties which are not covered by the power of attorney, they are liable themself pursuant to § 179 BGB. Furthermore, they may be liable to the granter under the legal relationship on which the power of attorney is based for breaches of duty (§ 280 BGB); the concrete form of this legal relationship is decisive (see 33.). Pursuant to § 278 BGB, the granter is also responsible vis-à-vis third parties for acts performed by the attorney in fulfilment of the latter's mandate. If the power of attorney covers all matters, the question also arises here whether *the attorney* may be liable themself for a breach of the duty to supervise the granter of the power of attorney (§ 832 BGB); the concrete form of this legal relationship is decisive (see 33.).[236]

Ill-conceived acts of the vulnerable adult may, under the conditions of § 1825 (1) 1st s. BGB, make a reservation of consent necessary as *ultima ratio*. However, this can only be ordered by the court if a custodian is appointed at the same time.[237]

46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:
a. is supervision conducted:
• by competent authorities;
• by person(s) appointed by the voluntary measure.
b. in each case, what is the nature of the supervision and how is it carried out?
c. the existence of measures that fall outside the scope of official supervision.

---

[234] See BGH (Federal Court of Justice), 08.01.2020 – XII ZB 368/19, *NJW-RR* 2020, 449, 450; BGH, 28.07.2015 – XII ZB 674/14, *NJW* 2015, 3572; BGH, 13.11.2013 – XII ZB 339/13, *NJW* 2014, 785, 786; BGH, 01.08.2012 – XII ZB 438/11, *NJW* 2012, 2885, 2886.

[235] On the reformed legal situation regarding the continuing power of attorney, see T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 38–94; G. MÜLLER-ENGELS, 'Vorsorgevollmacht und Betreuung – Update und Ausblick' *DNotZ* 2021, 84, 94–99.

[236] Cf. M. SCHARF, '§ 1 Vorsorgevollmachten' in M. RUDOLF, J. BITTLER and W. ROTH (eds), *Vorsorgevollmacht, Betreuungsverfügung und Patientenverfügung*, zerb Verlag, 5th ed., Bonn 2020, mn. 254–58; W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 295–97.

[237] Cf. BGH (Federal Court of Justice), 11.01.2023 – XII ZB 106/21, *NJW-RR* 2023, 507, 508; critically D. KURZE, *Die Reform des Vormundschafts- und Betreuungsrechts*, zerb Verlag, Bonn 2022, § 4 Einwilligungsvorbehalt.

Supervision of an attorney may be conducted by another attorney appointed by the vulnerable adult (see 39.) or by a monitoring custodian and the custodianship court (see 45.).

End of the measure

47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.

In principle, the revocation of the power of attorney is always possible by the granter who has capacity to contract. (See also 45. for revocation by a custodian.) Furthermore, according to § 168 BGB, the power of attorney expires with the legal relationship on which it is based, i.e. the mandate, management or other legal relationship (see 33.). If no substitute attorney has been determined, the power of attorney therefore also expires upon the death of the attorney. Whether the power of attorney also expires or continues to apply upon the death of the granter depends in principle on their stipulation; as a rule, it persists (§ 672 1st s. BGB). The same applies regarding the granter's incapacity to contract. A power of attorney related to the assets of the vulnerable adult may also expire with the opening of insolvency proceedings (§ 117 (1) InsO). The power of attorney may be limited in time or subject to a condition. In addition, the authorised representative may renounce the representation.[238]

(See also 38.)

Reflection

48. Provide statistical data if available.

(See 3.)

49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so, what are the outcomes?

Out of many discussion points, three important ones should be briefly highlighted:

[238] For details, see W. ZIMMERMANN, '2. Kapitel Die Vorsorgevollmacht' in W. ZIMMERMANN (ed), *Vorsorgevollmacht – Betreuungsverfügung – Patientenverfügung*, 3rd ed., Erich Schmidt Verlag, Berlin 2017, mn. 55, 227–61.

With regard to the specificity of living wills (see 37.) the Federal Court of Justice in its case law takes a line that respects the patient's will while maintaining the greatest possible degree of specificity.[239] However, if the Court's case law could initially be understood as interpreting the criterion of specificity rather broadly,[240] it clarified this into a more restrictive interpretation.[241] Thereby, particularly through its decision of 6 July 2016, it had caused legal uncertainty in practice with regard to the preparation of such living wills and their degree of specificity.[242] In this decision, the Federal Court of Justice ruled that the written statement that 'no life-sustaining measures' are desired does not in itself contain the necessary specific treatment decision by the person concerned, which is required for a living will to be legally binding. Rather, in addition, specific medical measures would have to be named or reference would have to be made to sufficiently specified illnesses or treatment situations.[243] This decision was predictable and corresponds to the express will of the legislator.[244] However, there was criticism that the Court gave little guidance on *how specific* a living will would need to be and did not comment on whether existing model living wills, e.g. the template provided by the German Federal Ministry of Justice, met this requirement.[245] Furthermore, some feared that, as a result of the decision, many of the living wills prepared up to that point were too unspecific and thus not legally binding.[246] In the meantime, however, the Federal Court of Justice has reaffirmed that the requirements for the specificity of a living will must not be overstretched.[247] Yet the issue of specificity remains the element of the living will that causes the most legal disputes.[248] Therefore, it is to be welcomed that the Court accepts an interpretation of

[239] See BGH (Federal Court of Justice), 14.11.2018 – XII ZB 107/18, *NJW* 2019, 600; BGH, 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737; BGH, 06.07.2016 – XII ZB 61/16, *NJW* 2016, 3297.

[240] Cf. BGH (Federal Court of Justice), 17.09.2014 – XII ZB 202/13, *NJW* 2014, 3572, 3576.

[241] See BGH (Federal Court of Justice), 14.11.2018 – XII ZB 107/18, *NJW* 2019, 600, 602; BGH, 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1738; BGH, 06.07.2016 – XII ZB 61/16, *NJW* 2016, 3297, 3301–3302.

[242] Cf. BGH (Federal Court of Justice), 06.07.2016 – XII ZB 61/16, *NJW* 2016, 3297; see G. MÜLLER-ENGELS, 'BGB § 1901a' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn.10.

[243] Cf. BGH (Federal Court of Justice), 06.07.2016 – XII ZB 61/16, *NJW* 2016, 3297, 3301.

[244] Cf. BT-Drs. 16/8442, 14–15.

[245] Cf. G. MÜLLER, 'Verschärfte Anforderungen an den Behandlungsabbruch aufgrund Vorsorgevollmacht und Patientenverfügung?' *ZEV* 2016, 605, 608.

[246] See, for example, M. WEBER, 'Anforderung an Patientenverfügung – „Keine lebenserhaltenden Maßnahmen" zu unkonkret.' *NZFam* 2016, 959; cf. also G. MÜLLER, 'Verschärfte Anforderungen an den Behandlungsabbruch aufgrund Vorsorgevollmacht und Patientenverfügung?' *ZEV* 2016, 605, 608.

[247] BGH (Federal Court of Justice), 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1738.

