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VOLUNTARY GUARDIANSHIP NOTARIZATION CHINA'S LEGAL REMEDY TO SUPPORT SELF-DETERMINATION AND DECISION-MAKING FOR INCAPACITATED OLDER ADULTS

Abstract

In lieu of a comprehensive adult guardianship law, voluntary guardianship notarization has become the main route to support the self-determination, autonomy, and decision-making of incapacitated older adults in China. This article is a first attempt to provide an overview of recent developments and current forms of voluntary guardianship notarization initiatives in mainland China. Besides highlighting the difficulties and challenges faced by the country, this article also outlines the types of guardians under the current legal framework, identifies the social functions of the notary office in adult guardianship socialization, and sets out the emerging initiatives to support decision-making for incapacitated older adults.

Keywords: adult guardianship system, voluntary guardianship, self-determination, incapacitated older adults, China

INTRODUCTION

Guardianship is a relationship created by law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for another (the incapacitated individual or person deemed to be without capacity). The appointment of a guardian occurs when a judge decides that an adult individual lacks the capacity to make decisions on his or her own behalf (Teaster et al. 2007). It is the most common legal protective service used to aid the adults with declining cognitive capacity (Iris 1990).

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As one of the fast-ageing nations in the world, China witnessing not only an acceleration of population ageing, but also an increasing number of older adults with chronic disease, physical impairments, and cognitive impairments without a guardian. According to China's seventh census data, the number of older adults aged 60 and above has reached 264 million, constituting a prevalence of 18.7%. Meanwhile, the number of older adults with disabilities has reached 6.18 million (Statistics NBO 2021). Today, an increasing number of incapacitated older adults have been living without a proper guardian or have been under the status of caregiver neglect, and physical or psychological abuse in China. The Civil Affairs Bureau is at a loss for where to find a proper guardian to safeguard the well-being of the so-called 'empty-nester' (a person or couple whose children have grown up and left the family home, leaving them with an empty nest). Old people under the status of caregiver neglect, and physical and psychological abuse are looking for legal paths to safeguard their dignity and self-determination. Meanwhile, many incapacitated old adults are receiving care and guardianship from relatives or non-relatives (Wang et al. 2023). Yet, potential guardians hesitated to guard those needy old adults, as there was no adult guardianship law to protect the 'under-recognized' guardian.

There has been, so far, little to no research in English examining how the decision-making, autonomy, and self-determination of incapacitated older adults are supported in mainland China; previously published studies in Chinese mainly focus on court records and theoretical analysis from the perspective of law (Li 2017). Cheung (2021), Willmott et al. (2017) and Lee (2015) are among the few scholars to provide an analysis of China's adult guardianship regime in English, but they primarily focus on theoretical analysis and brief discussion of the developments of the guardianship regime. The paucity of research is problematic, as it prevents recognition of adult guardianship as an important social service sector within social security, health, law and public service, and prevents adult guardianship from receiving the acknowledgment, support, and promotion that it requires.

This article attempts to fill these research gaps in the literature. Based on both first and second-hand data, this article builds on and adds to previous research by providing a review and analyzing emerging initiatives adopted through voluntary guardianship notarization. We not only outlined the types of guardians possible under the current legal framework,

identified the social functions of the notary office in the application of voluntary guardianship, but also provided representative initiatives adopted in mainland China.

DECLINING CULTURAL TRADITIONS AND UNMET DEMANDS

Throughout history, family as the welfare institution and social security system for older people and family members in China, providing not only help with daily living, but also care, emotional support and guardianship. As the cornerstone of Confucian ethics, filial piety (*xiao*) outlines moral standards that cover both practical and intangible facets of the parent-child relationship in China (Bedford & Yeh 2019). Under the traditional patriarchal social structure, older adults typically lived with their married son, daughter-in-law, and grandchildren, who provided them with physical, emotional, and financial assistance, and guardianship.

Over the past few decades, traditional Confucian filial piety has undergone modification and been challenged by changing attitudes. Chinese families have experienced notable transitions, intergenerational relationships also undergone significant transitions: traditional patriarchal extended family has been replaced by modern nuclear family; urbanization and domestic migration have been transforming the living arrangements of Chinese families (Xu et al. 2014); the implementation of 'one-child policy' has led to not only fewer eldercare resources than in previous generations but also a new 'childless' older adults and 'empty-nester' phenomenon (Zhang & Goza 2006). An aging population and shrinking birthrate have worsened the situation. Struggling adults are left with limited resources to guarantee their decision-making and remaining abilities.

