

On the Guardianship System of the Aged in China

Shuai Pan

Wuhan University of Technology Grammar Academy
Hongshan District, Wuhan City, Hubei Province, China

Abstract—The aging problem facing China is becoming more and more serious while the relevant laws on the supervision of the aged are far from perfect. The General Principles of Civil Law, which was officially implemented on October 1, 2017, expanded the scope of regulation and the elderly population are within the coverage, however, it is undeniable that deficiencies are also existed. This paper compares the German guardianship system for the aged, analyzes the current guardianship system for the aged in China, and put forward several suggestions such as classifying the aged in China in detail and deal with different situations in accordance with the current social and legislative reality in China, moreover, further improve the temporary guardianship measures and the relevant provisions of the temporary guardian, and add the relevant system of entrusted guardianship.

Keywords—Elderly guardianship; Intentional guardianship system; Normal; The general civil law

I. IMPROVE THE FOUNDATION OF THE ELDERLY GUARDIANSHIP SYSTEM IN CHINA

In recent years, China has experienced an aging problem, which is becoming more and more serious. In order to better protect the rights of the elderly, it is urgent to establish a comprehensive system for the supervision of the elderly in China.

A. The practical needs of the elderly guardianship system.

The problem of aging faced by China's current society is very serious. According to relevant UN data, as early as 2000, there were 85.5 million elderly people over 65 years old. It is expected that this number will soar to 156.47 million by 2020 and as many as 215.96 million by 2030. By this time, the total number of elderly people in China will rank first in the world [1]. In other words, by 2030, one in every four Chinese is an elderly person [2]. Not only that, as the country with the largest population in the world for a long time, China's aging is characterized by the large number of elderly people, rapid development, uncoordinated development and aging more than the level of social and economic development [3].

China's long-term family pension model has also been greatly affected. This is not unrelated to the long-term implementation of the basic national policy of family planning, the emergence of a core family life model, and the increasingly intense social competition in a market economy.[4]With the increasing competitive pressures facing social life today, it is basically difficult for a young couple to assume the family pension model of four elderly people. Moreover, the traditional way of living has also been severely impacted. Especially in

some remote rural areas, children are basically going out to work, which has led to the growing problem of "empty nesters".[5] However, the current guardianship system in China is still insufficient for the protection of the elderly with mental problems. At present, the newly promulgated "General Principles of Civil Law" classifies the elderly with physical disabilities caused by old age and diseases into the non-civil behavioral capacity or the capacity of people with limited capacity for civil protection, but there are still shortcomings.

B. The theoretical basis of the guardianship system for the elderly

Previously, the scope of application of China's current guardianship system was for minors and mental patients. In the specific guardianship system, the guardian must be the actor with full civil capacity, while the person under guardianship must be the person with incomplete civil capacity or the person without civil capacity, and the guardianship system can only be applied if it meets other conditions stipulated by law. As can be seen from this, China has strict requirements on the application of guardianship. Because guardianship means a certain degree of deprivation of the guardian's ability to handle his own affairs, these strict requirements are made in consideration of the respect for the guardian's ability to handle his own affairs. Guardianship system in our country "general principles of the civil law", from the perspective of the economic interests of the protection and maintenance of transaction security, do not have person of civil action ability and the limited capacity for civil conduct despite equal capacity for civil rights with others, but its the realization of the right ability is limited by their behavior ability, therefore cannot be independent or not completely independent civil activities. The establishment of guardianship system can complement the capacity of persons without civil capacity and those with limited capacity, so that they can participate in normal economic activities with the help of guardians. In this way, their legitimate rights and interests can be protected and the stability of transaction order can be maintained.

According to the relevant provisions of guardianship in general principles of civil law of China, the applicable objects of guardianship system are limited to minors and mental patients. If the elderly want to apply the relevant provisions of guardianship system to obtain the supervision and protection of personal rights and interests and property rights and interests, they must be mental patients to obtain the protection of guardianship system. In reality, most of the elderly with the increase of age, physical, mental and spiritual aspects of level gradually decline, lead to lack of behavior ability, can not properly handle their own affairs, but that does not belong to

the category of mental patients, and the mental patient itself is a medical concept, mainly refers to the various harmful factors caused by brain dysfunction, abnormal clinical manifestations of mental activity. Therefore, the provisions of the guardianship system in the civil law are most appropriate if the rights and interests of this part of the elderly want to get the maximum supervision and protection. China's new general principles of civil law has included this kind of elderly people into the category of guardian.