[248] Cf. W. HINDERMIT, 'Die Patientenverfügung in der notariellen Praxis' *RNotZ* 2022, 1, 6.

the provisions laid down in the living will according to § 133 BGB, thus facilitating the preservation of the will of a vulnerable adult – within narrow bounds.[249] Overall, however, a large number of living wills do *not* meet the requirement of specificity.[250] Non-binding living wills can then represent treatment wishes or an indication of the presumed will within the meaning of § 1827 (2) BGB,[251] i.e. they are not a legally binding decision by the person concerned, but can form the basis for a representative's decision.

Furthermore, it remains the case that for the attending doctor and the representative of the vulnerable adult in the context of the interpretation of a living will, there are considerable liability risks and also threatening criminal sanctions, especially in the case of misinterpretation. This is counteracted by the possibility of a negative certificate (*Negativattest*) created by case law, i.e. an approval by the custodianship court, even if the law does not require it, that safeguards them.[252]

With regard to the effective granting of a continuing power of attorney by a vulnerable adult who *may* not have capacity to contract (§§ 104 no. 2, 105 BGB, see 14.), the Federal Court of Justice has already contributed to the greatest possible preservation of autonomous precaution by the vulnerable adult – according to current law – by changing its case law.[253] Continuing powers of attorney are now considered *effective in case of doubt*.[254] However, if they are not accepted by third parties because there is a risk that they are void due to § 105 (1) BGB, a custodian may still have to be appointed (see also 36.).[255] In this case, the intended attorney is then usually appointed as custodian. Thus, the vulnerable adult's choice as to the person of their representative is preserved, but the stricter provisions for custodians now apply to the person who was actually intended to be the attorney. This suggests thinking about a reform of the legal consequences of incapacity to contract, i.e. § 105 BGB. It should be noted that the continuing power of attorney was not a central topic of the reform and further development in practice is awaited by the legislator.[256]

---

[249] Cf. BGH (Federal Court of Justice), 14.11.2018 – XII ZB 107/18, *NJW* 2019, 600; BGH, 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1739.

[250] Cf. D. WEDEL and J. KRAEMER, 'Patientenrechte stärken – mehr Rechtssicherheit bei der Patientenverfügung' *FamRZ* 2022, 852, 853 (with further references).

[251] Cf. BGH (Federal Court of Justice), 17.09.2014 – XII ZB 202/13, *NJW* 2014, 3572, 3575–76.

[252] Cf. BGH (Federal Court of Justice), 08.02.2017 – XII ZB 604/15, *NJW* 2017, 1737, 1739; BGH, 17.09.2014 – XII ZB 202/13, *NJW* 2014, 3572, 3575; A. SPICKHOFF, 'BGB § 1827' in A. SPICKHOFF (ed), *Medizinrecht*, 4th ed., C.H. Beck, Munich 2022, mn. 15.

[253] Cf. BGH (Federal Court of Justice), 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701; G. MÜLLER-ENGELS, 'BGB § 1896' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 30.

[254] Cf. BGH (Federal Court of Justice), 29.04.2020 – XII ZB 242/19, *NJW-RR* 2020, 1011, 1013; BGH, 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702.

[255] Cf. BGH (Federal Court of Justice), 03.02.2016 – XII ZB 425/14, *FamRZ* 2016, 701, 702.

[256] BT-Drs. 19/24445, 150.

SECTION V – *EX LEGE* REPRESENTATION

Overview

50. Does your system have specific provisions for ex lege representation of vulnerable adults?

Since 1 January 2023, there is the specific provision on mutual representation of spouses in matters of health care under § 1358 BGB. This provision was introduced with the objective of reducing interim court orders for appointing an interim custodian (§ 300 (1) FamFG) by having the spouses provide legal assistance to the vulnerable adult. It is *the* specific provision on the *ex lege* representation of vulnerable adults, which, although it is located in marital law, is therefore presented in detail in the following.

Start of the ex-lege representation

Legal grounds and procedure

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?

Pursuant to § 1358 (1) BGB, one spouse has the right to represent the other spouse in matters of health care if the other spouse cannot legally take care of these matters themself due to unconsciousness or illness (see 17.). It is not entirely clear whether the legislator presupposes incapacity to consent *sui generis* (i.e. *Einwilligungsunfähigkeit*, see 14.) here; the wording, which is similar to § 1814 (1) BGB, suggests otherwise.[257] The legislator's stated aim is to cover the period following acute medical care as a result of an accident or serious illness and to make the appointment of an interim custodian superfluous in the case of *temporary* restrictions of the vulnerable adult.[258] Thus, following the intention of the legislator, the *ex lege* representation should be limited to cases of *acute* health impairment. Disabilities are not mentioned in the provision, unlike in the provision for ordering custodianship. Thus, it is a right of emergency representation, which is consequently time-limited according to § 1358 (3) no. 4 BGB.[259] If the vulnerable adult is in need of representation in legal matters for a period longer than six months, a

[257] See K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 93; other opinion T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 1121.

[258] Cf. BT-Drs. 19/24445, 155–56, 179.

[259] See also A. DUTTA, 'Handlungsbefugnisse von Ehegatten in Angelegenheiten der Gesundheitssorge – ein weiterer Versuch für einen neuen § 1358 BGB' *FamRZ* 2020, 1881.

custodian has to be appointed. However, the restriction to acute situations is not reflected in the wording of the provision, which can thus also be understood more broadly.[260] One misses the explicit mention of the principle of necessity in the provision (e.g. through the wording 'if and only to the extent' or through the restriction to 'measures that cannot be postponed'[261]).[262]

52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?

Pursuant to § 1358 (4) BGB, the first doctor vis-à-vis whom the spouse's right of representation is exercised must confirm in writing that the factual *and legal* prerequisites for this right are met and the time of their occurrence. A further declaration that this is the first exercise of the right of representation and that there is no ground for exclusion according to § 1358 (3) BGB has to be confirmed in writing by the spouse. Together, these declarations form the documentation of the entitlement to further exercise of *ex lege* representation. According to the intention of the legislator, these documents can be presented in every case of action for the adult, for example vis-à-vis hospital authorities, care institutions, insurance companies or other doctors, in order to prove the right of representation.[263] However, there are doubts that this document actually provides the necessary legal certainty for third parties, especially medical professionals. Neither do these documents legally guarantee that the prerequisites of the right of *ex lege* representation actually exist and that it is not excluded, nor is the good faith in the document protected.[264]

53. Is it necessary to register, give publicity or give any other kind of notice of the *ex-lege* representation?

No special registration or notification of *ex lege* representation is required. However, the refusal of the spouse as representative by the vulnerable adult may be registered in the Central Register of Continuing Powers of Attorney according

[260] Critically K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 92, 95; see also G. MÜLLER-ENGELS, 'Vorsorgevollmacht und Betreuung – Update und Überblick' *DNotZ* 2021, 84, 100; M. SZANTAY, 'Notgeschäftsführung zwischen Eheleuten' *NZFam* 2021, 805, 806.

[261] In this case, however, according to § 630d (1) 4th s. BGB, the presumed will of the patient is sufficient and consent that cannot be obtained in time is dispensable.

[262] Cf. K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 92–93, 95; but see the mentions in the explanatory memorandum to the law, BT-Drs. 19/24445, 179–80.

[263] Cf. BT-Drs. 19/24445, 156.

