On the Legal Exploration of Protecting the Rights and Interests of the Elderly in China

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Abstract. Guardianship of the elderly is a guardianship system specially designed for the elderly in order to effectively protect the rights and interests of the elderly. This paper aims to design the system of guardianship for the elderly, define the scope of the elderly, the specific content of guardianship involves the main body of guardianship, the form of guardianship and the scope of guardianship, and also has a special guardianship supervision system, so as to establish a complete set of feasible guardianship system.

Introduction

Guardianship refers to a system stipulated in the civil law for the supervision and protection of the person, property and other lawful rights and interests of persons without civil capacity and persons with limited civil capacity. Guardianship is the supervision and care system in essence for people who lack the ability to act. At the moment, China has stipulated the guardianship system for minors and mental patients, and there is no special guardianship system for the elderly. The so-called guardianship system for the elderly is a civil guardianship system specially established for the elderly. In today's China, where the aging problem is serious, the aging population is increasing, and the related legal issues are also increasing. Therefore, it is extremely important to construct a guardianship system for the elderly.

Definition of the Objects of the Guardianship System for the Elderly

From the Age of the Definition

China's law on the protection of rights and interests of the elderly takes 60 years old as the age standard to define the elderly, which has scientific basis and conforms to the international trend and China's specific reality. At present, there are generally two international standards. The majority of developing countries are generally defined as 60 years old, while only a few developed countries are defined as 65 years old. According to the traditional definition standards of China, as early as thousands of years ago, China's ancient times defined the age of 60 as the lower limit of the elderly. In accordance with historical habits and the age conditions stipulated by the retirement and retirement systems after the founding of the People's Republic of China, the age of 60 is regarded as the boundary between old age and prime.[1]

From the Perspective of Behavioral Ability

Of course, as the main body of the guardianship system for the elderly, not all people over the age of 60 need to be guardianship, but take the age of 60 as the basis point, and then consider their behavioral ability, so as to determine the objects that need to be included in the protection framework of this system.

Capacity for conduct refers to the ability of a natural person to exercise his civil rights and assume civil obligations in accordance with the law. A natural person's capacity for civil conduct is based on his ability to judge and recognize objective things, that is, his capacity for consciousness. With the increase of age, the characteristics presented in the old age also gradually show up, while the behavior ability is a more obvious aspect. From the perspective of natural law, the behavioral ability of the elderly is gradually declining, and their ability to participate in civil activities by relying on their own behaviors is gradually declining.
Therefore, the elderly in need of supervision fall into the following situations: first, the elderly with poor meaning ability. Because most of the elderly disease, some diseases can make people gradually lose judgment, such as alzheimer's, this often due to mental disorders in the cognition of the lack of man, or for mental disorders and identify things ability obviously insufficient, unable to properly deal with the daily affairs, may damage the interests of its own already so, also can damage the rights and interests of the other party and the normal trading order. Therefore, these people should be included in the protection system of our elderly guardianship system. Second, the elderly with poor mobility, that is, those who are physically incapacitated or unable to move due to illness or other reasons. For this part of the elderly, because their sense of ability is not lost. In order to make the system better protect the rights and interests of the elderly and achieve the ultimate goal of setting up the system, we cannot completely disregard their own wishes and cannot simply use the traditional guardianship system. So that we should fully respect their will, set up a guardianship system suitable for their actual situation, such as the care system of Germany.[2]

The Identification of the Behavioral Ability of the Elderly

To determine which of the elderly need monitoring, the first to identify the elderly's behavioral ability. It includes the identification of meaning ability and the identification of action ability. The main body that appraise ought to be the hospital that has quite medical actual strength to undertake unified appraise that has law regulation, undertake appraise namely in the hospital that has qualification of behavioral ability appraise technically. And according to the actual situation of the identification of the status of grading, according to the actual level of the elderly behavior ability, divided into different levels of ability stage, so as to implement different degrees of supervision of them. Only by monitoring the elderly with different abilities and levels to different degrees can such monitoring be more targeted and meet the needs of the elderly, so that the monitoring system can play its role instead of unified and universal useless monitoring. The applicant that undertakes behavioral ability appraisal to old people, according to general legal principle and common sense, still have order cent. Applicants in the first order should be children, spouses, parents and themselves; Applicants in the second order are grandchildren, siblings and grandparents. The third order is other relatives or friends who have support relations and related units and organizations. Finally, by the court according to the hospital identification results of the elderly need to be monitored to determine the application of different monitoring methods. Therefore, the identification of the capacity of the elderly needs the court's confirmation, so as to effectively prevent the abuse of the guardianship system against the rights and interests of the elderly. It means fully respect the will of the elderly and avoid forced guardianship.

