

The Implementation Dilemmas and Solutions of the Appointed Guardianship System from the Perspective of the Protection of the Rights and Interests of the Elderly

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Abstract: *In a deeply aging society, the appointed guardianship system, as an important arrangement for the protection of the rights and interests of the elderly, still faces many practical difficulties. Typical examples include: during the decision-making stage of whether to choose appointed guardianship, the lack of professionalism and availability of appointed guardians can easily hinder the elderly from choosing to apply it; during the establishment stage of appointed guardianship, the limited rules related to the appointed guardianship agreement can easily lead to the frustration of the elderly's subjective will; during the operation stage of appointed guardianship, the insufficient accountability mechanisms for appointed guardians can easily lead to the infringement of the personal or property rights of the elderly. By reflecting on its jurisprudential causes, it can be found that the current law largely ignores the orientation of appointed guardianship as a welfare for the elderly in social law, the concept of substantive equality in the appointed guardianship agreement, and the theoretical attributes of the appointed guardianship as a fiduciary relationship. Therefore, the appointed guardianship system in China should be systematically improved to fully release its institutional potential in the protection of the rights and interests of the elderly based on these jurisprudential principles. In particular, it is possible to consider actively promoting the "trust + appointed guardianship" model and cultivating a team of appointed guardians by the state based on the concept of elderly welfare; strengthening the protection of notarization procedures and the reasonable design of the appointed guardianship agreement based on the concept of substantive equality; and refining the fiduciary standards of appointed guardians and strengthening guardianship supervision based on the nature of fiduciary relationship.*

Keywords: protection of the rights and interests of the elderly ♦ appointed guardianship ♦ elderly welfare ♦ substantive equality ♦ fiduciary relationship

As over a hundred cities across the country enter the phase of deep aging,¹ the number of elderly people who are long-lived but functionally impaired has surged sharply. Meanwhile, the role

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¹ Lin Xiaozhao, "Big Data on Urban Aging in China: 149 Cities in Deep Aging, Concentrated in These Provinces," Yicai, accessed June 1, 2024, <https://m.yicai.com/news/101164016.html>.

of family members in providing elderly care has weakened, and resources for medical and nursing services for the elderly are both scarce and uneven in quality. In response, the Fifth Plenary Session of the 19th Central Committee of the Communist Party of China (CPC) explicitly proposed, “It is necessary to implement a proactive national strategy in response to population aging.”² The report to the 20th CPC National Congress also clearly proposed, “We will pursue a proactive national strategy in response to population aging, develop elderly care programs and services, and provide better services for elderly people who live alone. By doing so, we can ensure that basic elderly care is accessible to the entire elderly population.” As an important arrangement for protecting the rights and interests of the elderly, the appointed guardianship system is a new elderly care mechanism that responds to the national strategic deployment in the era of aging. However, the current regulations on this system are rather brief, and numerous practical issues such as deciding whether to choose appointed guardianship, its establishment, and its operation, remain in stages, which hinder the full realization of its potential. Therefore, China should improve the appointed guardianship system in a timely manner to effectively address the social needs of the era of aging, thereby enabling the elderly population to better enjoy their later years. Against this backdrop, this paper, from the perspective of protecting the rights and interests of the elderly, systematically explores China’s appointed guardianship system through three aspects: implementation challenges, causal reflections, and improvement pathways, aiming to provide a foundational legal basis and policy reference for the subsequent refinement of support systems.

I. Analysis of the Implementation Dilemmas and Solutions of the Appointed Guardianship System from the Perspective of the Protection of the Rights and Interests of the Elderly

Decades after many foreign countries advanced reforms in their adult guardianship systems,³ China essentially established the framework for appointed guardianship with the revision and adoption of the *Law on the Protection of the Rights and Interests of the Elderly* in 2012. Since then, elderly individuals in China with full capacity for civil conduct have been able to designate guardians for themselves in accordance with Article 26 of this law, autonomously arranging their anticipated guardianship arrangements.⁴ Building on this approach, Article 33 of China’s *Civil Code* expands the scope of application, extending the appointed guardianship system to all adults with full capacity for civil conduct who wish to designate guardians in advance, and emphasizes the requirement for a written form. At the same time, unlike testamentary guardianship under Article 29 of the *Civil Code*, where guardians are designated by the parents of the ward, or agreed guardianship under Article 30, where guardians are negotiated among those qualified to serve, the appointed guardianship system relies more on the autonomous choice of the potential ward. From the perspective of its original intent, the core distinction between appointed guardianship and statutory guardianship lies in the former’s stronger emphasis on the principle of the autonomy of private law: It ensures that individuals with full capacity for civil conduct can designate their future guardians according to their own will. This also reflects the conceptual evolution of contemporary guardianship systems — from substitutive decision-making in statutory guardianship to supportive

² *Proposals of the Central Committee of the Communist Party of China for Formulating the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Long-Range Objectives Through the Year 2035*, adopted at the Fifth Plenary Session of the 19th Central Committee of the Communist Party of China on October 29, 2020.

³ Li Xia, *Adult Protection System in the Civil Code* (Jinan: Shandong University Press, 2007), 65.