[264] See A. DUTTA, 'Handlungsbefugnisse von Ehegatten in Angelegenheiten der Gesundheitssorge – ein weiterer Versuch für einen neuen § 1358 BGB' *FamRZ* 2020, 1881, 1883; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 1143; K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 95.

to § 78a (1) and (2) no. 7 BNotO. If the doctor or the spouse is aware of the refusal of the spouse as representative, the *ex lege* representation is excluded (§ 1358 (3) no. 2 a) BGB).

Representatives/support persons

54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.

Only the spouse can act as *ex lege* representative.

During the ex-lege representation

Powers and duties of the representatives/support person

55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.

§ 1358 BGB governs the mutual *ex lege* representation in matters of health care. The first paragraph enumerates exhaustively the spouse's representative powers. If the prerequisites are met, the spouse can consent to (i.e. they can *einwilligen*, see 14.) or prohibit examinations of the state of health, medical treatment or interventions and can receive information[265] from doctors (§ 1358 (1) no. 1, (2) BGB). They may also conclude and enforce the necessary contracts, such as treatment contracts, contracts with hospitals or contracts for urgent measures of rehabilitation and care (§ 1358 (1) no. 2 BGB). In addition, they can decide on short-term fixation measures in a hospital, a nursing home or another institution (up to a duration of 6 weeks) in accordance with §§ 1358 (1) no. 3, 1831 (4) BGB. However, this decision may only be taken with the authorisation of the custodianship court according to §§ 1358 (6), 1831 (2) and (4) BGB, unless there is danger in postponement. Finally, they are granted the right to assert claims to which the represented spouse is entitled against third parties on account of the illness and to assign them to the service providers under the contracts concluded on the basis of this right of *ex lege* representation or to demand payment to them (§ 1358 (1) no. 4 BGB). In addition to claims under civil law, this also refers to claims under social law, e.g. claims against health insurances, care insurances, pension insurances and

[265] They already receive this information in accordance with § 630e (4) BGB.

accident insurances.[266] To the extent of § 1358 (1) BGB, the doctors are released from the duty of confidentiality according to § 1358 (2) 1st s. BGB.

Thus, medical decisions are encompassed by the *ex lege* representation. Contracts and financial transactions are covered only up to a certain medically related extent. In addition, the spouse can assert social law claims of the vulnerable adult as long as they are based on the illness (§ 1358 (1) no. 4 BGB). However, in order to prevent abuse, the representing spouse is not authorised to receive payments themself (cf. the wording of § 1358 (1) no. 4 BGB).[267] Furthermore, they have no power for bank withdrawals, taxes or mail. However, some point out that opening the vulnerable adult's mail is necessary to take care of legal affairs and that the competences under § 1358 (1) BGB should be understood broadly in this sense.[268]

56. What are the legal effects of the representative's acts?

To the extent of the *ex lege* representation (see 55.), the spouse acts as a representative for the vulnerable adult with effect for and against them according to §§ 164–181 BGB.

Can an adult, while still mentally capable, exclude or opt out of such ex-lege representation (a) in general or (b) as to certain persons and/or acts?

The vulnerable adult may, while still mentally capable, refuse representation by their spouse in whole. If the representing spouse or the attending doctor have knowledge of such a refusal, the representation is excluded pursuant to § 1358 (3) no. 2 a) BGB (see also 53.). (On the interaction of powers of attorney and *ex lege* representation, see 57.)

57. Describe how this ex lege representation interacts with other measures? Think of subsidiarity

The mutual *ex lege* representation of spouses in matters of health care is intended to have the effect that the appointment of an interim custodian is not necessary in individual cases, but that the spouse takes the necessary legal actions instead by means of their right of emergency representation. As a rule, this has priority over the state-ordered appointment of a custodian according to the princi-

[266] Cf. BT-Drs. 19/24445, 180; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 1137; K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 97.

[267] BT-Drs. 19/24445, 180.

[268] Cf. K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 97; different R. KEMPER, 'Die große Reform: Das Notvertretungsrecht für Ehegatten kommt' *FamRB* 2021, 260, 265.

pal of necessity (§ 1814 (3) 1st s. BGB). However, if the custodianship court nevertheless considers the appointment of a custodian to be necessary or if a custodian has already been appointed, the spouse is limited in their *ex lege* representation to the extent that corresponding tasks are assigned to the custodian (§ 1358 (3) no. 3, (5) BGB). The same applies to the extent that the vulnerable adult has granted power of attorney to a person other than the spouse to manage their health care affairs. The individual power of attorney has priority over *ex lege* representation and excludes the latter, but only if it is known to the representing spouse or the doctor (§ 1358 (3) no. 2 b) BGB). According to §§ 1358 (6), 1827 (1) BGB, living wills must be observed by the representing spouse and the will of the adult expressed therein must be enforced. Secondarily, the spouse must also determine the wishes or the presumed will of the vulnerable adult pursuant to §§ 1358 (6), 1827 (2) BGB and decide accordingly (the same procedure applies as already explained under 38.).

Safeguards and supervision

58. Are there any safeguards or supervision regarding ex lege representation?

There are several safeguards. Firstly, a definitive time limit of 6 months is set for the *ex lege* representation (cf. § 1358 (3) no. 4 BGB). Furthermore, the right of representation is excluded if the spouses have separated within the meaning of § 1567 (1) BGB (§ 1358 (3) no. 1 BGB) or if it is known to the representing spouse or the doctor that the vulnerable adult refuses representation by their spouse (§ 1358 (3) no. 2 a) BGB). In addition, according to § 181 BGB, the spouse cannot conclude a contract with themself on behalf of the vulnerable adult

Moreover, the spouse must observe the central criterion of custodianship law in their *ex lege* representation, i.e. in particular the will and wishes and, secondarily, the presumed will of the vulnerable adult, in accordance with §§ 1358 (6), 1821 (2) to (4) BGB. This applies above all to medical measures pursuant to §§ 1358 (6), 1827 (1) to (3), 1828 (1) and (2), 1829 (1) to (4) BGB. If they do not comply with this criterion when taking care of the affairs of the vulnerable adult, the court may deem it necessary to appoint a custodian for these tasks and thus exclude *ex lege* representation.

Certain acts may require the authorisation of the custodianship court. This applies in principle to risky or life-threatening medical measures pursuant to §§ 1358 (6), 1829 (1) to (4) BGB as well as in the case of (short-term) fixation measures in a hospital, a nursing home or another institution under deprivation of liberty (§§ 1358 (6), 1831 (2) and (4) BGB).

Supervision can only be spoken of insofar as the custodianship court must examine *ex officio* whether at the beginning or in the course of the *ex lege* representation an appointment of a custodian for the matters of health care is necessary.

The spouse is then excluded from representation according to § 1358 (3) no. 3, (5) BGB in the tasks that are assigned to the custodian.

End of the ex-lege representation

59. Provide a general description of the end of each instance of *ex-lege* representation.

The *ex lege* representation by the spouse in matters of health care ends according to § 1358 (3) no. 4 BGB if either the prerequisites pursuant to § 1358 (1) BGB, i.e. the need for assistance of the other spouse as a result of unconsciousness or illness, no longer exist, or if more than six months have elapsed after the time when the conditions first occurred, as determined in writing by the doctor pursuant to § 1358 (4) no. 1 BGB.