Today, the formal/state-based caring system consisted of the public pension system and the long-term care system has become an important complement for declining informal/family-based care. Although formal care is available in most cities, individuals who are childless, who live alone, who experience caregiver neglect, or physical and psychological abuse, and ageing individuals with mental disabilities, and declining capacity have been cast into a guardianship limbo (Lee 2015). Such a limbo undermines the survival and well-being of those older adults in at least three ways: (1) when their health has deteriorated to a point where they require hospitalization, there is no guardian to sign

the consent forms for hospitalization and medical treatment for them; (2) when they want to be institutionalized, there is no guardian to sign the consent forms for nursing home entrance; (3) with a diminishing health and functional capacity, adults who suffer from cognitive impairment are likely to encounter abuse, neglect, and exploitation, but there is no one to protect them.

CONFORMING THE ADULT GUARDIANSHIP FRAMEWORK TO UNCRPD

Triggered by the above factors, including the ageing of the population, the declining fertility rate, and the spirit of the United Nations *Convention on the Rights of Persons with Disabilities* and its Optional Protocol (UNCRPD), China's adult guardianship regime has undergone several major reforms over recent decades. UNCRPD seeks to promote a rights-based approach that respects the dignity and agency of people with disabilities, striving to provide support and assistance when needed while upholding their fundamental rights to make decisions about their own lives (United Nations 2016, Article 12). China was one of the early adopters to ratify the UNCRPD and has developed laws and regulations aimed at safeguarding the rights of people with disabilities (Huang 2019), including (1) extending the scope and details of individuals eligible for guardianship in *General Principles of Civil Law* (GPCL), Articles 21, 22 and 28 of *General Rules of Civil Law* (GRCL), and Article of the Supreme People's Court's Opinions on Various Matters Regarding the Application of the GPCL; (2) promoting the autonomy and best interest of individuals in Article 31, 33 and 35 of the GRCL.

THE LEGAL LANDSCAPE OF CHINA'S ADULT GUARDIANSHIP REGIME

According to current legal provisions, adult guardianship in China can be divided into two: (1) the legal guardianship system, which includes legal guardianship and assigned guardianship; and (2) the voluntary guardianship system.

THE LEGAL GUARDIANSHIP SYSTEM

Legal guardianship is laid out in Article 28 of the CRCL, Article 28, and Article 32 of the *Civil Code*: a natural person guardian of a person without or with limited capacity for civil conduct should be the spouse, parents, adult children, other close relatives, or friends who, with the consent of the relevant authorities, are willing to assume the responsibility of guardianship. Assigned guardianship is laid out in Article 31, Article 32 of the CRCL, and Article 31 of the *Civil Code*: if a person without or with limited capacity for civil conduct has no natural person as a guardian, the unit to which he/she belongs, or the village (residential) committee of the place of his/her residence, or the civil affairs department shall act as his/her guardian.

THE VOLUNTARY GUARDIANSHIP SYSTEM

In terms of voluntary guardianship, although the legislative provisions concerning adult guardianship are fragmented in different regulations (Wang 2020; Willmott et al. 2017), the legislative blank surrounding voluntary guardianship has been filled by various provisions. Legal provisions concerning adult guardianship include: Article 29 to Article 39 of the CRCL, Article 26 of the *Law of the Older adults*, and Article 33 of the *Civil Code*.

Article 35 of the CRCL stipulates that an adult with full capacity for civil conduct may determine his/her guardian in writing through prior consultation with his/her close relatives, or other individuals or organizations willing to act as the guardian. When an adult loses or partially loses the capacity for civil conduct, the guardian determined through consultation should perform his/her duty of guardianship. In terms of scope, Article 26 in the *Law of the Older adults* stipulates that voluntary guardianship was previously available only for the older adults. Now, however, Article 33 of the CRCL, promulgated in 2017, makes it available for all adults with full capacity.