⁴ Zhang Haiyan and Su Jie, “A Study on Foreign Elderly Appointed Guardianship Systems and Their Implications for China,” *Social Sciences Abroad* 6 (2022): 87.

decision-making in appointed guardianship⁵, and from paternalism to respect for individual differences⁶. However, translating the principles embodied in appointed guardianship into practice to protect the rights and interests of the elderly requires systematic institutional support. Yet, both the *Law on the Protection of the Rights and Interests of the Elderly* and the *Civil Code* contain few detailed provisions. Under these circumstances, when examined from the perspective of protecting the rights and interests of the elderly, the existing framework of the appointed guardianship system faces the following core challenges at the stages of deciding whether to opt for appointed guardianship, establishing appointed guardianship, and operating appointed guardianship. These challenges not only severely constrain its practical potential but may also pose adverse impacts on the protection of the rights and interests of the elderly.

A. Limitations in the professional competence and availability of appointed guardians easily hinder its selection and application

For many elderly individuals and those who will eventually become elderly, the decision of whether to opt for appointed guardianship is confronted with the practical challenge of limited professional competence and availability among potential appointed guardians. This often hinders many elderly people from choosing to utilize this system.

First, ordinary appointed guardians often lack professionalism in property management and value preservation and appreciation, failing to meet the crucial need of many elderly people for the proper management and financial growth of their assets. Although current laws do not explicitly state whether asset value preservation is one of the duties of a guardian managing property on behalf of the ward, some scholars argue that the guardian's obligation to preserve property should be interpreted more widely to "include acts of protecting and managing property, as well as necessary acts of operation and disposition."⁷ However, if the appointed guardian is not a professional financial manager, it is difficult to fully accomplish this task. Moreover, in the event of risks, the appointed guardian is also susceptible to criticism from the relatives and acquaintances of the ward. In this regard, France requires the convening of a family council for decisions on the disposition of a ward's property, but this method incurs excessively high time costs.⁸ For China, the current appointed guardianship system itself does not provide professional services such as property management and value preservation and appreciation for elderly people with diminished capacity. It may not effectively prevent elderly people from engaging in legally disadvantageous acts.⁹ This may constitute a significant obstacle for elderly individuals considering appointed guardianship to arrange their future affairs.

Second, in the absence of statutory requirements and practical incentives, the pool of individuals who are both willing and qualified to serve as appointed guardians is likely to be quite limited. This creates a risk that the system could be rendered effectively unimplemented in practice, leading to a dilemma for the elderly at the very outset of selecting a qualified guardian. Shanghai, a microcosm of China's deeply aging society, is projected to have an average life expectancy exceeding 84 years by 2025.¹⁰ Furthermore, according to statistics from Japan, which entered an aging society many years before China, the prevalence of dementia reaches as high as 27.3% among

⁵ Li Xia, "The Modern Transformation of the Adult Guardianship System," *China Legal Science* 2 (2015): 199-219.

⁶ Xie Gen, "Conflicts of Interest in Property Management for the Elderly," *Contemporary Law Review* 3 (2014): 94.

⁷ Liang Huixing, *General Principles of Civil Law* (3rd edition) (Beijing: Law Press • China, 2017), 108.

⁸ Chen Jun, "Analysis of the Notarization Participation in the Supervision Model of Adult Appointed Guardianship," *China Notary Journal* 5 (2019): 63.

⁹ Wang Zhicheng, *Trust Law* (5th edition) (Taipei: Wu-Nan Book Inc., 2016), 51.

¹⁰ *Shanghai Municipal 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Long-Range Objectives Through the Year 2035*, approved at the Fifth Session of the 15th Shanghai Municipal People's Congress on January 27, 2021.

those aged 85 and over.¹¹ Consequently, it is evident that the number of functionally impaired elderly will increase significantly, creating a substantial and growing social demand for care and support. However, both China and Japan share a cultural context characterized by less developed contractual relationships and a greater reliance on guardianship by relatives.¹² In reality, due to factors such as children predeceasing their parents, children living abroad, or poor relationships between the elderly and their children or other family members, an increasing number of elderly people within this demographic will have an urgent need for guardians from outside their families to manage their care. Within the current framework of China's adult guardianship system, which juxtaposes statutory and appointed guardianship, the former is no longer restricted to relatives of the ward. It can also involve public guardianship bodies (such as civil affairs departments) or other willing individuals or organizations acting as guardians (Articles 28 to 32 of the *Civil Code*). A key significance of the appointed guardianship system, which allows for the selection of a guardian via agreement, is precisely to bypass the order of precedence set by statutory guardianship. Therefore, appointed guardians often are not close relatives of the ward. Yet, considering China's practical circumstances, public guardians are already stretched too thin to effectively serve as guardians for the future functionally impaired elderly without family guardians. Thus, responding to this demand will likely require more social organizations and professional appointed guardians. Evidence from real-world cases shows that statutory guardianship is often rejected because it fails to meet the specific needs of the ward. Moreover, from the perspective of the economic principle of demand, if a non-relative is to serve as an appointed guardian, it seems necessary to provide the guardian with certain economic benefits to ensure the sustainability of the arrangement. In this context, if the ward's assets are insufficient to subsidize the guardian, should the guardian receive a government allowance? If so, how should such an allowance be calculated? These questions urgently require resolution. As China currently lacks professional appointed guardians, the growing social demand among many elderly people for qualified non-relative guardians cannot be adequately met. This also constitutes a significant obstacle for the elderly when considering whether to use appointed guardianship to arrange their future care.

B. Limited rules governing appointed guardianship agreements can lead to the frustration of subjective intentions

After deciding to opt for appointed guardianship, the process moves to the stage of establishing guardianship. In this stage, the limited rules governing appointed guardianship agreements can easily lead to the frustration of the elderly's subjective intention to properly arrange their lives via this system.