If a custodian is appointed whose scope of responsibilities also includes health care, the *ex lege* right to representation of the spouse must no longer be exercised from that time onwards, according to § 1358 (5) BGB. It follows from paragraph 3 no. 3 and paragraph 5 that the right of representation then also no longer exists.[269]

In addition, the right to *ex lege* representation can no longer exist due to another reason mentioned in § 1358 (3) BGB, namely separation of the spouses or the knowledge of the attending doctor or representing spouse that the vulnerable adult refuses *ex lege* representation or has authorised another person in matters of health care.

Reflection

60. Provide statistical data if available.

A 2014 survey found that 65% of respondents (falsely) thought that in the event of an accident or serious illness, the next of kin of the adult could automatically make decisions for them if they are no longer able to do so themselves.[270] However, a right to *ex lege* representation has been in force for the first time since 1 January 2023.

61. What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?

---

[269] Cf. K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 94; other opinion T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 1125.

[270] Quoted according to BT-Drs. 18/10485, 9.

Due to inertia phenomena, such as the already known *status quo bias* and *optimistic bias*,[271] a hesitation to take voluntary precautionary measures, i.e. in particular through continuing power of attorney and living will, is quite to be feared. Against this background, the intention of the legislator behind the introduction of a right of spouses to represent each other in matters of health care is to be welcomed, as this is meant to avoid (at least initially) state-ordered measures in emergency situations. However, the *ex lege* representation by the spouse is a new regulation which – despite a broad discussion and much feedback in the legislative process – has numerous shortcomings and leaves room for legal uncertainty at crucial points. It remains to be seen to what extent the application in practice can concretise the unclear, ambiguous and partly confusing wording used in many places. The two most important points of criticism, in our opinion, are highlighted here:[272]

It is conceivable, for example, that in some cases the vulnerable adult is still capable of consenting to medical interventions, but at the same time, in general terms, – within the meaning of § 1358 (1) BGB – is unable to legally take care of their health care affairs due to illness (e.g. because they are confined to bed). The concern here is that the prerequisites of *ex lege* representation will nevertheless be considered fulfilled and thus the spouse will be granted the right to consent to the medical measures according to § 1358 (1) no. 1 BGB – thus having a concurrent competence with the vulnerable adult that is not explicitly regulated.[273]

While the latter problem can hopefully be solved by interpretation, the main problem is the lack of adequate and legally secure proof for third parties that the prerequisites for the right of representation (still) exist in the specific case. The document to be issued by the doctor according to § 1358 (4) BGB is neither constitutive for the *ex lege* representation, nor does it form the basis of legal certainty, e.g. by means of a legal presumption or fiction.[274] Medical staff will ultimately not be able to rely on this document.[275] The examination of the *legal* (!) prerequisites

[271] Cf. A. DUTTA, 'Paarbeziehungsregime jenseits der Ehe' *AcP* 216 (2016), 609, 655–57; N.D. WEINSTEIN, 'Unrealistic optimism about future life events' (1980) 39(5) *Journal of Personality and Social Psychology* 806.

[272] On these and other problematic points, see e.g. A. DUTTA, 'Handlungsbefugnisse von Ehegatten in Angelegenheiten der Gesundheitssorge – ein weiterer Versuch für einen neuen § 1358 BGB' *FamRZ* 2020, 1881; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 1117–46; K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91; M. SZANTAY, 'Notgeschäftsführung zwischen Eheleuten' *NZFam* 2021, 805.

[273] Cf. G. MÜLLER-ENGELS, 'Vorsorgevollmacht und Betreuung – Update und Überblick' *DNotZ* 2021, 84, 99, 102; M. SZANTAY, 'Notgeschäftsführung zwischen Eheleuten' *NZFam* 2021, 805, 807; however, a decision-making hierarchy could be read out of § 630d (1) BGB.

[274] See in contrast the draft of § 1358 (3) BGB in the version of BT-Drs. 18/10485, 6.

[275] Critically, among others, A. DUTTA, 'Handlungsbefugnisse von Ehegatten in Angelegenheiten der Gesundheitssorge – ein weiterer Versuch für einen neuen § 1358 BGB' *FamRZ* 2020, 1881,

for the right of representation by doctor and spouse without legal training is error-prone.[276]

Ultimately, it is better suited to the individual case to lay down specific regulations by means of a power of attorney. Here, for example, a substitute attorney can also be named in the event of the primary attorney being unable to act.[277] But there is a fear that the granting of powers of attorney will be prevented precisely by the new institute of *ex lege* representation and a deceptive security conveyed in this way.[278]

Specific cases of ex lege representation

ex lege representation resulting from marital law and/or matrimonial property law

62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then also legally bind the other spouse?

According to § 1357 (1) BGB, each spouse – if the spouses do not live separately within the meaning of § 1567 BGB – is entitled to enter into transactions to appropriately provide the family's necessities of life. In principle, the transaction also entitles and obliges the other spouse, unless the circumstances of the individual case indicate otherwise; this is the case regardless of the other spouse's legal capacity. This entitlement may be restricted or excluded by one spouse with adequate reason (§ 1357 (2) BGB).[279]

63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.

1883; S. MAZUR and O. ZIEGLER, '(Haftungs-)rechtliche Aspekte im Zusammenhang mit dem Ehegattenvertretungsrecht gem. § 1358 BGB n.F. im Arzt-Patienten-Verhältnis' *GuP* 2022, 41, 42, 47–48; G. MÜLLER-ENGELS, 'Vorsorgevollmacht und Betreuung – Update und Überblick' *DNotZ* 2021, 84, 100–101; M. SZANTAY, 'Notgeschäftsführung zwischen Eheleuten' *NZFam* 2021, 805, 808.

[276] Cf. K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 99.

[277] Cf. M. SZANTAY, 'Notgeschäftsführung zwischen Eheleuten' *NZFam* 2021, 805, 809–10.

[278] Cf. K. LUGANI, 'Gegenseitige Vertretung von Ehegatten in Angelegenheiten der Gesundheitssorge – Der neue § 1358 BGB' *MedR* 2022, 91, 99.

[279] For details, see N. DETHLOFF, *Familienrecht*, 33rd ed., C.H. Beck, Munich 2022, § 4 mn. 58–73; J. GERNHUBER and D. COESTER-WALTJEN, *Familienrecht*, 7th ed., C.H. Beck, Munich 2020, § 19 mn. 23–58.

The rules on community of property, which is not the statutory but an optional matrimonial property regime in Germany (cf. § 1415 BGB), state that, unless otherwise stipulated, the spouses jointly administer the property (§ 1421 2nd s. BGB). However, it may be stipulated in the marriage contract that one spouse may administer the property (§ 1421 1st s. BGB). The administrative arrangement may also be changed by another agreement of the spouses in a marriage contract. A right of emergency representation of the non-administrating spouse is regulated in § 1429 BGB.

If the administering spouse is under custodianship and the administration of the joint property falls within the scope of responsibilities of the custodian, they can, pursuant to § 1436 BGB, represent the spouse under custodianship in the rights and duties arising from the administration of the joint property. This also applies if the other spouse is appointed as custodian. Here, too, the administration of the property can be transferred to the other spouse by means of a marriage contract; in this case, § 1411 BGB must be observed. As a result, the legally competent person under custodianship can conclude the marriage contract themself, unless a reservation of consent has been ordered regarding this matter. For a legally incompetent person, only the custodian can conclude the marriage contract with the authorisation of the custodianship court. Furthermore, the other spouse is entitled to apply for dissolution of the community of property under the prerequisites of § 1447 no. 1 or no. 4 BGB.

ex lege representation resulting from negotiorum gestio and other private law provisions

64. Does the private law instrument negotiorum gestio or a similar instrument exist in your jurisdiction? If so, does this instrument have any practical significance in cases involving vulnerable adults?