Contents of the Guardianship System for the Elderly

Main Body

China's legal provisions on the subject of adult guardianship can be found in article 17 of the general principles of civil law: "mental patients without or with limited capacity for civil conduct shall be under the guardianship of the following persons: Spouse, Parents, Adult children and other close relatives. Other close relatives or friends who are willing to bear the responsibility of guardianship are approved by the unit to which the mentally ill person belongs or by the residents' or villagers' committees of the place where he lives."[3]

First of all, in the first and second order are spouses and parents, most of the spouses of the elderly are also old and weak, especially the elderly parents may not have died long ago, even in the world, most of them have lost the ability to monitor, which is a natural law, the basic embodiment of life and death. Therefore, it is often not realistic to regard the spouse and parents of the elderly as the guardians of priority. Therefore, it is necessary to decide the guardian in accordance with the specific situation of the case, rather than adopting the current one-size-fits all provisions of the law.

Secondly, there are big problems in the provision itself, let alone whether it is suitable for the
guardianship system for the elderly, that "other close relatives and friends are willing to bear the
guardianship responsibility with the consent of the unit where the mentally ill work or the residents’
committee or villagers' committee in the place where they live". The unit that is in by ward place
agrees, this one regulation is carried out very hard actually. Most of the elderly people in China live
in rural areas, and they have no enterprises or units. Even for the old people who used to have units
in cities, they have retired, few former units are willing to choose guardians for them. Therefore, by
the guardian of the unit elected guardian, this point in the operation of the discount. There is also a
problem with the selection by the residents’ committee or villagers' committee of the place where
the guardian resides. The residents’ committee and villagers’ committee of our country belong to the
basic mass self-government organization, which is composed of the masses' spontaneous election.
Selected by the neighborhood or village committee guardian, though probably because they know
more about the actual situation of ward, the selection will be more suitable for the monitoring, but
because of its structure is loose, and a lack of authority, the guardian damage the interests of the
ward cannot timely and effective supervision, and the neighborhood or village committee is not
responsible for lack of selected guardian.

For the confirmation of the subject of the guardianship system for the elderly, there should be
something unique in accordance with the actual situation of the elderly in reference to the
provisions of the guardianship subject in the current adult legislation. It can be specified as follows:

Elderly persons in need of guardianship shall be supervised by the following persons:
1. Spouse, parents and adult children
2. Other close relatives
3. Residents' committee or villagers' committee of the place of residence
4. Specialized social institutions

This is only the subject of legal guardianship, in any guardianship, the elderly can choose their
own guardian, not limited to the scope of legal guardianship.

Content: to Property, to Person

The content and scope of the guardianship system for the elderly should be determined according to
different situations. Article 18 of the general principles of the civil law stipulates the content of the
general guardianship system, including the person, property and other legitimate rights and interests
of the guardian. This is mainly for minors and mental patients set by the content of custody, they do
not have the ability to judge, so the scope of custody involves all aspects, but for the elderly, it is
necessary to make a specific analysis.

First of all, in the arbitrary custody, since the arbitrary custody is set by the elderly before the
decline of judgment ability, that is, when they have complete judgment ability, they fully respect
their own will. Arbitrary guardianship is essentially a kind of civil contract, it has been by
monitoring shall be set in the negotiations between the old and guardians of the content and scope
of guardianship, because they are set up according to the principle of voluntary, the rights and
obligations between both sides so that content is related to person or property or other lawful rights
and interests, and the scope of the guardian permissions are free, there is no necessary to discuss
here.

Secondly, in legal guardianship, it is necessary to distinguish between two different situations.
First, the monitoring of elderly people who are incapacitated or partially incapacitated. For the
elderly who are incapacitated or lack of ability to act, their judgment ability is not necessarily lost.
Therefore, legal guardians mainly take care of the daily life of the elderly, assist them in daily
affairs, and fully respect their will. At this time, guardianship is more similar to care. In this case,
the loss or partial loss of the ability to act, but judgment ability and improve the old people, for they
set the guardianship system is different from the general sense of the guardianship, not for their
personal, property and other lawful rights and interests of sole agent, but more is the content of the
care, help, mainly make up for the lack of their ability to act, this has to do with Germany
promulgated by the act of caring. Second, the legal custody of the elderly who have lost or lacked
judgment is much broader. However, for those old people who have lost or partially lost the ability
to judge, they cannot understand their own behaviors and cannot make behaviors in line with their interests and intentions, which will not only harm their own interests but also endanger the safety of transactions. Therefore, the supervision of such elderly people is the supervision in the practical sense. The content and scope of guardianship should include taking care of the daily life of the elderly, treating and recuperating the elderly, arranging the cultural and recreational life of the elderly, conducting civil activities on behalf of the elderly, managing the property of the elderly and so on. But when carrying out these affairs on behalf of the elderly, their legal guardians must insist on protecting the rights and interests of the elderly, so that the elderly can enjoy a happy old age, and at the same time not for the interests of the elderly may not dispose of the property of the elderly.