II. THEORETICAL RESEARCH ON THE GUARDIANSHIP SYSTEM FOR THE ELDERLY ABROAD

Foreign adult guardianship system, especially the elderly guardianship legislation leading China for many years, is more perfect. We should actively study the advantages of foreign legislation to make up for our shortcomings.

A. Foreign scholars' theory on the guardianship system of the elderly

In recent years, the international community to put forward a new concept about disabled people's welfare, namely "normal" and "respect for the self-determination", "is not disabled people from the us ordinary social members, but should let them participate in social activities, in all aspects of living a life of ordinary, to participate in normal activities." [6] The same goes for older people. The aged should be given special protection for inconveniences in movement and mental disorders caused by degenerative bodily functions. "Respect for self-determination," that is, "according to my existing ability to judge," "let him, by the hand of his guardian, integrate into the normal society of ordinary people as I wish, and have the right to have the right to make decisions about my basic life. The validity of the decision shall also depend on the decision of the person making the decision on his/her future affairs after he/she loses the ability to judge, for example, when he/she becomes senile dementia. [7]

Take countries with civil law system as an example, France passed act no. 68-5 as early as 1968, which abolished the original prohibition and quasi-prohibition of property and established a new guardianship system. In 1990, Germany enacted the Law on Reforming Adult Guardianship and Escrow Law, which was officially implemented in 1992. Subsequently, in 1998, Germany enacted the Law on Amending the Guardianship Law and Other Provisions to supervise the elderly. The problem has been completely planned. In Japan, on December 1, 1999, a number of laws and regulations on the custody of the elderly were promulgated, mainly including the Law on Amending Part of the Civil Law, the Law on Arbitrary Guardianship Contracts, and the Law on Guardianship Registration. The law on the amendment of laws relating to the implementation of laws on the revision of civil law, the formal implementation of these laws means that the original custody system in Japan has been completely changed [8].

B. Introduction of Germany's elderly guardianship system

This paper mainly introduces the guardianship system of the elderly in civil law system countries similar to China's legislative system, taking the reform of adult guardianship system in Germany as an example.

On January 1, 1992, the federal government of Germany began to implement the law on the reform of the adult custody and custody law, hereinafter referred to as the care law. There is a big difference between this law and the guardianship system in Germany's previous civil law, which is mainly reflected in the following aspects:

First is to take care of the system to replace the original prohibition of property declaration system. There are obvious differences between the care system and the original care system: No matter who the supervisor is, the capacity of the person in charge will not of course disappear or be limited because of this, unless there is a special reason, the court will determine that the specific intention of the person in charge should be recognized by the person in charge in order to be effective. Care is to realize the custody of the person under care, not the custody of his property. The basic principle that takes care of reflects for tutelage "complementary sex" or "necessity", take care of a person to still should respect the will of the person that be taken care of, the person that take care of agrees authority to be able to carry out only inside necessary limits. According to article 1896 of the German civil code, the objects of care and protection include adults with mental illness or physical, mental or spiritual disabilities who are completely or partially unable to deal with their affairs. The selection of the care person is mainly made by the guardianship court according to the application of the elderly or according to the authority. To the person that has physical obstacle (if old people), ought to have him to apply personally, even if oneself do not have natural sexual capacity, also ought to wait for him to come to apply for oneself after restoring this ability, only oneself cannot make clear meaning except.

Secondly, the legal obligations of the custodian are clarified. According to the provisions of articles 1901 and 1904 of the German civil code, the custodian shall abide by the following basic principles when performing the duties of care: 1. The custodian must take the maximization of the interests of the person being looked after as the basic starting point to handle the affairs of the person being looked after. 2. Without prejudice to the interests of the person in charge, the person in charge should try his best to meet the basic wishes of the person in charge. 3. The person in charge of the existence of disease or disability, the person in charge should try their best to eliminate the symptoms of the disease to promote their rehabilitation, to prevent the deterioration of the disease or reduce the consequences of the disease. 4. The guardian court shall be notified in time of the occurrence of causes which may lead to the suspension of custody. 5. The custodian shall first obtain the authorization of the guardianship court if he/she is allowed to undergo health examination, treatment or medical operation, unless it is immediately decided that there will be a danger.

