Practices around the world — Japan —

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I. Introduction

1. Problems with the previous guardianship law (based on adjudication of incompetence or semi-incompetence)

   Until March 2000, the adjudication of incompetence or semi-incompetence prescribed in civil law existed as a system for protecting adults whose mental capacity or judgement was impaired, including elderly people suffering from dementia, the mentally disabled and the psychiatrically ill. When the Civil Code was formulated around 100 years ago, however, the main purpose of Japan’s laws was the protection of financial assets under the “household system.” This system was established in 1904 with the purpose of defining the head and members of families, but its adjudication system had virtually ceased to function. The old system was abolished and the new Adult Guardianship Law came into force in April 2000.

   There are two major reasons in the background to the enactment of this new Adult Guardianship Law – the progression of the super-aging society, and the introduction of the Long-Term Care Insurance Act.

2. Progression of the super-aging society

   Japan’s society is aging at a pace unseen elsewhere in the world. In the year 2008 the population of people aged 75 or over surpassed 10 million people for the first time ever, and a fully-fledged aging society, unknown in any other nation, was ushered in. This aging of Japanese society will increase still further, and it is predicted that by 2055 two in every five people will be aged 65 or over, and one in every four people 75 or over.

   The total population of Japan as of October 2008 was 127.6 million, and while this represented a decline of 80,000 people compared to the previous year, the number of people aged 65 or over reached an all-time high of 28.2 million, an aging rate accounting for 22.1% of the population.

   In addition, the percentage of those aged between 65 and 74 reached 15 million,
or 11.7% of the population, and those over 75 years of age climbed to 13.2 million, this 10.4% of the population breaking the 10% barrier for the first time.

Sadly, this elderly society leads to the occurrence of numerous old people with dementia. The number of elderly dementia sufferers in Japan is estimated to rise from the 2005 level of around 3 million to 5.53 million by the year 2025.

### Two Reasons for the New Law

1) The advent of the ‘super-aging society’

- **in 2055**
  - 1 in every 2.5 people will be 65 years old or over
  - 1 in every 4 people will be 75 years old or over

- **in 2025**
  - The number of elderly people with dementia will be around 5.53 million

### 3. The introduction of the Long-Term Care Insurance Act

Traditionally, the care of family members has been a domestic matter in Japan. But with the burden of care placing tremendous pressure on families — a burden that is was no longer possible to bear — a need arose for society as a whole to provide support; hence the establishment of the mandatory long-term care insurance system. To maintain individual respect for its beneficiary users and provide them with high-quality services, the system enabled persons in need of long-term care to enter into care service contracts under the catchphrase of “from administrative measures towards contracts.” With regard to elderly people suffering from dementia, however, a need arose for adult guardians to conclude contracts on behalf of the principals. For this and other reasons, the Long-Term Care Insurance Act came into force simultaneously with the Adult Guardianship Law in April 2000.
Two Reasons for the New Law

2) Introduction of the Long-Term Care Insurance Act

‘from administrative measures towards contracts’

The Long-Term Care Insurance Act and the Adult Guardianship Law are like the wheels of a vehicle

II. The New Adult Guardianship Law

1. Overview

The Adult Guardianship Law is a new system for supporting those who require protection, and it is linked to some new ways of thinking: normalization, respect of the right to self-determination, and an emphasis on protecting livelihoods.

“Normalization” is the guaranteeing of a prejudice-free and as normal as possible way of life for people with disabilities. The idea is to move away from protecting these people whilst depriving them of their abilities, towards offering them a lending hand, allowing them to keep their dignity intact.

The concept of “Respect of the right to self-determination” contains two meanings. First, even in cases in which the principal’s competence is impaired, the maximization of the person’s residual competence is sought. Second, the principal's self-determination concerning matters after they lose their competence is sought while the person still retains their mental faculties.

“Emphasis on livelihood protection” stresses not only the protection of financial assets but also emphasizes support for a person’s daily life and the ability to help one’s self. It can also be described as an approach to adult guardianship that seeks to improve people's quality of life.
2. Continuing power of attorney and statutory guardianship

There are two types of adult guardianship: statutory guardianship and continuing power of attorney. The old incompetence or semi-incompetence system was a form of statutory guardianship, or retroactive aid. A guardian or curator was chosen following the petitioning of the relevant parties, after the principal had lost his or her mental capacities and began to need protection.

