
Personal budgets and legal capacity. More autonomy, more tension.

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Résumé

This contribution deals with issues concerning the right to legal capacity when shifting towards personal budgets for persons with disabilities.

Under the impetus of the UN Convention on the Rights of Persons with Disabilities there is a worldwide shift to personal budgets in disability care. At the basis is the right to live independently and to be included in the community (art. 19), that according to the United Nations Committee on the Rights of Persons with Disabilities must be realized through *“person-directed ‘user’-led human support”*. This marks the end of funding the supply side; funding for care and support must be linked to and managed by the person with disability.

The transition to personal budgets has been applauded as a shift towards greater autonomy and is considered a prerequisite for the realisation of another right in the Convention: the right to equal recognition before the law (art. 12). That right is considered to be the cornerstone of the Convention and states that the will and preferences of a person with a disability must be central. The link between legal and mental capacity must be rejected, as must any form of substituted decision making. Instead, supported decision making must be used.

On the level of the principles personal budgets indeed enhance the right to legal capacity. In practice however, tensions may arise exactly between legislation on these personal budgets and the right to legal capacity. This is for example the case in dealing with persons we consider unable to manage their own budget.

The purpose of this contribution is to examine to what extent legislation on personal budgets is in line with the right to legal capacity as referred to in Article 12 of the UN Convention. To the extent that legislation appears to be in conflict with this article, this contribution quests for possible solutions. To do this, the legislation of the Flemish community serves as a case. In 2014 the northern part of Belgium refrained from directly subsidising care providers and started to award personal budgets. After a tailored assessment, persons with disabilities receive a budget (either in cash or in vouchers) that they can freely spend on care and support.

An article 12 analysis of legislation on personal budgets is renewing. Often only guardianship laws are evaluated from this perspective. However, if we assume that personal budgets contribute to the realisation of the right to legal capacity, we must at least ensure that the

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law governing these personal budgets does not infringe on the right to legal capacity.

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