Guardianship for the Elderly under China Law

Description

Part of the estate planning services always concerns the caring of the elderly people. After all, we are all getting old each day and we all probably lose capacity to act on our own some day in the future.

Guardianship is the legal system designed for people of no or limited capacity due to young age or loss of mental capability, so that their interests are being taken care of and protected.

In this post, we discuss the guardianship for elderly people only, since the guardianship and custody for children are actually more complicated under Chinese laws that will take a separate post for discourse.

Basically, rules and framework regarding guardianship for the elderly in China are provided in the relatively new General Provisions of Civil Code of China, effective as of October 1, 2017.

I. **General Framework of Guardianship**

The major breakthrough brought by the new General Provisions of Civil Code is the introduction of the so called “guardian appointment” mechanism where a person while being of full capacity is allowed to appoint his own guardian among people that are not restricted to his or her family members.

In the absence of a written appointment of guardian, a person’s guardian is determined in such order as prescribed in the General Provisions of Civil Code. Article 28 goes:

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Article 28 The following persons shall serve as the guardian for the adults of no or limited capacity in the prescribed order below:

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I. Spouse;

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II. Parents, children;

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III. Other relatives

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IV. other persons or organizations willing to serve as guardian, subject to the consent of

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local urban community commission, local rural community commission or local civil affair department.

In addition, Article 30 allows multiple qualified guardian candidates to select the guardian(s) by way of agreement, provided that such selection shall respect the intentions of the ward.

In the case of dispute over the guardianship, the dispute can be solved either through local urban community commission (?????), local rural community commission (?????) or local civil affair department, or through a court.

II. Appointing Your Guardian

While it is a big progress in making available to its citizens the choice or liberty of appointing one's own guardian by way of agreement, how this new rule works in reality remains unclear, due to the lack of detailed instructions on its application.

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Article 33 An adult of full capacity may consult with individuals or organizations that are willing to serve as his guardian and appoint his guardian in writing. The guardian so appointed shall perform his guardian duties and responsibilities upon the said adult losing his entire or partial capacity.

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It is too sketchy to be implemented. Many questions shall be answered, for example:

1. Here "in writing" should be interpreted as "agreement". In other words, the adult seeking to appoint his guardian shall need to enter into an agreement with the person contemplated to be his guardian. But an agreement doesn't seem proper for the guardian to prove his guardianship when dealing with any third party. There should be some kind of power of attorney that should go hand in hand with that agreement.
2. Should the agreement be duly notarized? The law does not say anything about this. If not, then who dare rely on an agreement and/or the power of attorney when dealing with the guardian? We do notice that in practice, local notary offices in Shanghai have started entertaining notarization of such agreement.
3. If the power of attorney is necessary, then what kind of powers or what scope of powers and authorities shall be given to the guardian in the power of attorney? It is analyzed, and I agree, that such power of attorney shall focus on dealings of financial affairs and general properties or assets other than primary home. Major medical decisions shall be treated with greater attentions.
4. There is also a big concern on the lack of rules that should be in place regarding supervision of guardians in their course of performance.

In spite of those problems surrounding this new legal system, it is still a good start toward a better administration of one's own affairs in difficult times of life.

Clients, esp those Chinese emigrants who have left their old parents in China, may be interested in the information above, and it is your duty to help your elderly parents to ensure they are taken care of in good manners in China while you are away.

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