Guardianship of Elderly People in China

Description

We used to touch on this subject matter some time ago from the perspective of estate planning : guardianship for the elderly under China law. In this post, we discuss some concrete issues related to custody of elderly people in China. To many overseas Chinese whose parents or grandparents are still living in China, this may be of their interests.



Young woman pushing an elderly woman in a wheelchair through a garden

1. **When an Adult Needs a Custodian/Guardian?**

Minor children are assigned their guardians (their parents) upon birth till they turn 18 years old. What about adults who have only limited or no civil capacity?

Article 28 of China Civil Code provides that

> Where an adult has no or limited civil capacity, the following people who are able to provide guardianship shall serve as his or her guardian in sequence:
>
> (1) spouse;
>
> (2) parents or children;
>
> (3) other close relatives (*Jin Qin Shu*, please note this concept may denote different scope of people in different jurisdictions) ;
>
> (4) other persons or organizations that are willing to serve as guardians, subject to the approval of the community commission (*Ju Min Wei Yuan Hui*), village commission (*Cun Min Wei Yuan Hui*) or civil affair departments.
> *Article 28 of China Civil Code*

So, the precondition of appointing a guardian for an adult is that the said adult has no or limited civil capacity for juristic acts. The next question will be how to determine the level of an adult person's civil capacity. This power or authority shall only be vested in courts.

2. Court Proceeding for Determining Civil Capacity for Juristic Acts

As a court proceeding, the answer lies in China Civil Procedures Law in which Chapter 15 captioned "Special Proceedings" (as compared to general dispute resolution proceedings) sets out the rules for petitioning courts for determination of a person's civil capacity.

(1) Who Can Petition Courts?

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Article 187 of China Civil Procedures Law provides that the close relatives or interested parties can petition local courts where the person concerned resides (generally keeping the residence for more than a year) for determination of civil capacity.

“Close relatives” is a clearly defined term in China Civil Code, referring to spouse, parents, children, siblings, grandparents (from both maternal and paternal sides), and grandchildren (from both maternal and paternal sides). “Interested parties” generally means non-relative people who are financially or otherwise interested with that person in question such as creditors.

(2) How Does the Court Decide?

In practice, if the adult person is apparently incapacitated, the court may directly decide on the level of civil capacity. In other cases where it may not be clear, the court may request a forensic assessment on the civil capacity of the person and deliver a decision accordingly.

For purpose of assisting the court to come to its decision, medial records of the person shall always be submitted to court.

(3) Appointment of Agent

In this special proceeding, the law mandatorily requires that there must be agent/representative to act on behalf of the person in question with a view to protecting his or her rightful interests.

Such agent/representative is supposed to be one of close relatives of the person except for the petitioner. IF there is no close relative available, the court may appoint any other persons or organizations that are willing to serve as the agent subject to the approval of local community commission, village commission or civil affairs department. If there is no such a person or organization available, then the court may directly appoint community commission, village commission or civil affairs department.

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3. Appointment of Guardian

Once a person is declared by court as having no or limited civil capacity, then a guardian shall be appointed by for that person. Though China Civil Procedures Law doesn’t provide for special proceeding for appointing guardianship, China Supreme Court has made it clear that appointment of guardianship shall be conducted as a special proceeding.

In practice, most courts will merge the proceeding for determining civil capacity and the proceeding for appointing guardianship, meaning the same court appoints a guardian upon determining a person as having no or limited civil capacity. But some other courts insist on conducting separate proceeding respectively for capacity determination and guardian appointment, unnecessarily increasing costs and burden on related parties.

4. Guardianship Contract and Current Problems

A guardian is so appointed as outlined above because the adult ward has not appointed his or her own guardian when they were of full civil capacity. In this case, courts must step in to ensure such ward's legitimate interests are protected.

Since 2017, China law has allowed people to enter into guardianship contracts with their close relatives or any other person or organizations that are willing to serve the guardian role when people lose their civil capacity entirely and partially. China Civil Code has adopted this mechanism as well.

This is heralded as a considerable progress in recognizing one's own will in choosing their guardians as opposed to leaving the important life decision to the state. Please note that a person may conclude with more than one person to take care of his or her various aspects of life in such guardianship contracts.

However, while this is a civil progress, at the present, there is apparently a drawback to put this law into practice, namely, how such contractual guardianship is recognized and respected by third parties in practice. For example, will banks accept such representation by such guardians in dealing with banking business for the wards? At the moment, most likely not.

China notary offices have found their role in making this contractual guardianship official by notarizing the guardianship contracts. But the problem is that there has no law empowering China notary offices in conducting such business, so the effect of such notarization can be easily challenged.

Here, it requires a new law to patch the loophole and deficiency.

5. Advice for Overseas People Having Elderly Family in China

Despite being thousands of miles away from your elderly parents or grandparents, overseas child can still be appointed by court as guardian for their family members in China.

Guardianship in China law mainly focuses on representation of wards in dealing with third parties, or in other words, it is more of an agency relationship. Indeed, guardians are the statutory representatives of their wards. In practice, there has been laws authorizing guardians to delegate their duties to third parties, which is also indirectly reflected in Article 36 of China Civil Code.

This delegation of such guardianship duties can to a great extent relieve the concerns of guardians who are far away from their wards in China, because they can have much of the personal cares arranged to be given by third parties to their elderly family members in China. Given the current ongoing Covid-19 pandemic, this delegation mechanism is of greater importance in ensuring the wellbeing of elderly people in China.

If you need such assistance in arranging the guardianship over your family members in China, we are more than happy to help.

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Author
admin

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