The instrument negotiorum gestio exists under §§ 677–687 BGB (*Geschäftsführung ohne Auftrag*). This does not grant power of attorney to the person acting, but it does justify the act if they act according to the (presumed) will of the vulnerable adult, for example, if financial affairs of the person concerned have to be dealt with urgently.[280]

[280] Cf. V. Lipp, *Legal Protection of Adults in Germany – An Overview*, (2016) p. 2 <https://www.bgt-ev.de/fileadmin/Mediendatenbank/Themen/Einzelbeitraege/Lipp/Lipp_Legal_Protection_Adults.pdf> accessed 07.07.2022.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?

No.

66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?

There are no provisions on advance planning or on advance arrangements by third parties and these cannot in fact lead to supported or substituted decision-making. However, the possibilities of third parties to effect benefits in favour of the vulnerable adult through *contracts for the benefit of third parties* (*Verträge zugunsten Dritter*, § 328 BGB) and *wills for the benefit of a disabled person* (so called '*Behindertentestament*')[281] should be mentioned at this point.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:
a. the transition from substituted to supported decision-making;
b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;
c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;
d. effect of the measures on the legal capacity of vulnerable adults;
e. the possibility to provide tailor-made solutions;
f. transition from the best interest principle to the will and preferences principle.

In conclusion, the German system is generally to be assessed as progressive with regard to the empowerment of vulnerable adults. It is the prevailing opinion in German jurisprudence, legislation and politics that the law on custodianship

[281] BGH (Federal Court of Justice), 24.07.2019 – XII ZB 560/18, *NJW* 2020, 58; for further details, see G. RUBY and A. SCHINDLER, *Das Behindertentestament*, 3rd ed., zerb, Bonn 2018.

complied with the requirements of Art. 12 CRPD even before the recent reform.[282] Nonetheless, with the reform, the legislator has taken up many – although not all – remaining points of criticism.

Preserving the **autonomy** of the vulnerable adult to the greatest extent possible is the central concern of the adult protection regulations outlined above – this is underlined by the recent reform. It is inadmissible to order measures against the free will of the person concerned (§§ 1814 (2), 1825 (1) 2nd s. BGB). Characteristic of the German system is furthermore the **principle of necessity**. It is an expression of the subsidiarity of protective measures vis-à-vis the autonomy of the person concerned as well as the requirement of proportionality of all applicable instruments of adult protection – thus emphasising the constitutionally guaranteed position of the vulnerable adult as a self-determined subject. The variety of possible graduated measures aims at a tailor-made solution for each individual case. Only in this way can the described principle of necessity be met.

It should be noted that the **will and wishes** of the vulnerable adult were the decisive criteria governing custodianship even before the reform (cf. § 1901 (2) 2nd s., (3) 1st s. BGB old version). Where the law spoke of the welfare (*Wohl*) of the person concerned, this should not be interpreted in terms of the objective best interests. Rather, the Federal Court of Justice[283] clarified that the concept of the welfare of the person under custodianship also had to be understood subjectively, i.e. that the vulnerable adult's wishes were paramount and an essential part of the welfare – this was the only interpretation that complied with the vulnerable adult's right to self-determination.[284] However, with the previous wording, there was nonetheless still a risk that decisions would be made on the basis of objective welfare in terms of the best interests of the person concerned.[285] With the reform, the concept of best interests, which is to be rejected against the background of the

[282] Cf. BT-Drs. 19/24445, 120; D. BROSEY, 'Der General Comment No. 1 zu Art. 12 der UN-BRK und die Umsetzung im deutschen Recht' *BtPrax* 2014, 211–15; D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243; V. LIPP et al., 'Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany' in M. GANNER et al. (eds), *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 117, 121–22; V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 675–79; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 6–10; against this ALLIANZ DER DEUTSCHEN NICHTREGIERUNGSORGANISATIONEN ZUR UN-BEHINDERTENRECHTSKONVENTION, Für Selbstbestimmung, gleiche Rechte, Barrierefreiheit, Inklusion! Erster Bericht der Zivilgesellschaft zur Umsetzung der UN-Behindertenrechtskonvention in Deutschland, Berlin 2013, pp. 25–26

[283] BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814, 2815–17.

[284] On the significance of the vulnerable adult's right to self-determination in custodianship law, see BVerfG (Federal Constitutional Court), 31.05.2021 – 1 BvR 1211/21, *FamRZ* 2021, 1146, 1147; BVerfG, 31.03.2021 – 1 BvR 413/20, *NJW* 2021, 2355, 2358; see also G. DODEGGE, 'Vom Wohl des Betroffenen zu dessen Wünschen und Willen - neue Maßstäbe für die Betreuertätigkeit' *FamRZ* 2022, 844.

[285] Cf. BT-Drs. 19/24445, 249.

CRPD,[286] is now completely – i.e. also according to the wording – banned from the law. Instead, the wishes of the vulnerable adult now explicitly permeate the entire law on custodianship as the decisive criterion.[287]

If the wishes cannot be determined even after significant efforts, the **presumed will** is to be taken into account. In accordance with the Committee and General Comment No. 1,[288] the reformed law then requires the best interpretation of will and preferences. Only if there are no reliable subjective indications for identifying the presumed will, may the objective general life experience and the comparison with a reasonable average person be used. However, the legislator wants this to be understood as a last resort of the best interpretation of will and preferences and not as a recourse to the objective welfare, i.e. the concept of best interests.[289]

In general, the principle of '**support before representation**' ('*Unterstützen vor Vertreten'*) applies.[290] With the recent reform, 'other assistance' that avoids the appointment of a custodian is emphasised and facilitated in its application (see 1.). But also the regulations on the support and representation of the vulnerable adult by custodians or attorneys are subject to changes in a multitude of details. As before the reform, the legal capacity of vulnerable adults depends mainly on their ability to form a free will. Vulnerable adults thus remain legally capable of acting themselves in principle as long as *and to the extent*[291] that they have the mental capacity to act of their own free will (§§ 104 no. 2, 105 BGB) – at least in theory.[292] The limitation by means of a reservation of consent by the custodian (§ 1825 BGB) also follows this rule, since it is a means to retain the possibility for vulnerable adults, who are restricted to a certain extent in their capacity to act of their own free will[293], to continue to make their own declarations of intent under

---

[286] Cf. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *General Comment No. 1 (2014), Article 12: Equal recognition before the law*, 2014, § 21.

[287] See G. DODEGGE, 'Vom Wohl des Betroffenen zu dessen Wünschen und Willen - neue Maßstäbe für die Betreuertätigkeit' *FamRZ* 2022, 844–52.

[288] See COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *General Comment No. 1 (2014), Article 12: Equal recognition before the law*, 2014, § 21.