First, the validity of the appointed guardianship agreement may be challenged externally, readily undermining the elderly's wish to arrange their lives through appointed guardianship. If statutory guardianship duties are excluded solely based on an appointed guardianship agreement, and if inheritance is tied to the appointed guardianship, its validity is highly susceptible to external challenges in practice. For example, in November 2020, an octogenarian in Shanghai designated a local fruit stall vendor as his future appointed guardian. Subsequently, his relatives questioned the vendor's motives, demanded an assessment of the elderly person's mental state, and presented conflicting accounts against the vendor.¹³ In May 2021, the Baoshan District People's Court, based on an appraisal, recognized that the octogenarian suffered from an organic mental disorder and declared him to have no capacity for civil conduct, allowing the appointed guardianship to take

¹¹ Qian Weirong, "Japan's Civil Guardianship System," translated by Li Xia and Geng Siyuan, *Journal of Shanghai Normal University (Philosophy and Social Sciences Edition)* 1 (2021): 7.

¹² Wang Weiling and Li Xia, "On the Establishment Rules of Appointed Guardians under Dual Attributes," *Nanjing Journal of Social Sciences* 10 (2021): 102.

¹³ Chen Zhan, "Elderly Person's Property Gift of 3 Million Yuan to Outsider Challenged by Relatives: Is This Appointed Guardianship Agreement Still Valid?" Guangming Online (GMW.cn), accessed June 1, 2024, https://m.gmw.cn/2020-11/28/content_1301847794.htm.

effect.¹⁴ In fact, had the written appointed guardianship agreement not been notarized prior to his diagnosis of Alzheimer's disease, a situation could easily have arisen where no verification was possible once his mental clarity deteriorated. This signifies that it may be impossible to effectively prove both the ward's intent in establishing the guardianship and his possession of capacity for civil conduct at the time of establishment, thereby exposing the appointed guardianship agreement to the risk of ultimately being declared invalid. This outcome, however, does not sufficiently respect but rather clearly contravenes his true will. It can instead readily become a method for family members or other interested parties to attempt to gain statutory guardianship eligibility for the purpose of controlling property.

Second, the rights and obligations within the written appointed guardianship agreement are not clearly defined. Even if successfully established, this ambiguity can easily lead to the frustration of the potential ward's well-intentioned vision. Unlike family-based elderly care, which can be regulated by a more mature body of family law, the parties in an appointed guardianship arrangement — the guardian and the ward — often lack a familial relationship. Therefore, there is a particular need for detailed and comprehensive contractual rules specifically designed for appointed guardianship to govern the relationship between the parties, thereby fully safeguarding the subjective wishes and free will of the potential wards before they (partially) lose their capacity for civil conduct.¹⁵ In this regard, according to the regulations of Article 33 of the *Civil Code*, an appointed guardian must be appointed in writing; the potential future ward must have full capacity for civil conduct at the time of appointment; the establishment of the guardianship agreement requires mutual consultation; and the agreement takes effect when the ward loses or partially loses his or her capacity for civil conduct. However, beyond this triggering condition, the article does not specify the essential content of the written agreement, nor does it address the validity of multiple, potentially conflicting appointed guardianship agreements. In this context, particularly when the parties enter into a non-remunerated appointed guardianship agreement, specific standards are lacking regarding the extent of the guardian's duties concerning personal care and property management. Concurrently, if the appointed guardian neglects or even fails to perform his or her duties, it is often difficult to reappoint a guardian who aligns with the ward's will. Furthermore, the specific rights entitled to the appointed guardian remain quite ambiguous. Simply relying on the suggestive terms outlined in Article 470 of the *Civil Code* is too nebulous for the content of an appointed guardianship agreement, failing to meticulously protect the interests of the potential ward. Even if the appointed guardianship is validly established, these circumstances easily lead to the failure of the elderly people's hopes to properly manage their lives through this mechanism.

C. Inadequate accountability mechanisms for appointed guardians can lead to infringements of rights and interests

After the appointed guardianship is validly established and the elderly individual has (partially) lost his or her capacity for civil conduct, the operation stage begins. A core systemic challenge during this stage is the lack of adequate accountability mechanisms for appointed guardians. This deficiency makes it difficult to effectively prevent and control the appointed guardian's moral hazards, potentially resulting in inadequate care for the ward and ultimately harming the ward's personal or property rights and interests.

First, unclear supervisory standards may lead appointed guardians to neglect their duties. Within the appointed guardianship relationship, as the parties often are not relatives, a high degree of initial trust exists. However, for the appointed guardian, significant moral hazards arise once the

¹⁴ “‘Property Bequeathed to Fruit Stall Vendor’ Faces New Controversy: How to Protect Public Order and Good Customs?” The Paper, accessed June 1, 2024, <https://baijiahao.baidu.com/s?id=1700173829074720520&wfr=spider&for=pc>.