The 2000 law emphasizes a new form of guardianship, embracing the three concepts mentioned above, particularly the right to self-determination (and especially self-determination before the principal becomes incompetent). This is continuing power of attorney. The new paradigm of continuing power of attorney is a method that seeks to help principals to express their wishes while their mental capacity is still intact, and to ensure that their wishes continue to be respected even after they become incompetent. This is pre-emptory aid, based on the concept of “advanced directive.” Adult guardianship in the future will continue to be underpinned by both statutory guardianship and continuing power of attorney, but there will be an increasing emphasis on the prioritized use of the continuing power of attorney system. In other words, the current trend is to place continuing power of attorney at the heart of guardianship systems, with statutory guardianship working as a supplementary or subsidiary system.
Ⅲ. The results after fourteen years of the law

Compared to the moment when the Adult Guardianship Law came into force fourteen years ago, it is fair to say that its use has developed dramatically. This is due partly to the enormous efforts of the family courts to reduce inquiry periods and make the appraisal expenses cheaper.

On the other hand, the Adult Guardianship Law is still not being adequately used, and the use of guardianship in all its forms in Japan is extremely low when compared to other nations. Yet the burden on the family courts stemming from guardianship proceedings is approaching breaking point. Methods to alleviate this burden — a typical example of which is the omission of interviews with the principal — have also been the subject of criticism.

Ⅳ. Conclusion

In October three years ago (2010), the first world congress in the field of Adult Guardianship Law (World Congress on Adult Guardianship Law 2010) was held in Japan. As a result of discussions spanning over three days, the Yokohama Declaration, relating to the Adult Guardianship Law, was adopted.

After re-acknowledging the importance of the role played by the Adult Guardianship system in countries throughout the world, the Yokohama Declaration addressed issues that the world’s countries are facing, as well as taking up issues specific to Japan. Suggestions offered regarding those issues included promptly ratifying the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and the Hague Convention of 13 January 2000 on the International Protection of Adults, the revision of the current law and improvement of its operation, the establishment of a public support system of the Adult Guardianship Law as well as the seeking of possibilities of a new Adult Guardianship system. In Japan, the aging of the population and the nuclearization of families is proceeding at a rapid rate and therefore, the role that the Adult Guardianship Law must fulfill has become even more important than it was at the time of its establishment, while demand for its utilization is expected to grow even further in the future. In accordance with the issues specified in the Yokohama Declaration, it is anticipated that the Adult Guardianship Law will become easier to utilize in the future.

In line with its initial objective of making a reality of the Yokohama Declaration the Japan Adult Guardianship Association, which hosted the World Congress, is proposing the Act for Promoting Use of the Adult Guardianship Law system as an
effective measure aimed at this goal.

The purpose of the act is to establish within the Cabinet Office an ‘Adult Guardianship Law Promotion Headquarters’ (headed by the Prime Minister) and an ‘Adult Guardianship committee,’ and make these entities serve as a sort of ‘control tower’ that will seek to mutually coordinate between the relevant governmental institutions such as the Ministry of Justice and the Ministry of Health, Labour and Welfare. By doing so, the creation is being sought of a public support system based on an organic collaboration involving family courts, the relevant governmental institutions, regional public bodies, private sector groups and citizens, all of which will be under the guidance of the national government. It is to be hoped that the revision of the Adult Guardianship Law will also be rapidly achieved within the framework of the new act.

Enacting into law the Act for Promoting Use of the Adult Guardianship Law looks set to be the issue we will be tackling for the time being.

**Recommendations**

1) “Yokohama Declaration”

2) “Act for Promoting Use of the Adult Guardianship Law”
Appendix

Yokohama Declaration

October 4th, 2010
At Yokohama

The World Congress on Adult Guardianship Law 2010, held in Yokohama, Japan, from 2 October to 4 October 2010, is the first world congress in the field of Adult Guardianship Law, and its hosts and co-hosts decided to issue the Yokohama Declaration to reconfirm the extremely significant implications of the Adult Guardianship Law and the international roles it will play in the years to come, while making a proclamation to the world on the proper use of the adult guardianship system.

