

Study on the Issues of Legal Application of Intended Guardianship System in China: From the Perspective of Protecting the Rights and Interests of the Elderly

Nan Ye*

Heyuan Open University, Heyuan 517000, Guangdong Province, China

*Corresponding author: Nan Ye, 15007622766@qq.com

Copyright: © 2023 Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution License (CC BY 4.0), permitting distribution and reproduction in any medium, provided the original work is cited.

Abstract

With the development of society, the problem of population aging has become increasingly prominent, and the protection of the rights and interests of the elderly has attracted more attention from the public and also troubled the governments of all countries in the world. At present, although the intended guardianship system has been stipulated in the legislation, there still exists some partial and uneven problems, hence the intended guardianship supervision system urgently needs to be perfected.

Keywords

Intended guardianship
Supervision system
People's Republic of China Civil Code

Online publication: November 25, 2023

1. Introduction

The rights and interests of the elderly in China have sought new protection ideas according to the intended guardianship system stipulated in the People's Republic of China Civil Code promulgated in 2021. However, the intended guardianship system still leaves much room for interpretation and discussion in the identification of the subject's behavioral capacity and the management of property.

2. The concept of intended guardianship

The concept of intended guardianship has been defined differently by several scholars. For example, some scholars believe that it is "an instrument guardianship

agreement established based on the will of the parties, and the selection of guardians, guardianship affairs, and guardianship (agency) authority are decided by the parties themselves." Some scholars also describe it as "a system in which adults over the age of 18 who cannot recognize or cannot fully recognize their own actions due to intellectual or mental disorders, old age, or illness, and therefore need others to protect their person, property, and legitimate rights and interests"^[1].

Although the above definitions have explained the intended guardianship to a certain extent, the academic community has not analyzed the constituent elements of "intended guardianship," and the rigor of their expressions

is also worth our further investigation. In essence, the intended guardianship could be divided into two stages, that is, before and after the intended guardianship agreement takes effect. Before the intended guardianship agreement takes effect, the two parties belong to the entrusted legal relationship. After the guardianship agreement takes effect, the two parties belong to the guardianship legal relationship^[2].

3. The constituent elements of intended guardianship

According to the provisions of the Civil Code of the People's Republic of China, it is concluded that guardianship has the following components.

3.1. Full capacity for civil conduct

The Civil Code of the People's Republic of China stipulates that the establishment and entry into force of civil acts are based on the premise that the civil subject has the capacity for civil conduct, and the person with limited capacity for civil conduct can only perform civil acts that are compatible with his intelligence and age. Although the act of intended guardianship is similar to that of entrustment agency and that of trust, it has its particularity. After the occurrence of the agreed cause, the guardian needs to fully, effectively, and appropriately perform the guardianship obligation to the ward, including protecting and guaranteeing the personal safety of the ward, reasonably managing the property of the ward, and other civil acts based on the true will of the ward^[3].

3.2. Written form of the agreement

China's Civil Code and Contract Law stipulate that the parties may adopt oral or written form as an essential condition for the establishment of an agreement, but if the law requires that it should be in written form, it shall be established in written form. The Civil Code of the People's Republic of China is the basic civil law formulated and passed by the National People's Congress of our country, whose effect is second only to the Constitution, so the "written form" stipulated in it to establish an intended guardianship agreement is also the key to the validity of the agreement. In addition, the written form is more conducive to protecting the legal rights and interests of the ward^[4].

3.3. Transformation from entrusting legal relationship into guardianship legal relationship

Under normal circumstances, a contract takes effect upon its establishment, but the Civil Law of the People's Republic of China stipulates that a contract with effective conditions shall take effect upon the establishment of the conditions, because the intended guardianship agreement is a contract with effective conditions, that is, the entry into force of the contract is premised on the loss of behavioral capacity of the trustor, so unless the above conditions are met, the contract will not take effect^[5]. If a party improperly facilitates the fulfillment of a condition for its own benefit, it shall be deemed that the contract condition is not fulfilled. Therefore, if the trustee intentionally infringes on the trustor before the contract becomes effective, resulting in the loss of capacity of the trustor, it cannot be regarded as the fulfillment of the conditions for the contract to become effective^[6].