¹⁵ Additionally, if a will and an appointed guardianship agreement are executed simultaneously, based on their relative independence, the invalidity or partial invalidity of either document does not, in principle, affect the validity of the other. Moreover, given that the appointed guardianship agreement typically covers broader content, it can further safeguard the free will of the testator and future potential ward.

elderly person loses cognitive and functional abilities. Yet, current laws do not specify concrete standards of conduct for appointed guardians, focusing primarily on providing remedies through ex post facto liability. This approach is clearly inadequate to effectively address the various moral hazards associated with appointed guardians. For instance, Article 35 of the *Civil Code* outlines the principles and requirements for guardians to perform their duties. However, faced with the complex realities of the system's application, highly generalized standards such as “respecting the ward's true will to the greatest extent possible” and “the principle of performing duties in the best interest of the ward” lack specific guidance and practical enforceability. Simultaneously, Articles 34 and 36 of the *Civil Code* stipulate remedial measures for guardianship: namely, that “a guardian who fails to perform his or her duties or infringes upon the lawful rights and interests of the ward shall bear legal liability”; and it lists the circumstances under which a guardian's qualification can be revoked, as well as the range of individuals and organizations entitled to apply for such revocation. Although these two articles clarify the legal consequences of the revocation of guardianship for non-performance, this is only an ex post facto remedy — a recourse for harm already done. This lagging supervisory method has a weak deterrent effect and fails to achieve effective oversight throughout the entire process of guardianship duty performance. Especially given that the loss (or partial loss) of capacity for civil conduct by the ward in appointed guardianship is often irreversible, merely stipulating legal liability is insufficient to effectively prevent and control the guardian's moral hazards in the absence of basic standards of conduct to guard against the guardian's passive fulfillment of duties.

Second, unclear supervisory procedures, including vague definitions of supervisory bodies and processes, make it difficult to effectively protect the ward's rights and interests. In practice, once the guardianship process commences, the ward has de facto (partially) lost capacity for civil conduct and cannot effectively express his or her attitudes or will. Therefore, it is essential to design a supervision mechanism targeting the guardian. In this regard, Article 36 of China's *Civil Code* only specifies the individuals or organizations entitled to apply to the court to revoke the guardian's qualification, but it does not explicitly mention the appointment of active supervisors within the appointed guardianship agreement or the setting of their responsibilities. Furthermore, a problem exists where entities have the qualification to apply but no obligation to do so, leading to inaction in practice. Additionally, although this catch-all clause in Article 36 grants civil affairs departments the authority to apply for revocation, in practice, some departments, when other organizations and individuals are absent, may inevitably struggle to achieve supervisory goals due to their heavy workloads. Under the aforementioned institutional arrangements, the appointed guardianship system, which primarily serves elderly populations with limited external contact, lacks effective supervisory bodies and has failed to form a systematic supervision mechanism. If a guardian abuses his or her power and infringes upon the ward's rights and interests, primary-level mass organizations, civil affairs departments, medical institutions, elderly care organizations, and other entities may easily provide insufficient attention or engage in buck-passing due to unclear supervisory obligations and rights, de facto leaving the ward's rights and interests unprotected. Building on this, with the increasing prevalence of socialized elderly care models, the ward may also face the problem of dual moral hazards from both the guardian and the nursing home. In traditional care models, elderly people often fear being mistreated due to infrequent visits from their children. Under the appointed guardianship system, however, the care model that relies on the guardian and the nursing home, combined with the ward's vulnerable position — such as limited verbal expression or physical disabilities¹⁶ — may create even greater space for moral hazard in practice. In fact, given the reality of the elderly person's lost cognitive and functional abilities, this moral hazard can easily materialize in the absence of a robust supervision system. For example, in practice, contracts are typically signed between the guardian and the nursing home: The former

¹⁶ Li Hongxiang, “On Several Misunderstandings in the Study of Adult Guardianship System,” *Journal of Political Science and Law* 2 (2017): 94.

effectively delegates parts of the guardianship duties to the latter, including but not limited to ensuring the ward's personal safety; the latter, in turn, must promptly notify the guardian in emergencies. In such scenarios, the appointed guardian still retains obligations such as maintaining communication with the nursing home, promptly accompanying the elder for external medical treatment, and paying fees on time. If the appointed guardian is negligent, enabling the nursing home to reduce services, the ward's quality of life may decline. Notably, as the appointed guardian may not have an absolute emotional bond with the ward, if the guardian intentionally colludes with the nursing home to infringe upon the ward's rights and interests, ordinary supervisory bodies would struggle to detect the problem and assign accountability. Consequently, in the absence of robust guardianship supervision rules, the aforementioned moral hazards may be inevitable.

II. Reflection on the Causes of Challenges in the Appointed Guardianship System from the Perspective of Protecting the Rights and Interests of the Elderly

To some extent, while the aforementioned systemic challenges arise from the relatively principled and abstract nature of legal provisions in the *Civil Code* and other laws, a more significant cause likely lies in the fact that current legislation overlooks the underlying concepts including elderly welfare, substantive equality, and the fiduciary relationship inherent in the appointed guardianship system, and consequently fails to construct targeted institutional frameworks accordingly. Therefore, a jurisprudential reflection on these institutional challenges is necessary to clarify their specific causes, thereby providing a theoretical foundation and policy basis for subsequently exploring pathways to improve the appointed guardianship system. The analysis proceeds as follows.

A. Neglecting the social law role of appointed guardianship as elderly welfare

Regarding the institutional challenge where limitations in the professionalism and availability of appointed guardians hinder many elderly people from choosing to utilize the appointed guardianship system during the decision-making stage, this paper argues that the core reason lies in the failure of current laws to fully protect the legitimate rights and interests of the elderly as a vulnerable group based on the concept of elderly welfare¹⁷. Particular attention should be paid to value considerations oriented toward protecting this vulnerable group, which is why China has specifically enacted the *Law on the Protection of the Rights and Interests of the Elderly*. According to Article 4 of this law, "Measures shall be taken to improve various systems for protecting the rights and interests of the elderly, and to gradually enhance conditions for ensuring their living, health, and safety, as well as their participation in social development." Therefore, the state should actively promote the safeguarding and enhancement of elderly welfare through institutional empowerment and financial support. Specifically concerning the appointed guardianship system, while it formally belongs to traditional civil law, in substance, it should be characterized as a social law system functioning as elderly welfare.¹⁸ Elderly welfare generally refers to "the services, facilities, or allowances provided by the state and society to meet the living needs of the elderly and improve their quality of life."¹⁹ Accordingly, the appointed guardianship system is not an end in itself; the real legislative purpose is to protect elderly welfare through the optimized combination of the appointed guardianship system and other supporting measures. However, current law still adheres to the traditional characterization of it as a civil law institution, neglecting to address the

¹⁷ Yoko Kuwahara, *Introduction to Japan's Social Welfare Legal System*, translated by Han Junling and Zou Wenxing (Beijing: The Commercial Press, 2010), 251.