As for the principles on decision-making, under the new legal framework, the principle of 'respect for the true will of the ward' and 'the best interests of the ward' are introduced in the new provision. According to the CRCL, 'the views and wishes of the individual are to be considered where an appointment of a guardian needs to be made in cases of dispute (Article 31) and where the guardian is fulfilling guardianship responsibilities (Article 35)'. Meanwhile, in Article 35, 'benefitting the ward to the greatest extent' is emphasized. Yet what remains unclear is how to assess whether a particular decision indeed benefits the ward to the largest extent.

In terms of the competence and responsibility of the guardian, the new legal framework puts detailed language in place on the competence and qualification of the guardian. The selection of guardians follows the order of priority in Article 28 of CRCL: spouse; parents and children; brothers and sisters; other individuals and organization that are willing to be the guardian and approved by the neighborhood committee; and the village committee and the local civil affairs apartment. What remains vague is how the guardianship competence should be assessed. Article 35 of the CRCL stipulates that the guardian's role is to assist the ward in performing civil legal acts that are compatible with the intelligence and mental health of the ward. In terms of disqualification and termination of guardianship, Article 36 in the CRCL lays out detailed situations where disqualification might be ordered by the court or individuals, and where organizations can apply for this. Additionally, Article 39 also adds a provision on the termination of guardianship.

Overall, the current voluntary guardianship system of China can be summarized as a relatively comprehensive system of "family guardianship as the basis, voluntary guardianship as a supplement, and assigned guardianship as the bottom line" (Li & Zuo 2020).

METHODS AND DATA

As an exploratory study, this article utilizes two data sources: (1) the published statistics of the Chinese Ministry of Justice, official statements, policy documents, and news articles, documentaries and TV programs from June 1, 2018 to November 30, 2022; and (2) primary qualitative data collected through semi-structured interviews from April 2021 to November 2022 with notaries at Shanghai Putuo Notary Office, staffs of China's first social guardianship service organization, and individual guardians. Open-ended questions were formulated to enable participants to contemplate and express their personal insights and experiences concerning the adult guardianship programs, methods of guardian assignment, difficulties associated with the guardianship system, and the characteristics of a successful guardianship.

We first conducted case searches using the database of Chinese judicial cases from www.pkulaw.com. We performed a search using the condition "full text: voluntary guardianship," resulting in a total of 48 petitions

containing the keyword “voluntary guardianship.” The time range for these petitions spans from 2018 to 2022. Among the 48 petitions, the highest number of cases is in Shanghai. We found that Shanghai has witnessed the first effective case of “voluntary guardianship” in the country, and this voluntary guardianship agreement was notarized by Mr. Li Chenyang, a notary at the Putuo Notary Office in Shanghai. Using typical case sampling (TCS) method, we conducted in-depth analysis of three cases out of the 180 voluntary guardianship notarization cases recommended by Mr. Li Chenyang. We then conducted eight semi-structured interviews with Putuo Notary Office, China’s first social guardianship service organization, and relatives of guardians from April 2021 to November 2022. Three case of voluntary guardianship notarization were selected.

FINDINGS

According to the statistics provided by the Shanghai Putuo Notary Office, from October 2017 to June 2019, of 180 voluntary guardianship cases, older adults aged 60 and above accounted for 87%. Of these, approximately 17% were cases involving older adults aged 60 to 69, 28% were cases involving older adults aged 70 to 79 and 42% were cases involving older adults older than 80 years. Reasons for voluntary guardianship notarization are various; family conflicts accounts for 44% of the total sample, which reflects the fact that statutory guardianship constructed by kinship and marriage may not protect the ward, especially in the case where an older individual owns many assets. The so-called ‘empty-nester’ without a spouse, children, or relatives to be guardians accounted for 32.2% of the 180 cases. Others included critical incidents triggered by the questioning of the third party to a statutory guardianship; for example, when adult children have to get the deposit of their parents with dementia, the bank may ask them to provide an official notarization of their guardianship identity (Interview with the notary, October 2021).

VOLUNTARY GUARDIANSHIP NOTARIZATION IN SHANGHAI: THREE INITIATIVES

The following three cases provide examples of how support of self-determination and decision-making could be realized through voluntary guardianship notarization.

CASE 1: ADULT CHILDREN AS GUARDIAN

Mr. A is a 70-old-year man residing in B District of Shanghai, who lost his wife while he was middle-aged. In 2016, he was hospitalized because of a cerebral infarction. However, his five children have been fighting over his treatment, care, and guardianship. Mr. A was anxious and worried that his children would argue over his medical and care issues once he become incapacitated due to illness. Therefore, he decided to make preparations in the event he became cognitively impaired. He decided to appoint his youngest son as his voluntary guardian, whom he trusted to take care of him the most.