4. The predicament of intended guardianship in the protection of the rights and interests of the elderly

4.1. The predicament in determining behavioral capacity

The premise and core element of the determination of guardianship is the loss of behavioral capacity of the ward. However, according to the stipulation of the Civil Code of the People's Republic of China, a person with no or limited capacity for civil conduct is firstly determined based on the fact of total or partial loss of ability to identify his own behavior, and then his interested parties or organizations need to apply to the court on his behalf, and lastly the court determines it^[7]. The elderly group is different from other general adult groups and is more diverse than other groups. Therefore, the following problems will inevitably occur when applying the rules of voluntary guardianship. Firstly, the criterion of judging capacity is too simple; secondly, the declaration system of lack of capacity may infringe on the rights and interests of the elderly^[8].

4.2. Predicaments in property management

Under the guardianship system, although it is stipulated that the guardian needs to protect the property rights

of the ward, in the rapid development of society and economy, the value of property is no longer just possession and use, but gradually embodied in exchange and appreciation. The guardians determined by the elderly through consultation are often close relatives, civil affairs department staff, or other grass-roots organizations^[9]. However, it is difficult for them to ensure that the property interests of the elderly are not impaired due to their own ability limitations. In addition, the application problems of supervision in property management are also reflected in the following aspects: the lack of property guardianship rules and the lack of distinction between property types^[10].

For example, Mr. Zhang, the former general manager of Neijiang Capital South Park Corporation, lost tens of millions of assets in the hands of the nanny who took care of him.

5. The optimization path of the guardianship supervision system in China

5.1. Establishing pre-supervision of voluntary guardianship

Article 11 and Article 12 of the Notary Law of the People's Republic of China clearly define the right of notaries to participate in judicial assistance work, so the notarization of determined guardianship can also be included in other notarization projects voluntarily applied for by the parties. Through formal and substantive examination, it is actually possible to determine the real will of the ward and whether he has full capacity for civil conduct at the time of signing the voluntary guardianship agreement. Thus, it realizes the preventive judicial function of notarization. On the whole, the notarial institutions have the legitimacy of the pre-supervision of determined guardianship^[11].

Commencement of voluntary guardianship should be confirmed by the court. The rights and responsibilities of both parties should be determined through the analysis of the agreement. The judge shall further determine the rights and obligations of the parties of the contract according to the scope of authorization stipulated in the voluntary guardianship agreement. At the same time combining the specific terms of the intended guardianship agreement, the court reminds the ward of his scope of independent decision-making and determines the ward's

scope of authorization corresponding to the current status of the ward so as to prevent the ward's exercise of rights beyond the scope of authorization^[12].

5.2. Establishing supervision in the course of determined guardianship

There are two different ways to choose and set up a voluntary guardianship supervisor^[13]. One is to be chosen by the ward. To this end, supervision clauses can be stipulated in the guardianship agreement and signed by three parties, namely, the ward, the voluntary guardianship supervisor, and the voluntary guardian, clarifying the rights and responsibilities of the three parties^[14]. The other is to be determined through the authorization of the court. The voluntary guardian appointed by the court shall have no interest with the legal guardian. The reason why the application of the voluntary guardianship system chooses someone other than the legal guardian is mainly because the ward has lost confidence in the legal guardian^[15].

Therefore, the court can appoint a voluntary guardianship supervisor according to its own authority and can understand the relationship between the legal guardian and the ward through investigation and other methods when necessary.

Court review of improper guardianship should be established. In our country, there still exists understaffing problem in the court. Therefore, if the court is in charge of the entire process and actively investigates the behavior of the voluntary guardian for their neglecting or improperly performing guardianship affairs, it will cause serious human resources allocation problems in the court^[16]. Therefore, under the conditions of the existing legal system, it is a more practical and feasible way to construct the "report-investigation" system with "application + authority" as the core. In the application of the law, the court may, according to its actual needs, take positive measures to conduct a preliminary review of its implementation^[17].

5.3. Improving post-supervision of voluntary guardianship

When exercising the duty of guardianship, the voluntary guardian may easily have a deviation in concept, resulting in injustice due to his safeguarding his own interests. Those who seriously deviate from the expectations of

the ward, and who believe that they are performing the intended guardianship affairs for their own undue benefit, and whose offense is serious, shall be disqualified from guardianship once found. As for the subject of the lawsuit applying for the right to revoke, we shall include in law the ward as the subject of the lawsuit applying for the right to revoke^[18].