In a word, the scope and content of guardianship applicable to the elderly in the two categories of situations are different, but both must adhere to the basic principle of protecting the rights and interests of the elderly for the benefit of the elderly, the guardian must do the duty of good guardianship, take good care of the elderly body and mind.

The Form of Guardianship for the Elderly

In the design of the guardianship system for the elderly, the legal guardianship system and the designated guardianship system in the current guardianship system should be used for reference, and the arbitrary guardianship system should be added according to the particularity of the cognitive situation of the elderly.

Legal Guardianship

As mentioned above, the legal guardian order and scope are stipulated in the main body of the guardianship system for the elderly, which consists of four sequences, including spouse, parents, adult children and other close relatives.

Designate Custody

First of all, in the case of disputes over legal guardians, the appointment shall be made by the residents' committee or villagers' committee in the place where the elderly live. If all the legal guardians in one order are willing or unwilling to act as guardians, or if the guardian in the latter order objects to the guardianship of the guardian in the former order, the residents' committee or villagers' committee in the place where the elderly live shall designate the legal guardian according to the actual situation. The residents' or villagers' committees shall perform their duties, take full account of the actual family situation of the elderly and appoint guardians in accordance with the principle of protecting the rights and interests of the elderly. If several persons jointly act as guardians, the division of responsibilities between guardians shall first be negotiated by the parties concerned, and if consultation fails, the division of responsibilities shall be determined by the neighborhood committee or the village committee. Secondly, when there is no legal guardian, the residents' committee or villagers' committee in the place where the elderly live shall act as the guardian. Finally, if the residents' committee or villagers' committee in the place where the elderly live is not suitable or able to act as guardian, a special social organization shall act as guardian.

Arbitrary Custody

This is the characteristics of the guardianship system for the elderly, which is different from the guardianship system for minors and mental patients. The arbitrary guardianship system in Japanese law refers to the civil activities in which a person under his guardianship chooses a trustworthy person as his guardian in advance according to his will as the guardian after he loses his capacity for conduct.[4] In China's current guardianship system, there is no provision for arbitrary guardianship, which is due to the lack of cognitive ability of minors. The purpose of guardianship is to make up for their lack of behavioral ability and cognitive ability. They have neither the ability nor the qualification to choose a guardian for themselves. While the elderly, the elderly with full capacity, behavior and their cognitive abilities are often higher than the general adults, even as we age, the
law of nature, a gradual decline in their behavior ability, but their cognitive ability and the declining ability does not necessarily mean, so must fully consider when set for the guardian and respect for the elderly will itself, and the arbitrary guardianship system is designed for the elderly.

**Guardianship and Supervision**

Whether a system can be well implemented depends on whether a good supervision system is set up. In terms of the construction of the guardianship system for the elderly in China, the establishment of a reasonable supervision system is essential.[5] The establishment of guardianship for the elderly must involve the interests of all aspects. Many elderly people also have a large amount of property. How to urge the guardian to protect the rights and interests of the elderly and take good care of their body and mind requires not only the guardian's goodwill to fulfill the guardianship responsibility, but also institutional supervision.

The following aspects should be taken into account in the construction of the supervision system of the elderly in China: first, the establishment of supervision of the supervision of custody, can be composed of a single natural person or multiple natural persons. The supervisor of guardianship and the guardian shall not be the same person. The supervisor of guardianship shall exercise conscientious supervision over the behaviors of the guardian, and timely stop the behaviors that endanger the rights and interests of the elderly by the guardian. In serious cases, the supervisor of guardianship may apply to the court to revoke the guardianship qualification of the guardian. In order to prevent compulsory monitoring, we should give full consideration to the will of the elderly. When they still have full judgment ability, they should designate them. If there are certain obstacles to the judgment ability of the elderly, it may also be made through consultation by a close relative of the elderly person; or it may be made by a residents' committee or a villagers' committee in the place where the elderly person resides. Second, supervision between legal guardians.

**Conclusion**

In a word, the current provisions on the protection of the rights and interests of the elderly can no longer meet the practical needs of the rapidly changing elderly society, which also forms a certain gap with the relatively perfect adult guardianship system. In order to adapt to the current grim situation of aging population and strengthen the legal response of the elderly society, it is urgent for us to build a perfect elderly care system to effectively protect the legitimate property rights and personal rights of the elderly. At the same time, it also requires the guardian to fully respect and protect the person of the elderly, reasonably protect the property interests of the elderly under the provisions of the law, so that the elderly can enjoy their old age.

**Reference**