[289] Cf. BT-Drs. 19/24445, 254; critically G. DODEGGE, 'Vom Wohl des Betroffenen zu dessen Wünschen und Willen - neue Maßstäbe für die Betreuertätigkeit' *FamRZ* 2022, 844, 851; see also BGH (Federal Court of Justice), 29.03.2023 – XII ZB 515/22, *NJW-RR* 2023, 850, 852.

[290] BT-Drs. 19/24445, 2; on the function of custodianship law to provide the necessary support T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, pp. 123, 124; V. LIPP, *Freiheit und Fürsorge: Der Mensch als Rechtsperson,* Mohr Siebeck, Tübingen 2000, pp. 40–60.

[291] On partial capacity to contract, see A. SPICKHOFF, 'BGB § 104' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 9th ed., C.H. Beck, Munich 2021, mn. 50–54; H. WENDTLAND, 'BGB § 104' in W. HAU and R. POSECK (eds), *BeckOK BGB*, 63rd ed., C.H. Beck, Munich 2022, mn. 11.

[292] For problems with *practical* implementation, see below.

[293] On the restriction of the capacity for understanding or the ability to act according to this understanding and the resulting considerable danger as a prerequisite for the ordering of a reservation of

the supervision of the custodian. The reservation of consent is thus ultimately for the most part a support measure that seeks to preserve the vulnerable adults' capacity to act in a self-determined manner to the greatest possible extent while providing the necessary protection. Only in exceptional cases, as *ultima ratio*, is consent denied; and only in these cases can one speak – if at all – of substitute decision-making.[294] However, it is necessary to address the concerns of the Committee on the Rights of Persons with Disabilities in its Concluding observations on the initial report of Germany with regard to German custodianship law. It recommended that Germany:

> (a) Eliminate all forms of substituted decision-making and replace it with a system of supported decision-making, in line with the Committee's general comment No. 1 (2014) on equal recognition before the law;
> (b) Develop professional quality standards for supported decision-making mechanisms;
> (c) In close cooperation with persons with disabilities, provide training on article 12 of the Convention in line with the Committee's general comment No. 1 at the federal, regional and local levels for all actors, including civil servants, judges, social workers, health and social services professionals and the wider community.[295]

With regard to compatibility of the German regulations with **Art. 12 CRPD** and in particular with the priority of supported over substituted decision-making enshrined therein – and thus the priority of the autonomy of the vulnerable adult –

consent, see 8. Pursuant to § 1821 (3) no. 1 BGB, the same applies to the denial of consent by the custodian in the individual case. As a matter of principle, the custodian must comply with the will and wishes of the vulnerable adult.

[294] Cf. D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243, 246.

[295] COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *Concluding observations on the initial report of Germany*, CRPD/C/DEU/CO/1, p. 5.

it is above all the reservation of consent (§ 1825 BGB),[296] the rules on the incapacity to contract (§§ 104 no. 2, 105 BGB)[297] and the rules on representation by the custodian (§ 1823 BGB)[298] that are being critically discussed.

It should be noted at this point that the instrument of **substituted decision-making** is not completely abolished in Germany – which is also not intended in the future.[299] From the German side, substituted decision-making is still seen as an important and necessary ***ultima ratio*** remedy to protect the vulnerable adult.[300] It is seen as a means which, if used only in absolute exception, and thus in strict compliance with proportionality and the greatest possible respect for the priority of the self-determination of the vulnerable adult, is also in compliance with Art. 12 CRPD.[301]

In addition, regarding the German regulations, because of the paramount consideration of the wishes and the (presumed) will of the vulnerable adult (§ 1821 (2) to (4) BGB) (see 25.),[302] it is only possible to speak of 'substituted decision-

[296] Cf. D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243–47; V. LIPP et al., 'Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany' in M. GANNER et al. (eds), *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 117, 122; A. SCHNEIDER, 'BGB § 1903' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 2–3.

[297] See C.E. WOLF, *Geschäftsunfähigkeit und Behindertenrechtskonvention – Zur Vereinbarkeit von §§ 104 Nr. 2, 105, 131 BGB mit Art. 12 Abs. 2 BRK,* LIT Verlag, Berlin 2015, pp. 149–73; cf. also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 247, 274; K. LACHWITZ, 'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung' *BtPrax* 2008, 143, 147; V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 670; F. WEDEMANN, 'Die Rechtsfolgen der Geschäftsunfähigkeit' *AcP* 209 (2009), 668, 670; generally critical A. SPICKHOFF, 'Autonomie und Heteronomie im Alter' *AcP* 208 (2008), 345, 371–74.

[298] Cf. K. LACHWITZ, 'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung' *BtPrax* 2008, 143, 146–48; A. SCHNEIDER, 'Vorbemerkung (Vor § 1896)' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 33; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 67–68; see also V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 7 (with further references).

[299] COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *Combined second and third reports submitted by Germany*, CRPD/C/DEU/2-3, p. 14.

[300] Cf. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *Combined second and third reports submitted by Germany,* (2021) CRPD/C/DEU/2-3, p. 14 with reference to BVerfG (Federal Constitutional Court), 26.07.2016 – 1 BvL 8/15, *NJW* 2017, 53, 57–58.

[301] Cf. D. BROSEY, 'Einwilligungsvorbehalt und Art. 12 der UN-BRK' *BtPrax* 2014, 243, 246; V. LIPP et al., 'Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany' in M. GANNER et al. (eds), *The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany*, Innsbruck University Press, Innsbruck 2021, pp. 117, 121–22; V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 675–79; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 6–10.

[302] Cf. BT-Drs. 19/24445, 249–51; see also the decision of the BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814.

making' at all in very few cases.[303] **Representation** in itself does not constitute substitute decision-making, even according to General Comment No. 1.[304] If the representative merely implements the will and wishes of the vulnerable adult, without basing the decision 'on what is believed to be in the objective "best interest" of the person concerned'[305], the representation is a means of support, while the decision-making itself remains with the vulnerable adult.[306] This is the situation – at least in theory – according to the conception of German custodianship law.[307] Similarly, the reservation of consent retains vulnerable adults' decision-making as long as it is based on free will, while at the same time protecting them.[308] Nevertheless, it represents a greater encroachment on the autonomy of the person concerned. Therefore, higher demands must be placed on the safeguards that accompany the reservation of consent. In conclusion, these regulations are rather based on will and preferences, or the best interpretation of will and preferences – thus in line with Art. 12 (4) CRPD and the Committee. According to the prevailing opinion, German adult protection law is therefore compatible with the CRPD, at least if interpreted correctly.[309]

However, it is important to highlight a specific problem that is not found in the law on custodianship itself, but in the general rules on **incapacity to contract** (see 14.). According to §§ 104 no. 2, 105 BGB, the legal transactions of an adult are void if the prerequisites are met. Admittedly, adults – and also vulnerable adults – are generally assumed to have capacity to contract. However, if the person concerned is in a state of pathological mental disturbance within the meaning of § 104

---

[303] Cf., among others, V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 7; also V. LIPP, 'Betreuungsrecht und UN-Behindertenrechtskonvention' *FamRZ* 2012, 669, 675–77.

[304] Cf. COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *General Comment No. 1 (2014), Article 12: Equal recognition before the law*, 2014, § 27; see also D. BROSEY, 'Der General Comment No. 1 zu Art. 12 der UN-BRK und die Umsetzung im deutschen Recht' *BtPrax* 2014, 211, 212; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 7; against this K. LACHWITZ, 'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung' *BtPrax* 2008, 143, 146–48.