¹⁸ Yoshimi Kikuchi, *Vision for the Future of Social Security Legal Systems*, translated by Han Junling (Beijing: The Commercial Press, 2018), 32.

¹⁹ Zheng Shangyuan, *Social Security Law* (Beijing: Higher Education Press, 2019), 363.

shortcomings of a purely civil law-based appointed guardianship system through measures such as institutional empowerment and government financial support. This results in many elderly individuals in practice not choosing to utilize this system.

First, regarding the management of the ward's property, a property management mechanism operating in parallel with appointed guardianship and specifically configured based on the concept of elderly welfare has yet to be established. Appointed guardians often possess some expertise in personal care but do not have particular advantages in preserving and appreciating the value of the ward's assets. Furthermore, for individuals with substantial family wealth, professional individuals or institutions are needed for value preservation and appreciation. However, current laws do not effectively regulate guardians' purchases of third-party financial products, thus failing to fully protect the rights and interests of functionally impaired elderly individuals. In this context, trusts possess inherent advantages, such as asset isolation, in property management. Especially in current practice, when trust companies act as trustees, their professionalism in financial management helps enhance the potential for preserving and increasing the value of trust assets. However, the trust system is rarely used in the field of elderly guardianship. On one hand, the value pursuits and corresponding rules of common commercial trusts in the industry differ significantly from the institutional purpose of appointed guardianship, making it difficult to form synergistic efforts; on the other hand, there are currently few specialized trust systems specifically designed for property management for the elderly, particularly those with cognitive or functional impairment.

Second, concerning the supply of qualified appointed guardians, financial support and incentive mechanisms have not been strengthened based on the concept of elderly welfare. Current discussions on elderly welfare, both domestically and internationally, often focus on areas such as major illness assistance and medical care.²⁰ For example, in the realm of social care, the United Kingdom has introduced nationally unified eligibility criteria in its Fair Access to Care Services; simultaneously, the UK also assesses the self-care ability of the elderly and their family assets, enabling the elderly in impoverished areas to access care as equally as possible. This approach achieves high assistance efficiency with relatively low subsidy inputs.²¹ In contrast, few scholars, either in China or abroad, discuss elderly welfare from the perspective of supplying professional appointed guardians. In fact, for some individual appointed guardians, their willingness to replace statutory guardians in caring for the elderly is based on deep affection and mutual trust. This is certainly an important scenario for the application of appointed guardianship. However, in cases where an elderly individual cannot find a suitable appointed guardian, based on the concept of elderly welfare, the state and society should cultivate a corps of professional appointed guardians and provide supporting institutional frameworks to ensure their regular supply. For instance, in Japan, statistics show²² that from age 65, the incidence of Alzheimer's disease doubles approximately every five years; even though an appointed guardian may initially be determined to care for an elderly individual, as the elder's self-care ability continues to decline and conditions such as unpredictable crying and agitation arise, even the biological children of the elderly individual might struggle to maintain patience at all times, let alone an appointed guardian. For example, Article 1113-7 of the *Civil Code* of the Chinese province of Taiwan stipulates that an appointed guardianship contract may specify whether remuneration is to be paid or not; if not specified, the guardian may request the court to determine compensation based on the guardian's efforts and the ward's financial capacity. Therefore, in a sense, it is legitimate for appointed

²⁰ Although China has currently established certain insurance mechanisms for major illnesses, long-term care remains an unbearable burden for economically disadvantaged families, not to mention for some less affluent elderly groups who are potential wards for appointed guardianship.

²¹ Luo Liya and Ding Jianding, "International Comparison and Value Implications of Long-Term Care Services for the Elderly in Typical Welfare States," *Comparative Economic & Social Systems* 1 (2021): 22-32.

²² Qian Weirong, "Japan's Civil Guardianship System," translated by Li Xia and Geng Siyuan, *Journal of Shanghai Normal University (Philosophy and Social Sciences Edition)* 1 (2021): 7.

guardians to receive remuneration. They can expect to be compensated similarly to those involved in legacy-support agreements, preferably through long-term, multiple payments. However, China still lacks necessary financial support and policy incentives in these areas, unable to encourage more professional individuals and social organizations to actively serve as appointed guardians, and unable to alleviate the pressures of social elderly care.