Third, set up a care-taker protection support organization. A caretaker is not just one person; there can be multiple caregivers. Guardianship court can choose legal person to

assume the role of custodian, should regard natural person as custodian in principle, encourage a society to provide charitable group for its at the same time. When natural person and association legal person cannot undertake taking care of, right now the court ought to choose the person that take care of from authority in charge. "A person who has a subordinate or close relationship with a recuperation institution, a recuperation institution or other facility in which an elderly person is placed or lives shall not be selected as a caretaker."

Fourth, clear procedural provisions. In charge of the selection of the process, according to law should directly listen to my opinion, that is to say, if possible, should try to respect the true meaning of the person being taken care of. Under general circumstances, the term of office of the custodian is five years, after five years should reappoint the custodian, the supervision court every five years to be engaged in the audit whether there is still the need for care. No matter what his capacity is, he should be provided with procedural AIDS.

Fifth, the treatment of care. In general, the care of people to perform the responsibility of care is free, but, if the appointment of the care of people to professional way to carry out care, care should be paid at this time. When the custodian has performed the duty of care according to law, the expenses incurred in the process of care may be required to be paid or reimbursed by the guardian according to law. If the guardian has no ability to pay, it shall be paid in advance or reimbursed by the state Treasury [9].

The homogeneity of adult guardianship system is embodied in the following aspects: first, the establishment of intentional guardianship system. The establishment of consensual guardianship system is the focus of the reform of adult guardianship system of the two legal systems, and it is also an important result of the introduction of the latest international human rights concept. In this round of large-scale revision, all countries choose to abolish the old guardianship system that deprives the guardian of the ability to act, and set up a new voluntary guardianship system that reflects the concept of "respecting the autonomy of will". Second, the types of custody are diversified. The diversified development of adult guardianship type, that is, the establishment of multi-level and flexible adult guardianship mode, is a trend of adult guardianship system reform in the two legal systems, and an inevitable requirement of respecting the difference in the expression of the guardianship's meaning ability. Third, the monitoring content is more comprehensive. The original old system of prohibition and control of property is mainly to maintain the safety of transactions and protect the interests of the third party. Although the content of personal care of the guardian is involved, the content is very few. Most of the content is about how to manage the property affairs of the guardian, which is far from meeting the diversified needs of the guardian. The fourth is to strengthen the appropriate intervention of public power. Guardianship and supervision mechanism has become the focus of attention of all countries. As the public power guaranteed by guardianship and supervision, moderate intervention in adult guardianship has become the consensus of all countries. The guardianship system gradually breaks through the limitations of private law

and presents the development trend of public law and socialization [10].

III. ANALYSIS AND SUGGESTION ON LEGISLATION OF GUARDIANSHIP SYSTEM FOR THE AGED IN CHINA

General provisions of the separate establishment of adult custody system is one of the highlights. The design concept of guardianship system in China has undergone significant changes. It has changed the traditional concept of taking the ward as the object of management and adopted the modern concept of treating the ward as an independent subject and respecting his independent will. In the traditional system of prohibition and management of property, the person who is declared as the prohibition and management of property is prohibited from managing his own property and can only be managed by the guardian or the guardian. However, in the reform of guardianship system in Germany and Japan, the general trend is to fully respect the will of the ward, and to some extent respect his freedom to manage and dispose of property. As for civil subjects who have the ability of identification, they should not be prohibited from disposing of their own property.

This concept is particularly important for older people. In the guardianship system for the aged, the property of the aged cannot be completely handled by the guardian, and it is more appropriate to deal with it after fully listening to the wishes of the aged. The guardian shall not interfere in matters which his ward is able to handle.

Adult guardianship is included in the guardianship category. Its main significance lies in: 1. It is conducive to protecting the legitimate rights and interests of the elderly and meeting the development needs of the elderly society. 2. It conforms to the development trend of the international community. 3. It makes up for the deficiencies of existing laws and regulations. 4. Established the principle of maximizing the interests of the ward and respecting the true will of the ward.

The general provisions of the civil law makes new provisions on the guardianship system in China, which makes some loopholes of the guardianship system get important supplement, but the relevant provisions are still too principled. The unfinished business is:

(1)The guardianship system of the elderly in Japan should be fully used for reference, and the elderly should be carefully classified, so as to respect the autonomy of the elderly as much as possible. For the elderly who are unable to handle all their own affairs, guardianship shall be established and the guardianship system shall be applied. For the elderly who cannot handle part of their own affairs, the establishment of a system of social security; For the elderly who cannot handle their own specific affairs, set up an auxiliary system for them. This design not only has operability, but also respects the complexity of social life and the generality of the trading society, which makes the guardianship system for the elderly have social appropriateness.

