

Belgium

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1. Belgium has ratified both the CRPD and its Optional Protocol in 2009. The Bills on the ratification and the execution of the Hague Convention 2000 will expectedly be adopted in Spring 2019.¹

Following the adoption of the CRPD, a fundamental legislative reform of adult protection has been prepared that was adopted in 2013 and partly reformed in 2018. The original measures of interdiction – comparable to minority – and judicial assistance – comparable to emancipation – had been supplemented with prolonged minority (and prolonged parental responsibility) in 1973 and with a provisional administration of property of incapacitated adults in 1991. The latter regime already allowed tailormade incapacitation and served as the basis for the fundamental 2013 reform, with extension to personal matters.

2. The 2013 reform has abolished the yearly overview in the Official Gazette of judicial measures of protection (below: MoP), which overview had already been abandoned for prolonged minority and provisional administration. Even though an excerpt of each judgment of judicial protection is still published in the Official Gazette, no official statistics are available. No publicity is organized either for judgments that vest a spouse with the authority to represent the vulnerable spouse.

The National Federation of Civil Law Notaries is responsible for the management of Central Registers of marriage contracts, of lasting powers of attorney and of declarations of preference of the administrator or and confidential counsellor to be judicially appointed in case need be. These registers are not public and statistics are not available either. The National Federation of Civil Law Notaries has published some data. From September 2014-June 2018, some 80k Lasting Powers of Attorney had been registered, with monthly registrations increasing from ca. 1200 in 2015 to almost 3000 in the first year half of 2018 (Belgian population ca. 11M).² Over the same period, some 11k declarations of preference had been registered, an increase from less than 100 to 450 monthly.

3. The protection of vulnerable adults is comprehensively organized in Title IX of the Civil Code; the procedure is regulated in the Judicial Code. The legislature aimed at introducing a consistent and coherent protection of adults that was clearly distinguished of the protection of minors. The focus is on autonomy rather than on protection; the principles of necessity, subsidiarity, and proportionality apply. The legislature has also taken to heart awareness-raising (art. 8 CRPD) through legislative terminology, e.g. by avoiding terms referring to the protection of minors or to the paradigm of protection, such as ‘guardianship’.

“Protected adults” are defined as adults who, due to their health condition, are fully or partly, albeit temporarily, unable to properly take charge of their property or personal interests without assistance or other measure of protection. They can be placed under protection if and insofar as required for the protection of their interests. A protection order is possible from the age of 17 and will become effective at the age of 18. Protection of property interests is also possible in case of prodigality, not due to one’s health condition. Protection can be either extrajudicial or judiciary.

On the one hand, the provisions on extrajudicial protection regulate the conditions under which legal acts can be declared null and void (post mortem) by the court on the basis of lack of consent due to one’s health condition, particularly in case the person concerned was later

¹ www.lachambre.be, documents 54K2421 and 2422.

² www.notaire.be > Baromètre des notaires > Semester 1 2018.

placed under judiciary protection. On the other hand, the Civil Code regulates Lasting Powers of Attorney (LPA). In order to be effective, LPA must be registered (see above) and should explicitly mention their applicability in case of protection. They can apply to both property and personal interests. The donor can appoint several agents and can determine their separate or joint competence. He should also determine the entry into force of the LPA, e.g. by the delivery of a certificate by the GP. There is no ex ante review of the LPA or the entry into force by a judicial or administrative body. The LPA is subject however to some ex post legal or court-ordered limitations – e.g. in case of conflict of interest between the donor and the attorney. The court also has jurisdiction (of its own motion) to (partly) end the LPA and replace it with judiciary protection.

Judiciary protection can only be ordered by the justice of the peace in case and insofar that extrajudicial protection does not allow to sufficiently protect the adult's interests. Any interested party can petition the court, and the court can also intervene ex officio in case of psychiatric confinement. In principle, the petitioner should submit a report by an approved medical practitioner or a psychiatrist. In case judiciary protection is necessary, the court should on the one hand determine the adult's legal incapacity to act alone, with assistance or not at all. This determination should be custom-made both for personal and property interests. The Civil Code contains a checklist of legal acts concerning personal interests and property interests that are considered important and for which the court should explicitly determine the adult's legal capacity. Legal acts concerning the family, such as marriage or acknowledgment of a child, are included in the checklist. On the other hand, the court can appoint an administrator or administrators to either represent the protected adult, or to assist him in personal or property matters. Representation and assistance are not allowed for strictly personal acts such as marriage or divorce petition. Administrators are subject to court control, e.g. judicial authorization of potentially dangerous legal acts, and are accountable to the court. The protected adult or the court can also appoint a confidential counsellor, somewhat comparable to an auxiliary guardian, who may mediate between the protected adult and the administrator and who supports the protected adult in expressing his opinion. Close family members are preferable appointed as administrator of confidential counsellor by the court, and court control is somewhat severed in case the parents are appointed as administrators. Close family members can also be nominated by the protected adult in a declaration of preference.

4. General private law techniques such as *negotiorum gestio* apply to the protection of interests of vulnerable adults. Moreover, the family court can vest a spouse with the competence to represent the vulnerable other spouse regarding marriage rights and obligations, including marital property law. The power of attorney by a protected adult will end in case it does not meet the conditions of a LPA.

5. Empowerment and protection of vulnerable adults seems up to standard since the 2013 fundamental reform, particularly insofar judiciary protection is concerned. With regard to LPA, it is firstly criticized that the focus on autonomy is to the detriment of protection. The withdrawal of court control may give rise to financial abuse, particularly of the elderly. Elsewhere in law, specific attention is devoted to elderly abuse³, but not here. Secondly, a protected adult may also conceive the LPA as a living will, containing choices regarding medical treatments. The provisions on LPA are however not integrated with particular legislation on advance medical planning and euthanasia.

With regard to judiciary protection, the provisions are regrettably not integrated with marriage law and all too often the competences of the spouse and the administrator are not well delineated. Empowerment of vulnerable adults is a competence of the federated entities in

³ <https://1712.be/geweld/ouderenmisbehandeling>

Belgium, whereas civil law protection is a federal competence. Contrary to other fields of law, an integrated approach is disappointingly lacking.

One final but major point of critique is that the government does not at all meet the requirement of statistics and data collection provided for in art. 31 CRPD. To a lesser extent, attention should be had for awareness-raising.

Legislation: <https://www.belgiquelex.be/en>

Ministry of Justice brochure (Dutch and French only):

https://justice.belgium.be/fr/themes_et_dossiers/personnes_et_familles/protection_des_majeurs/documents_utiles/brochure