[305] COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *General Comment No. 1 (2014), Article 12: Equal recognition before the law*, 2014, § 27.

[306] Cf. D. BROSEY, 'Der General Comment No. 1 zu Art. 12 der UN-BRK und die Umsetzung im deutschen Recht' *BtPrax* 2014, 211, 214; A. DIEKMANN, 'Aktuelle Aspekte des deutschen Betreuungsrechts' in A. DIEKMANN, V. LIPP and P. WINTERSTEIN (eds), *Betreuungsrecht im internationalen Kontext – Aktuelle Aspekte in Deutschland – 4. Weltkongress Betreuungsrecht – 15. Betreuungsgerichtstag*, Eigenverlag Betreuungsgerichtstag e.V., Bochum 2017, p. 99, 108–109; V. LIPP, 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK' in V. AICHELE (ed), *Das Menschenrecht auf gleiche Anerkennung vor dem Recht – Artikel 12 der UN-Behindertenrechtskonvention*, Nomos, Baden-Baden 2013, pp. 329, 340–43; V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 7; A. SCHNEIDER, 'BGB § 1896' in J. SÄCKER et al. (eds), *Münchener Kommentar zum BGB*, 8th ed., C.H. Beck, Munich 2020, mn. 68.

[307] See T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, pp. 123, 124.

[308] Cf. V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 8.

[309] Cf., among others, V. LIPP, 'Assistenzprinzip und Erwachsenenschutz' *FamRZ* 2017, 4, 10.

no. 2 BGB that is not merely temporary and prevents the free exercise of will, there is no possibility of preserving the person's declaration of intent (cf. § 105 (1) BGB), for example through the consent of a legal representative. A declaration of intent made in a state of unconsciousness or temporary mental disturbance is likewise null and void (§ 105 (2) BGB). At the same time, incapacity to contract is usually anything but obvious and easy to detect for third parties.[310] The (unintended) advance effects of this regulations are particularly problematic. In practice, for example, legal acts of the vulnerable adult are often not relied upon once a custodian is appointed. Instead, third parties, especially banks, focus on the representation by the custodian.[311] The threat of incapacity to contract (reasonably) feared by third parties as a result of the rigid legal consequences of §§ 104 no. 2, 105 BGB thus hinders independent or supported legal action by the vulnerable adult.[312] Reform considerations[313] have already been made with regard to §§ 104 no. 2, 105 BGB and should be further promoted with a view to Art. 12 CRPD.[314]

Finally, it remains to be seen whether the problems caused by the partial *disregard of the existing legal standards* for the protection of the vulnerable adult's autonomy ***in practice*** can be solved by the reform. In particular, it was reported that in the practice of the German custodianship system the principle of necessity, the subsidiarity of custodianship vis-à-vis other assistance and the priority of sup-

[310] Cf. S.M. MEIER and H. DEINERT, *Handbuch Betreuungsrecht*, 2nd ed., C.F. Müller, Heidelberg 2016, mn. 1067.

[311] Cf. BT-Drs. 19/24445, 258; G. DODEGGE, 'Vom Wohl des Betroffenen zu dessen Wünschen und Willen - neue Maßstäbe für die Betreuertätigkeit' *FamRZ* 2022, 844, 851; T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, pp. 123, 127; T. FRÖSCHLE, 'Zur Qualitätssicherung und Strukturentwicklung in der rechtlichen Betreuung' *NJOZ* 2018, 801, 802–803; S.M. MEIER and H. DEINERT, *Handbuch Betreuungsrecht*, 2nd ed., C.F. Müller, Heidelberg 2016, mn. 1067–75.

[312] See also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 247; T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, pp. 123, 127–28.

[313] On a possible reform and introduction of pending ineffectiveness with the possibility of consent by a legal representative as well as further transfers from the law on minors, see among others A. SPICKHOFF, 'Autonomie und Heteronomie im Alter' *AcP* 208 (2008), 345, 371–74; F. WEDEMANN, 'Die Rechtsfolgen der Geschäftsunfähigkeit' *AcP* 209 (2009), 668, 688–705; with a different proposal, see T. FRÖSCHLE, 'Sind die §§ 104 bis 105a BGB noch zeitgemäß?' in A. DUTTA et al. (eds), *Das Familienrecht in seiner großen Vielfalt – Festschrift für Hans-Joachim Dose zum Ausscheiden aus dem Richterdienst*, Gieseking, Bielefeld 2022, pp. 123, 128–32.

[314] See also T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 247, 274; C.E. WOLF, *Geschäftsunfähigkeit und Behindertenrechtskonvention – Zur Vereinbarkeit von §§ 104 Nr. 2, 105, 131 BGB mit Art. 12 Abs. 2 BRK,* LIT Verlag, Berlin 2015, pp. 149–81.

port by the custodian over substituted decision-making were not sufficiently observed in every case.[315] The recent reform is therefore intended to improve the quality of practical work in the custodianship system, among other things through specific practical requirements for and support to custodians (see 23.), but also through clarification of the legal requirements in the wording of the law.[316]

68. Provide an assessment of your system in terms of protection of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:
a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;
b. protection during a procedure resulting in the application, alteration or termination of adult support measures;
c. protection during the operation of adult support measures:
• protection of the vulnerable adult against his/her own acts;
• protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;
• protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;
• protection of the privacy of the vulnerable adult.

Art. 12 (4) CRPD obliges the state parties to provide appropriate and effective safeguards along with the measures that relate to the exercise of legal capacity. These safeguards shall in particular ensure that the measures respect the rights, will and preferences of the vulnerable adult, are free of conflict of interest and undue influence, are proportional and tailored to the vulnerable adult's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. In any case, the safeguards shall be proportional to the degree to which such measures affect the vulnerable adult's rights and interests.

As a whole, the **safeguards** provided for in the German law on custodianship are to be assessed as being in line with Art. 12 (4) CRPD. The protection of the vulnerable adult is achieved through a multitude of safeguards – as shown – which

[315] Cf. BT-Drs. 19/24445, 1–2, 121, 144; D. BROSEY, 'Der General Comment No. 1 zu Art. 12 der UN-BRK und die Umsetzung im deutschen Recht' *BtPrax* 2014, 211, 215; V. LIPP, 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK' in V. AICHELE (ed), *Das Menschenrecht auf gleiche Anerkennung vor dem Recht – Artikel 12 der UN-Behindertenrechtskonvention*, Nomos, Baden-Baden 2013, pp. 329, 330; see also V. MATTA et al., *Qualität in der rechtlichen Betreuung*, Bundesanzeiger Verlag, Cologne 2017; H.-D. NÖLTING et al., *Umsetzung des Erforderlichkeitsgrundsatzes in der betreuungsrechtlichen Praxis im Hinblick auf vorgelagerte „andere Hilfen*", Bundesanzeiger Verlag, Köln 2018.
[316] Cf. BT-Drs. 19/24445, 1–2, 121, 144.