After the status of a voluntary guardian is removed, the ward has previously appointed another voluntary guardian, the voluntary guardian shall continue to perform his guardianship duties. In this case, it should be pointed out that although the ward has appointed a number of intended guardians in advance in the voluntary guardianship agreement and reached an agreement with the parties, the scope of the powers granted by the ward to different intended guardians are not consistent, and each voluntary guardian only bears the guardianship

responsibilities within the scope of authority, and has nothing to do with the guardianship matters outside the scope of authorization. In a case where none of the multiple voluntary guardians is willing to take the voluntary guardianship in place of the disqualified guardian, the court may appoint a voluntary guardian for the ward^[19].

6. Conclusion

In an age when the aging of society tends to be more prominent, giving full play to the effectiveness of voluntary guardianship is the key to dealing with the protection of the rights and interests of the elderly. However, the system of voluntary guardianship itself still has a lot of room for improvement, and there are still many problems to be discussed in real life^[20].

Disclosure statement

The author declares no conflict of interest.

References

- [1] Li X, Zhang D, 2022, Study on Adult Voluntary Guardianship System in the Era of Civil Code. *Journal of Anhui Open University*, 2022(2): 1–6.
- [2] Lin Y, 2021, Study on Adult Voluntary Guardianship System from the Perspective of Civil Code. *Journal of Guangdong Open University*, 2021(3): 52–58.
- [3] Wang H, 2021, Research on the Integration of Voluntary Guardianship and Notary System Under the Background of Civil Code. *Legality Vision*, 2021(17): 128–129.
- [4] Chesterman J, 2013, The Future of Adult Guardianship in Federal Australia. *Australian Social Work*, 66(1): 26–38.
- [5] Mizuno Y, Nanba Y, 2003, Aging Society and the Adult Guardianship System. *Geriatrics & Gerontology International*, 3(4): 225–235.
- [6] Carney T, Tait D, 1998, Adult Guardianship: Narrative Readings in the “Shadow” of the Law? *International Journal of Law and Psychiatry*, 21(2): 147–162.
- [7] Zhang H, 2020, The Necessity of Psychological Care in the Elderly Care Process Under the New Situation. *Electronic Journal of Practical Clinical Nursing*, 2020(18): 191–192.
- [8] Peng C, 2019, Reconstruction of the Relationship Between Guardianship and Behavioral Ability Under Modern Guardianship Concept. *Chinese Journal of Law*, 2019(04): 61–81.
- [9] Zhang Q, 2019, A Legislative Study on the Guardianship System for the Elderly in China. *Theoretical Observations*, 2019(06): 113–115.
- [10] Li Y, 2019, Exploration of the Guardianship System for the Elderly in China from the Perspective of the Civil Code.

- Journal of Shandong Academy of Governance, 2019(02): 74–78 + 109.
- [11] Zhu Y, Wang C, 2019, On the Reshaping of Standards for Adult Guardianship in China: From Behavioral Ability to Functional Ability. *Journal of Anhui University (Philosophy and Social Sciences Edition)*, 2019(02): 101–109.
- [12] Sun H, 2018, The Predicament and Reconstruction of Chinese Public Guardianship Model for the Incapacitated Elderly. *Journal of Hohai University (Philosophy and Social Sciences Edition)*, 2018(04): 38–44 + 91–92.
- [13] Sun X, 2018, The Shift and Modification of Adult Guardianship Reform in Context of Civil Code. *The Jurist*, 2018(04): 16–34 + 191–192.
- [14] Liu A, 2018, A Study on the Guardianship System of the Elderly from the Perspective of The General Provisions of the Civil Law—On Voluntary Guardianship. *Journal of Liaoning Normal University (Social Sciences Edition)*, 2018(02): 13–18.
- [15] Wang Z, 2018, The Latest Development of Adult Guardianship System: Supporting Decision Making. *Journal of Law*, 2018(03): 78–87.
- [16] Li G, 2017, On the Coordination between the System of Behavioral Abilities and the New Type of Adult Guardianship System: A Review of the Institutional Arrangement of the General Principles of Civil Law of the People’s Republic of China. *Legal Science (Journal of Northwest University of Political Science and Law)*, 2017(03): 131–140.
- [17] Wu J, 2018, Research on the Construction of Adult Guardianship Supervision System in China, dissertation, Fuzhou University.
- [18] Huang R, 2015, An Analysis of Japan’s Adult Guardianship System and its Reference Significance for China, dissertation, East China University of Political Science and Law.
- [19] Xu Z, 2013, A Study on the Adult Guardianship System in Taiwan, dissertation, Central China Normal University.
- [20] Luo J, 2009, *The French Civil Code*, Compiled, Peking University Press, Beijing.

Publisher’s note

Art & Technology Publishing remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.