On October 12, 2016, Mr. A, accompanied by his youngest son, met the notary in the Shanghai Putuo Notary Office. The notary confirmed that Mr. A was capable of civil conduct and intended to appoint his youngest son as his guardian through an agreement. After the notary had accepted the notarization application, the notary guided Mr. A and his son to the special audio and video office, where the whole process of notarization was recorded. The notary carefully explained the legal concept, procedures, and legal effects of voluntary guardianship and the responsibilities of the guardians to Mr. A and his youngest son. Mr. A clearly expressed his willingness to designate his youngest son as his guardian in the event of his loss or partial loss of capacity for civil conduct. His son also made it clear that he was willing to be in charge of the care, medical treatment, property management, rights litigation, and funeral of his father in the future.

The notary further informed Mr. A that he could unilaterally withdraw from the guardianship agreement when he had sufficient judgement; at that time, the notary office would send the withdrawal on behalf of him, after which his youngest son would be withdrawn as his legal guardian in accordance with the law. The notary also told Mr. A that the notary office would keep the guardianship agreement confidential. And when the conditions agreed upon in the agreement were fulfilled, M. A's other legal guardians would be able to apply to the notary in order to safeguard the legitimate rights and interests of Mr. A and other legal guardians. Mr. A and his youngest son agreed the contents of the voluntary guardianship agreement, and signed in front of the notary. After the issuance of the notarial certificate, both Mr. A and his youngest son retained a copy. The notary also uploaded the voluntary guardianship agreement to the national

notary management system on the day of issuance (Interview with the notary, April 2021).

In a follow-up visit with Mr. A, the notary told us that, due to illness, Mr. A has become incapacitated, and that his youngest son is now the voluntary guardian of Mr. A (Interview with the notary, October 2022).

CASE 2: NPO AS GUARDIAN

Single elderly individuals in China refer to elderly people who are living alone without a spouse or partner. They may be widowed, divorced, or never married, and they do not have a partner with whom they share their household. Single elderly individuals often face unique social and economic challenges, as they may have limited social support networks and may be responsible for their own well-being in later life. Addressing the guardianship issue for single elderly individuals requires a comprehensive approach involving legal, social, and community support systems.

The Jinshan Social Guardianship Service Center (hereinafter referred to as the 'J center') was the first registered social organization to provide guardianship services in China. It commenced offering adult guardianship services in 2019. A team of professional social workers, psychological counselors, and lawyers, based on their expertise, collaborates to provide adult guardianship services for single older adults or incapacitated adults.

Mr. B is a 93-year-old elderly individual. After divorcing his wife and with his stepson moving out of his home, Mr. B decided to sell his house and move into a nursing home. However, he couldn't find a guardian to handle the procedures for his admission to the nursing home. He had considered appointing his former junior high school classmate, Ms. M, as his guardian. However, due to Ms. M's advanced age, she was unable to assume the responsibility of guardianship. Consequently, with the assistance of the community service center, Mr. B signed voluntary guardianship agreement with the J center. As a legal entity, social organizations recognized and registered by the Civil Affairs Bureau are more likely to gain the trust of the elderly. "I trust them because guardianship is not determined by a single individual but by an organization." (Narrative of Mr. B in a documentary of "The Civil Code in Action: Episode 2: Dignity of Life"). According to the agreement, the J center will assist Mr. B in selecting and supervising services from nursing homes, care facilities, and domestic helpers. When necessary, they will help him choose medical institutions, determine

treatment plans, handle related procedures, and act on behalf of Mr. B in various civil activities.

J center has collaborated with Jinmei Elderly Nursing Center, the city's first rehabilitation center established to address cognitive issues in the elderly. The interagency collaboration between social guardianship services provider (voluntary guardian), eldercare and health services provider (nursing home), and social justice organization (notary office) have created a network to prevent the potential maltreatment of incapacitated older adults. In this case, the notary office has been acting as the network coordinator, in charge of gathering information, monitoring implementation, and establishing plans for action.