operate at **three levels**: protection from inappropriate or even inadmissible measures, protection of the individual within the measure, and protection of the vulnerable adults from themselves. In general, their aim is to restrict intervention in the lives of the persons concerned and to limit the burden on the vulnerable adults to the minimum necessary for their support and protection. It should be noted that the German state is *obliged to protect* vulnerable adults, as the Federal Constitutional Court has repeatedly stated; as *ultima ratio* under very restrictive prerequisites even against their natural will.[317]

Safeguards can be found at the **substantive** level as well as in the **procedural rules**. With regard to ordering, termination, restriction or extension of the measure, in any case, subsidiarity and proportionality play the decisive role and are reflected in the principle of necessity, e.g. with regard to the appointment of custodians, the assignment of areas of responsibility to them or the cancellation of custodianship (§§ 1814, 1815, 1871 BGB). The principle of necessity is also decisive in the proceedings themselves. For example, the competent custodianship authority must be heard in the proceedings prior to the appointment of a custodian or the ordering of a reservation of consent (§ 279 (2) 1st s. BGB). This authority prepares a social report (§ 11 (1) no. 1 BtOG), which in particular assesses whether the order of the measure can be avoided by voluntary measures or other assistance. Following the reform, this report is now expressly to be received by the court *before* an expert opinion is requested. This is intended to avoid, as far as possible, the intimidating examination and questioning by the expert in the first place if it is not necessary, for example because other assistance is already sufficient to support the vulnerable adult and no custodian needs to be appointed.[318] Further procedural provisions, in particular the (constitutionally protected)[319] right to be heard and the requirement of expert opinions in specific cases, safeguard the proceedings against arbitrariness and emphasise the particular position of the vulnerable adult as the subject of the proceedings. In addition, a time limit of the measures (cf. §§ 286 (3), 294 (3), 295 (2) FamFG) and regular as well as ad hoc assessments of whether they are still necessary also contribute to the protection of the vulnerable adult in a manner consistent with Art. 12 (4) CRPD. The substantive and procedural requirements regarding the state ordering of measures guarantee a high standard of protection.

Furthermore, there are safeguards that concretely secure the **position** of the vulnerable adult as the subject of the respective protection measure **in relation** to **others**, be they support persons or representatives. On the one hand, during custodianship, the custodian is in principle obliged to report and provide information to

[317] Cf. BVerfG (Federal Constitutional Court), 26.07.2017 – 1 BvL 8/15, *NJW* 2017, 53; BVerfG, 24.07.2018 – 2 BvR 309/15, 2 BvR 502/16, *NJW* 2018, 2619, 2621–22.

[318] Cf. BT-Drs. 19/24445, 332; see also BGH (Federal Court of Justice), 19.08.2015 – XII ZB 610/14, *NJW* 2016, 159, 160.

[319] See BVerfG (Federal Constitutional Court), 23.03.2016 – 1 BvR 184/13, *NJW* 2016, 2559.

the custodianship court as supervisory authority. In addition, certain actions are subject to court approval. Further legal provisions protect in particular the assets of the person concerned. With regard to actions concerning the person of the vulnerable adult, respect for their self-determination is expressly emphasised. In particular, acts that involve serious risks for the vulnerable adult can generally only be taken as an *ultima ratio* remedy with the involvement of the custodianship court and after a precise demonstration of proportionality, e.g. compulsory accommodation or medical measures. Through the supervision thus ensured, as well as through the selection criteria of the custodian and the harsh sanction of dismissal of the custodian (§ 1868 (1) BGB), the vulnerable adult is protected as far as this is reasonably possible. In the voluntary measure of (continuing) power of attorney, on the other hand, control is primarily left to the design by the vulnerable adults – this is, however, just as much an expression of their autonomy. Supervision of the attorney is in the first instance the responsibility of the granter. Furthermore, it is also possible, for example, to appoint a second attorney with the express task of supervising the first one. Finally, with the involvement of the custodianship court, subsidiary to actions of the vulnerable adult, necessary – graduated – protective measures can be activated according to § 1820 (3) to (5) BGB, especially in the case of suspected abuse of the power of attorney (see 45.).

Finally, the rules for the **protection** of vulnerable adults **from themselves** must be considered. This will be exemplified by the central norm of § 1821 (3) BGB: Even before the recent reform, the Federal Court of Justice underlined the high rank and decisive importance of the wishes of the vulnerable adult in custodianship law.[320] The vulnerable adult's wishes were only *not* to be considered if compliance with them would endanger higher-ranking legal interests of the person under custodianship or significantly worsen their entire living and care situation. The same should apply if, as a result of the illness, the vulnerable adult is either no longer able to form own wishes and ideas and to make them the basis and orientation of their life, or if the person concerned fails to recognise the facts on which the formation of their will is based as a result of the illness.[321] Unfortunately, however, the Court did not sufficiently take into account the motives and the capacity of understanding of the person under custodianship, for instance in the case of intentional self-harm. A slight priority of higher-ranking legal interests over the will of the vulnerable adult was ultimately maintained in this decision.[322] Thus, the right to self-determination, which also includes the right to self-harm of one's own free will, was not adequately taken into account and the door to objective best interests was not entirely closed.

---

[320] Cf. BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814, 2815–17.

[321] Cf. BGH (Federal Court of Justice), 22.07.2009 – XII ZR 77/06, *NJW* 2009, 2814, 2815–17.

[322] Critically D. BROSEY, 'Wunsch und Wohl betreuter Menschen im Lichte der UN-BRK' in V. AICHELE (ed), *Das Menschenrecht auf gleiche Anerkennung vor dem Recht – Artikel 12 der UN-Behindertenrechtskonvention*, Nomos, Baden-Baden 2013, pp. 355, 367–68.

According to the new § 1821 (2) 3rd s. BGB, the custodian must in principle comply with the wishes of the vulnerable adult. The custodian is only released from the obligation to comply with the wishes to the extent that the vulnerable adult or their assets would be considerably endangered by such action *and* the vulnerable adult cannot recognise this danger due to their illness or disability or cannot act in accordance with this understanding (§ 1821 (3) no. 1 BGB) or this cannot be reasonably expected of the custodian (§ 1821 (3) no. 2 BGB). With regard to the first exception, the right of self-determination and the free will of the vulnerable adult are now largely respected. Nevertheless, even in the case of dangers which the person concerned cannot recognise as a result of their impairment, it must be assessed whether these dangers are *considerable*. This must not be done according to objective criteria, rather the autonomy of the vulnerable adult must sufficiently be taken into account.[323] Self-responsible self-endangerment is also the decisive criterion in other regulations, in the context of which the will of the person concerned meets the state's duty to protect. Besides this, the second exception according to § 1821 (3) no. 2 BGB is a necessity, but must be interpreted narrowly. Some authors, however, are critical of the new regulation.[324] It remains to be seen how practice will deal with this new central provision on the boundary between protection and empowerment of the vulnerable adult.

[323] Cf. T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 259.

[324] Critically, among others, C. BARTELS, 'Die große Reform: Primat der Wünsche des Betreuten – die neuen Vorschriften des Betreuungsrechts' *FamRB* 2021, 204, 208; T. FRÖSCHLE, *Das neue Vormundschafts- und Betreuungsrecht*, C.H. Beck, Munich 2022, mn. 257–61; A. SCHWEDLER, 'Die Betreuungsrechtsreform' *NZFam* 2022, 1011, 1015.