(2) General Provisions Article 31 (3) Before the guardian is designated in accordance with the provisions of the first paragraph of this Article, if the person, property and other

lawful rights and interests of the ward are in an unprotected state, the residents' committee, the village committee, and the law shall The relevant organization or civil affairs department acts as a temporary guardian. The concept of "temporary guardian" was introduced in general. However, the concept of "temporary guardian" does not seem clear enough. Is it consistent with the nature and status of the "guardian"? Is there any difference? May be controversial in practice. In particular, in view of the need for the guardian to bear legal responsibility for the ACTS of the guardian, under the circumstances that the legal meaning of "temporary guardian" is unclear, when the relevant unit ACTS as the "temporary guardian", it is likely to shirk the responsibility of the guardian. I suggest that, in order to better define the duties of guardianship and protect the interests of the person under guardianship, the law should directly stipulate that relevant units should serve as temporary guardians. The "temporary guardian" status of the unit concerned shall be terminated when the final guardian of the guardian is determined.

(3)General Provisions Article 33 Adults with full capacity for civil conduct may, in advance, negotiate with their close relatives or other individuals or organizations willing to act as guardians to determine their guardians in writing. A guardian determined through consultation shall perform his guardianship duties when the adult loses or partially loses his capacity for civil conduct. To old people group, the factor that brings about its life inconvenience to need to take care of has a lot of, if the body function declines, leg and foot inconvenience is waited a moment. For adult guardianship, even if the parties have not lost their civil capacity, but out of the need to facilitate life, they should also carry out the necessary guardianship. Therefore, we suggest that the restriction of incapacitated persons should be removed from adult guardianship.

(4) General Provisions 36 stipulates that when a guardian is revoked for various reasons, the necessary guardianship measures are arranged for the new guardian before it has been produced. When the guardian is disqualified for guardianship due to his failure to perform his guardianship duties and so on, and the new guardian has not been determined, the guardianship of the guardian cannot be left in a blank state. The general provisions use the expression "arrange necessary temporary measures". However, the legal meaning of "temporary guardianship measures" is not clear. In practice, it is feared that the units or individuals who undertake "temporary guardianship measures" will shift responsibility to each other and refuse to undertake guardianship responsibilities. We recommend that the law be expressed directly as "temporary guardian arrangement" to avoid unnecessary disputes.

(5) It is necessary to set up entrusted custody. Guardianship system in the process of practice often faced with many complicated and special cases, such as adult children in the process of care for the elderly, sometimes because of work problems to travel or to work overtime, at this time of the elderly care will exist, in a long time makes guardian temporarily or unable to fulfill their duties of guardianship, by the guardian or by "range", or entrust others to take care of. If the ward is entrusted to take care of others, there is no relevant law to apply when the problem occurs. Regarding this issue,

the second paragraph of Article 36, paragraph 1 of the General Principles of Civil Law of China, has slightly mentioned the entrusted guardianship, but has not made detailed provisions, but only as a condition for the revocation of the guardianship qualification. Therefore, in order to protect the interests of the guardian, it is necessary to establish a entrusted guardianship system. If the guardian is unable to perform the guardianship duties temporarily or for a period of time for some reasons, the guardian may entrust others to perform the guardianship duties on behalf of the guardian through the entrustment contract, but the guardian shall still bear the guardianship responsibilities and shall not transfer the guardianship qualification.

IV. CONCLUSIONS

Promoting the reform of the guardianship system for the aged is an important measure for the benefit of the country and the people, as well as a major progress in the field of law in China. Respect for the residual capacity of the elderly is the embodiment of the principle of autonomy of will, which is also the further guarantee of freedom by law. The hierarchical treatment of the guardianship system, in the face of complex guardianship situation we will not be simple and crude. The intervention of public power will be a solid barrier to the protection of the rights and interests of the elderly. The civil code should improve the guardianship system for the aged. This in order to meet the needs of aging society, and respect for human rights development in the elderly, or is it promote perfecting legal system, etc., all have the important meaning, all need to build scientific and effective guardianship system, more humane care for the elderly, to promote the construction of harmonious society, is the need of the old, the family, is also the country's social need.

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