This Yokohama Declaration is the result of a three-day congress, as summarized by the participants of the World Congress on Adult Guardianship Law 2010. Part I covers the issues shared by countries around the world and Part II covers the issues specific to Japan.

The World Congress on Adult Guardianship Law 2010 Organizing Committee expresses its gratitude to all participants involved in the drafting of this Yokohama Declaration and hopes that this declaration will contribute to the continued development of the Adult Guardianship Law around the world.

I. International Part

1. WE, the participants in the World Congress on Adult Guardianship Law 2010, held in Yokohama, Japan, from 2 October to 4 October 2010 ACKNOWLEDGE that:

(1) throughout the world the number of older people is increasing due to a combination of demographic factors, social changes, medical advances, and improvements in living conditions;

(2) the existence of an aging population has an enormous impact on resources for health care, pensions, benefits, housing, transport, and social services, and will be a serious socioeconomic issue for decades to come;

(3) mental capacity sometimes deteriorates with age, and the number of older people who are suffering from age-related impairments or disorders of the mind is also increasing;

(4) there is emerging evidence and awareness of the nature and extent of the
abuse of vulnerable older people in both family and institutional environments;

(5) although older people are the primary recipients of adult guardianship services, mental incapacity can affect younger people with psychiatric illnesses, learning disabilities, and acquired brain injuries; and

(6) despite an overall improvement in the protection of human rights, in many states the law relating to adult guardianship has been either neglected or not fully developed to take into account modern thinking with regard to anticipatory decision-making, best practices when assessing mental capacity, and establishing the procedures for substituted proxy decision-making on behalf of adults who lack the capacity to make decisions for themselves.

2. AFFIRM the guiding principles and provisions of:

(1) the Hague Convention of 13 January 2000 on the International Protection of Adults, which entered into force on 1 January 2009, and regulates jurisdiction, applicable law, recognition, enforcement and co-operation; and

(2) the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities, which requires states who are parties to the convention to reaffirm the universality, indivisibility, interdependence, and interrelatedness of all human rights, and to reaffirm the need for persons with disabilities to be guaranteed full enjoyment of such rights without discrimination.

3. DECLARE that in the context of adult guardianship:

(1) a person must be assumed to have the mental capacity to make a particular decision unless it is established that he or she lacks capacity;

(2) a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success;

(3) legislation should recognize, as far as possible, that capacity is both “issue specific” and “time specific” and can vary according to the nature and effect of the decision to be made, and can fluctuate in an individual from time to time; and

(4) measures of protection should not be all-embracing and result in the deprivation of capacity in all areas of decision-making, and any restriction on an adult’s capacity to make decisions should only be imposed where it is shown to be necessary for his or her own protection, or in order to protect third parties.

(5) measures of protection should be subject to periodic and regular review by an independent authority wherever appropriate.
4. FURTHER DECLARE that every adult who lacks the capacity to make a particular decision at a particular time, and is without any other means of support or representation in the decision-making process, is entitled to have a competent guardian who will:

(1) act with due care and diligence when making any decision on behalf of the adult;
(2) act honestly and in good faith;
(3) act in the best interests of the adult;
(4) respect and follow the adult’s wishes, values, and beliefs to the greatest possible extent, where these are known or can be ascertained, and clearly will not result in harm to the adult;
(5) limit interference in the adult’s life to the greatest possible extent by choosing the least intrusive, least restrictive, and most normalizing course of action;
(6) protect the adult from ill-treatment, neglect, abuse, and exploitation;
(7) respect the adult’s civil and human rights, and take action on his or her behalf whenever those rights are threatened;
(8) provide the adult with assistance and support, and actively pursue things to which he or she may be entitled, such as pensions, benefits, or social services;
(9) not take advantage of his or her position as guardian;
(10) be alert to, and seek to avoid, any conflict between his or her interests as guardian and the interests of the adult for whom he or she is acting;
(11) actively assist the adult to resume or assume independent or interdependent living wherever possible;
(12) involve the adult in all decision-making processes to the greatest possible extent;
(13) encourage participation and help the adult to act independently in those areas where he or she is able;
(14) keep accurate accounts records, and be ready to produce them immediately whenever required to do so by the court, tribunal, or public authority that appointed him or her;
(15) act within the scope of the authority conferred upon him or her by the court, tribunal, or public authority that appointed him or her; and
(16) keep under review the continuing need for any form of guardianship.