CASE 3: NON-RELATIVE AS GUARDIAN

As one of the Chinese megacities struggling to cope with a rapidly ageing population, the 'Senior Partner Scheme' is a volunteer activity promoted by the Shanghai Municipal Civil Affairs Bureau since 2012. As a community-based volunteer activity with mutual aid, the young-old (older adults aged between 60 and 75) offer regular door-to-door visits, telephone interviews, water, electricity, gas safety checks and care for the senior-old (older adults over the age of 75) and empty nest older adults. The 'Senior Partner Scheme' has greatly mobilized the informal care resources of the community and greatly promoted the integration of community members.

Mr. C was an 80-year-old man who lived alone. He has a son, but they have been estranged for several years. Although Mr. C has been in poor health for many years, with the help of his neighbor and neighborhood committee, and the services provided by the 'Senior Partner Scheme', he has been able to live alone in his own house. However, in June 2019, Mr. C was diagnosed with appendicitis and had to have surgery immediately. Since he had no close relatives and the only legal guardian never appeared, there was no one to sign his surgery consent form. With the help of the neighborhood committee, Mr. C appointed his young-old volunteer partner, who is his neighbor and has been taking care of him for a long period of time, as his voluntary guardian. In accordance with the notarization procedures, Mr. C signed a voluntary guardianship agreement with his neighbor. The notary office and the neighborhood committee then acted as the supervisor. After Mr. C had left the hospital, he sold his house and decided to move into a nursing home.

As for the management of Mr. C's property, the current payment for the care home for the older adults will be paid out of Mr. C's pension. According to the notarization agreement: (1) the income of the real estate transactions would be deposited in the notary office; when Mr. C encountered an emergency or had another need to use the money, the funds would be activated and withdrawn from the notary office; (2) the guardian would be in charge of Mr. C's basic living expenses, keep corresponding records, and report to the notary office every month (Interview with the notary, April 2021).

In a follow-up visit with Mr. C, we were told that as Mr. C has moved from the care home for the older adults to a nursing home due to his physical condition. As the payment changed, the notary came to the nursing home accompanied by the guardian and confirmed the needs with Mr. C face to face to ensure it was the true will of Mr. C (Interview with the notary, October 2022).

CONCLUSION

The application of voluntary guardianship in China has absorbed the spirit of the Convention on the Rights of Persons with Disabilities and takes on Chinese social, political, cultural, and economic characteristics. China's notary offices, representing public power and playing judicial auxiliary functions, have embarked on a path different from that adopted in most countries, where the court plays the dominant role on the identification and declaration of guardians (Cheung 2021; Lee 2015; Willmott et al. 2017). Drawing on interviews with a notary office in Shanghai, this article helps to raise the visibility of the emerging initiatives of the voluntary guardianship system, sharpening the contours and demonstrating the social functions of the notary office in the socialization of adult guardianship.

TYPES OF VOLUNTARY GUARDIANS

Based on existing legislation, two major forms of 'de facto' guardianship can be identified in China: legal relationships (kinship, government agencies); and voluntary relationships (friends, neighbours, and paid NGOs). Four main forms of 'de facto' voluntary guardians have been working on to support the self-determination and decision-making for incapacitated

older adults: 1) selected legal guardians selected by the ward (spouses, children, and relatives); 2) ordinary citizen guardians (friends and neighbors of the ward); 3) an administrative agency selected by the ward (neighborhood/village committees); and 4) non-profit organizations.

SOCIAL FUNCTIONS OF THE NOTARY OFFICE IN THE APPLICATION OF VOLUNTARY GUARDIANSHIP

Our analysis suggests that the notary office performs three functions in the voluntary guardianship process: (1) notarization of the voluntary guardianship agreement, the will, and advance directives. (2) supervision of the voluntary guardian, preventing possible asset exploitation, physical or mental abuse, and ensuring that the remaining capacity and self-determination are well respected through guardianship. (3) management and supervision of the property of the incapacitated individual; instead of handing over the assets to the voluntary guardian, the asset of the incapacitated individual will be kept in the notary office through the notarization of the asset supervision. If the ward loses the capacity for civil conduct, the ward will receive the related living and medical expense monthly according to the voluntary agreement. In the event of the large expenditure, such as hospitalization and medical operation, the ward could take the hospital's written payment notice to the notary office to receive the corresponding amount of medical treatment expense.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the authors.

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