B. Neglecting the concept of substantive equality in appointed guardianship agreements

Regarding the institutional challenge in the establishment stage of appointed guardianship, where limited rules governing the appointed guardianship agreements can easily lead to the frustration of the elderly's subjective intentions, this paper argues that this primarily reflects the failure of current rules to fully protect the ward's subjective intention to arrange their life through the appointed guardianship agreement based on the concept of substantive equality. The so-called concept of substantive equality²³ typically refers to the situation where, when a civil subject is in a disadvantaged position due to special circumstances, the law should provide preferential protection in its institutional configuration to rectify the substantive inequality masked by formal equality between the parties. This should particularly be the case in the field of appointed guardianship agreements. Because the ward faces risks of cognitive and functional impairment and complex situations such as inheritance distribution, he or she is often in a disadvantaged position within the arrangements of an appointed guardianship agreement. Furthermore, due to various factors including property inheritance, the ward's relatives and other interested parties may attempt to challenge the validity of the appointed guardianship agreement. Therefore, this disadvantaged position exists both relative to the ward's future potential appointed guardian and relative to his or her relatives and other interested parties. As a system primarily serving the elderly population and upholding justice and intergenerational order,²⁴ the appointed guardianship system needs to strengthen the protection of the needs of potential or actual wards. However, the current law's laissez-faire approach to appointed guardianship agreements often overlooks the concrete implementation of the concept of substantive equality, potentially harming the protection of the personal will and rights and interests of the elderly.

First, regarding the validity of appointed guardianship agreements, the protection of the ward's personal will and rights based on substantive equality has been neglected. As such agreements are rarely used in private practice, their validity is often questionable without the professional review of legal practitioners, which creates hidden risks for the frustration of the ward's intentions. Moreover, in practice, since the essence of an appointed guardianship agreement is a civil juristic act subject to a condition precedent, namely, the ward losing or partially losing capacity for civil conduct, the agreement only takes effect when this condition is met. By that time, the ward's ability to express their consciousness may already be impaired. If the agreement was only generally stipulated without prior professional involvement from legal practitioners, it becomes difficult to effectively bind the appointed guardian, casting doubt on whether the ward's expected outcomes can be achieved. Furthermore, although the effectiveness of an appointed guardianship agreement is contingent upon the ward losing or partially losing capacity for civil conduct, the standards for determining civil capacity may not fully align with those for assessing mental state and expressive ability in the medical field. Against this backdrop, if an individual with some ability to express their will is deemed to have limited capacity for civil conduct, the activation of their appointed guardianship agreement could potentially override their advance medical directives.²⁵ This would expand the scope of appointed guardianship while restricting the effectiveness of the ward's

²³ Luo Yizhong, "Equality Before the Law: Before Whom? What Kind of Equality?" *Zhejiang Social Sciences* 2 (2023): 50.

²⁴ Wang Bei and Zhou Mi, "Theoretical Interpretation and Practical Application: Research on the Expansion Mechanism of Legal Aid for the Elderly," *Journal of Sichuan University (Philosophy and Social Science Edition)* 5 (2020): 167.

²⁵ Cao Kai and Jiang Baisheng, "Reflections on Advance Medical Directives Based on the Appointed Guardianship System," *Medicine & Philosophy* 8 (2020): 54.

expressed intentions. Guardians may not make private decisions, such as whether to opt for conservative treatment, in accordance with the ward's intentions, thereby undermining the latter's autonomy. This stands in sharp contrast to the approach under Japanese law, which stipulates that statutory guardians do not have the right to consent to medical treatments, a measure designed precisely to protect personal autonomy.²⁶

Second, in the design of the content of appointed guardianship agreements, the full protection of the ward's subjective will based on the concept of substantive equality has been neglected. In traditional civil law, particularly contract law, parties are allowed to reach mutually beneficial arrangements based on free will and multifaceted negotiation. However, many elderly individuals often lack sufficient understanding of contract drafting and how to safeguard their own interests. Meanwhile, given that appointed guardianship agreements involve more critical and detailed matters such as the future basic living arrangements of the elderly, special consideration must be given to their particular interests. At the very least, elderly individuals should possess a certain level of awareness and understanding of the entire guardianship process within the practice of the appointed guardianship system, including the agreement, its notarization, the guardian's subsequent reporting to supervisors, and the legal provisions, significance, and consequences of potential guardian replacement. The current law's approach of entirely entrusting the design of appointed guardianship agreements to the parties' free negotiation, while adhering to the concept of formal equality, is not conducive to the effective protection of the rights and interests of the elderly. This often easily leads to the situation mentioned above — during the establishment stage of appointed guardianship, the wishes and demands of the elderly are not meticulously reflected in the agreement's terms. Consequently, when the elderly individual (partially) loses capacity for civil conduct, many legitimate interests considerations cannot be concretely safeguarded.

C. Neglecting the theoretical attribute of the appointed guardianship relationship as a fiduciary relationship

Regarding the institutional challenge in the operation stage of appointed guardianship, where inadequate accountability mechanisms for appointed guardians easily lead to infringement upon the personal or property rights and interests of the elderly, this paper argues that the main reason lies in the current law's neglect of the theoretical attribute of the appointed guardianship relationship as a fiduciary relationship. In fact, the relationship between the guardian and the ward in appointed guardianship constitutes a typical fiduciary relationship with the duty of loyalty at its core:²⁷ Here, the ward is the principal, who beforehand places trust and confers authority upon the appointed guardian, with the aim that the guardian serves the ward's best interest. The appointed guardian, as the fiduciary, naturally bears the obligation to act in the best interest of the ward. Moreover, the power balance within the appointed guardianship relationship is particularly unequal: Once appointed guardianship is activated, it signifies that the ward is often in a state of cognitive or functional impairment, fundamentally unable to effectively constrain or supervise the appointed guardian. Under these circumstances, it is essential to design corresponding fiduciary accountability mechanisms. On one hand, this involves refining the standards of fiduciary duties²⁸, and on the other hand, it requires strengthening the supervision and enforcement of these standards. This effectively mitigates the moral hazards of the appointed guardian and ultimately maximizes the ward's interests. However, the existing accountability rules for guardians have not fully

²⁶ Li Guoqiang, "Interpretation of the Legal Relationship in Adult Appointed Guardianship: An Analysis Based on Article 33 of the General Provisions of Civil Law," *Modern Law Science* 5 (2018): 184.