5. AND FURTHER DECLARE that, because adult guardianship can involve a deprivation of liberty, human rights are engaged, and because the work and duties of guardians worldwide are generally based on public intervention:
(1) states should address the development of professional standards, provide appropriate instruments of control, and guarantee a satisfactory infrastructure supported by adequate resources; and

(2) this Yokohama Declaration should be disseminated and communicated to public bodies and national governments to raise awareness of the issues involved, and to obtain the support required to implement the provisions that we have acknowledged, affirmed, and declared herein.

II. Japanese Part

After expressing their full accord with the spirit of Part I of this declaration, the Japanese participants of the World Congress on Adult Guardianship Law 2010 urged the Japanese government to ratify at the earliest opportunity the United Nations Convention on the Rights of Persons with Disabilities and the Hague Convention concerning the protection of adult(s), and confirmed the following items to be included in the Yokohama Declaration with the full support of overseas participants:

1. Revision of the current Adult Guardianship Law and improvement in the operation of the law

(1) Mayors around the country should make legislative preparations for a system that further facilitates statements to be made by mayors on guardianship for adult(s), etc.

(2) Public subsidies should be provided to those who have difficulty paying the costs of the adult guardianship system

(3) Given that the commencement of adult guardianship has an aspect of restricting the rights of adults, an evaluation and interview with adults should not be omitted and the current situation—in which the rate of execution of evaluations and interviews with adults remains at a low level—should be improved.

(4) Although the current Adult Guardianship Law specifies that a guardian of an adult must be assigned with power of attorney for the adult's property only, the guardian's power of attorney should not be limited to property management alone and this point should be revised. The guardian should be able to consent to medical treatment for the adult as well.

(5) Disqualifications remaining in the current adult guardianship system should be abolished. There are no rational grounds for disfranchisement on the determination of the commencement of guardianship. Doing so contravenes
the principles of the constitutionally guaranteed right to vote and represents a gross violation of basic human rights.

(6) Although the continuing power of attorney system is the most appropriate system in terms of “respect of the right to self-determination,” it has not been widely used. Legislative measures should be taken to promote the use of the continuing power of attorney system and at the same time to prevent abuses.

2. Creation of a public support system

Irrespective of the scale of the user’s assets or the existence of the petitioner, the adult guardianship system should be positioned as a system available for everyone and for this reason it is essential that the government publically support the entire adult guardianship system. Since the public support system results in the “socialization of guardianship for adult(s),” a public support system by the government is recommended. The main premise of smooth implementation of a public support system should be further expansion and enhancement of functions of the judiciary, especially functions of the family courts in the operation of the adult guardianship system. The establishment of such a public support system is to expand the network among the adults’ families, the general public and the specialists in each field and to contribute to securing appropriate guardians of adults and enhancing the advocacy functions of the adult guardianship system.

3. Potential of the new adult guardianship system

The potential for further development should always be sought after in search of a new philosophy rather than staying within the framework of the current Adult Guardianship Law.

(1) The current adult guardianship system is based on the three types of protection, namely guardianship, curatorship, and advisership. Guardianship, in particular, considerably limits the capacity of the adult. Considering the effect of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, it is necessary to study appropriateness of the current three types. At the same time it is also necessary to study procedural protections of the adult in the procedures for the guardianship of adult(s).

(2) Although one possible method to protect adults without limiting their capacity is the use of trusteeship, this type of trusteeship is not commonly used in Japan. Courts need to study the introduction of a trusteeship system as a substitute for adult guardianship with respect to the setting of trusteeship.

(3) To improve the present situation, in which victims of traffic accidents with
higher brain dysfunction rarely use the adult guardianship system, it is necessary to adopt new legislative measures to encourage people with higher brain dysfunction to use the system.