²⁷ Xu Huageng, "The General Theory of Fiduciary Duty and Its Development in Chinese Law," *Peking University Law Journal* 6 (2020): 1573.

²⁸ Li Quanxi, Zhang Ming, Li Jiwei, et al., "Improvement Directions for China's Notarization Duty System," *China Notary Journal* 7 (2020): 35.

implemented the concept of a fiduciary relationship within the appointed guardianship system, ultimately leading to situations where the rights and interests of the elderly are infringed upon.

First, in the design of rules defining the duties of appointed guardians, there is neglect of the need to strengthen regulatory provisions based on the principles of the fiduciary relationship. Appointed guardianship differs from conventional contractual arrangements. Given its inherent fiduciary nature, its practical implementation is more similar to trust relationships. With respect to property management, the obligations of a guardian are highly analogous to those of a trustee: both are required to act to maximize the interests of the ward/beneficiary, adhering to duties of care and loyalty. In the realm of personal guardianship, the requirements are even more stringent than those for property management, due to the severely asymmetrical relationship between the ward and the guardian. This necessitates the establishment of relatively rigorous and comprehensive fiduciary duties to effectively govern the conduct of the appointed guardian. From a comparative law perspective, the approach adopted in Articles 1308 to 1317 of the *Civil Code of Québec*, Canada, involves introducing fiduciary duty standards in the domain of property management on behalf of others, requiring administrators to fully employ their skills and experience to make prudent decisions when interacting with third parties, and explicitly specifying behavioral restrictions and corresponding consequences. At the same time, it prohibits managers from engaging in any activities that may harm the interests of the beneficiary.²⁹ In contrast, the regulatory framework for guardianship concerning property management under Article 1792, paragraph 2 of the *German Civil Code (BGB)* stipulates: If the management of property is material and not carried out jointly by at least two guardians, a supervisory guardian should be appointed.³⁰ However, in this respect, although Article 35 of China's *Civil Code* establishes the fundamental principle of serving the best interest of the ward, public authority cannot substitute abstract evaluations for specific harmful acts or consequences as a criterion for intervention³¹. Moreover, existing laws lack corresponding detailed provisions, failing to achieve the intended effect of constraining and mitigating the moral hazards associated with guardians: Issues such as predatory lending in the reverse mortgage sector, abuse of power of attorney, and related-party transactions occur with some frequency.

Second, the supervision and enforcement of duty standards for appointed guardians overlooks the institutional design needed to strengthen accountability based on the principles of the fiduciary relationship. As previously emphasized, the significant power imbalance between parties in appointed guardianship necessitates holding guardians to the high standards of conduct required by fiduciary duties. Accordingly, robust mechanisms for supervising and enforcing these fiduciary duties must be comprehensively established to effectively ensure the security and stability of the ward's mental well-being and asset preservation. In practice, to ensure transactional security, some jurisdictions prohibit guardians — even those holding notarized guardianship agreements — from completing real estate registration and title transfers on behalf of the ward.³² Although this prevents certain risks, it also unnecessarily restricts the scope of actions available to appointed guardians and may ultimately undermine the true intentions of the ward. From another perspective, however, China has not yet instituted a guardianship supervision system, making it imprudent to freely permit such transactions in the absence of oversight. Moreover, unlike the operational transparency required in commercial trusts or corporate governance, guardianship arrangements are not subject to requirements for information disclosure or regular reporting. Thus, compared to other legal acts with the fiduciary relationship, the lower transparency surrounding appointed guardians' actions

²⁹ James Douglas, "Trusts and Their Equivalents in Civil Law Systems: Why did the French Introduce the Fiducie into the Civil Code in 2007? What Might Its Effects Be?" 13 *QUT Law Review* 1 (2013): 19-29.

³⁰ Zhu Guangxin, "The Legislative Construction of the Guardianship Supervision System," *Journal of Soochow University (Law Edition)* 1 (2020): 4.

³¹ Liu Zhengfeng, "The Neglected Differences: The Blind Spot in the Legislative Model Dispute over 'Senior and Minor Guardianship' in the *General Principles of Civil Law* (Draft)," *Modern Law Science* 1 (2017): 186.

³² Li Xin, "The Chinese Practice and Institutional Improvement of Appointed Guardianship," *Modern Law Science* 2 (2021): 36.

weakens constraints on their conduct. In practice, there are no other strong supervisory mechanisms to effectively prevent and control associated risks. Given the circumstances of elderly individuals with cognitive or functional impairment, this institutional gap, which fails to fully incorporate the principles of the fiduciary relationship, creates a dilemma. It both increases the risk of appointed guardians abusing their authority and unduly limits the scope of legitimate guardian action. It is evident that whether the goal is to delegate authority to guardians or to prevent its abuse, the key lies in strengthening the accountability mechanisms — the way to ensure the proper exercise of authority is not to constrain it arbitrarily, but to clearly define responsibilities and implement efficient accountability.

III. Pathways for Enhancing the Appointed Guardianship System from the Perspective of Protecting the Rights and Interests of the Elderly

A systematic analysis of the aforementioned institutional challenges and their root causes reveals that appointed guardianship transcends the conventional boundaries of the civil subject system or the contract law system. It inherently functions as a social legal mechanism that simultaneously engages with multiple principles, including elderly welfare, substantive equality, and the fiduciary relationship. Therefore, from the standpoint of protecting the rights and interests of the elderly, it is imperative to incorporate these three core principles — elderly welfare, substantive equality, and the fiduciary relationship — into the legal architecture through a coherent structuring of rights and obligations, thereby achieving systemic consistency.³³ Moreover, a locally adapted appointed guardianship system should be designed, taking into account institutional constraints and practical demands, with the ultimate goal of unleashing the system's full potential in addressing the challenges of an aging society. Concrete improvements may be pursued through the following three dimensions.

A. Promoting the “trust + appointed guardianship” model and cultivating appointed guardians

To address the institutional challenge where limitations in the professionalism and availability of appointed guardians hinder many elderly individuals from opting into the system during the decision-making stage, it is advisable — based on the concept of elderly welfare — for the state to actively promote the “trust + appointed guardianship” model and foster the development of a professional corps of appointed guardians.

First, the state should employ policy support to encourage the integration of appointed guardianship and trusts, thereby optimizing the protection of the personal and property interests of the elderly. To meet the asset preservation and appreciation needs of wards with considerable assets within appointed guardianship arrangements, the state can, through policy incentives, encourage the establishment of trust relationships at the time of executing appointed guardianship agreements. This synergy between the two mechanisms can maximize various rights and interests of the elderly. For example, the appointed guardian would be primarily responsible for the ward's personal care and well-being, while necessary financial disbursements and asset preservation and appreciation would be handled by the trust trustee. The advantages of this combined approach are as follows. On one hand, the trust mechanism enables stronger regulatory measures to control opportunistic behavior by the trustee, while simultaneously allowing more flexible asset management.³⁴ This effectively ensures the long-term and continuous operation and appreciation of trust assets. The ward transitions from being the owner (or full rights holder) of the property to becoming a trust

³³ Sun Ximing, “The Systemic Benefits and Coherence of the Adult Guardianship System in the Civil Code,” *Journal of Shandong University (Philosophy and Social Sciences)* 2 (2021): 119.

³⁴ Zhu Xiaozhe, “The Jurisprudential Basis for the Coordinated Application of Appointed Guardianship and Trusts: Focusing on the Trustee's Management Authority and Obligations,” *Global Law Review* 5 (2020): 81.

beneficiary,³⁵ thereby enjoying various beneficial rights. On the other hand, many appointed guardians can be relieved from the burdens of asset preservation and appreciation and focus exclusively on meeting the ward's daily life needs. Furthermore, depending on the specific institutional design, the appointed guardian and the trustee can exercise mutual oversight, thereby ensuring that the rights and interests of the elderly ward are robustly protected. Building on this, the state should particularly encourage — through policy support — the establishment of Special Needs Trusts for elderly individuals with mentally or physically disabled children, or those with a family history of specific hereditary conditions.³⁶ This would allow these groups to continue enjoying family resources in accordance with the settlor's genuine will and preferences and maintaining a high quality of life³⁷.

Second, the state should strengthen financial support and assistance for appointed guardians. (1) Efforts can be made to actively enhance financial support for professional individuals and social organizations serving as appointed guardians. The long-term and vital nature of the appointed guardian's role often restricts arbitrary withdrawal to protect the ward's interests.³⁸ Moreover, the current guardianship system continues to use the provisions from the previous *Tort Liability Law*: When a ward without or with limited capacity for civil conduct causes harm to others, the guardian shall bear tort liability.³⁹ This imposes certain risks on the lives of appointed guardians. Additionally, the current appointed guardianship system lacks rules regarding guardian remuneration and liquidation mechanisms, which is not conducive to the establishment and expansion of a professional corps of guardians. To address this, the government should increase financial support to encourage professional individuals and social organizations to serve as appointed guardians. Through ex ante cultivation, in-process supervision, and ex post feedback, a professional corps of appointed guardians can be developed, thereby addressing the practical challenge of an insufficient number of qualified appointed guardians. (2) Social organizations can be encouraged to create platforms for mutual assistance for the elderly and provide services.⁴⁰ This will create institutional space for the cultivation and identification of qualified appointed guardians. In Shanghai, for example, several professional social organizations specializing in dementia care have made substantial contributions to community-based elderly care systems. In response, relevant authorities have developed localized standards, such as the *Changning District Guidelines for Establishing a Dementia-Friendly Community*, through pilot initiatives, thereby effectively integrating diverse social resources into community-based elderly care. Furthermore, unlike other approaches, community-based elderly care serves as an effective form of early intervention for dementia. While allowing seniors to remain in their homes, it provides access to cognitive training within the community at a relatively low cost, thereby helping delay the onset of the disease. Therefore, the government should encourage the pairing of younger seniors with older ones for mutual support. Such initiatives not only help prevent and monitor age-related functional decline but also fulfill the emotional companionship needs of both groups, as demonstrated by initiatives like the Shanghai municipal government's Elderly Partners Program. This approach also offers a

³⁵ Dogauchi Hiroto, *Introduction to Trust Law*, translated by Jiang Xuelian (Beijing: China Legal Publishing House, 2014), 18.

³⁶ He Jinxuan and Li Yingzhi, *Special Needs Financial Planning: A Comparative Perspective*, translated by Yao Jiangtao and Yuan Tian (Beijing: Law Press China, 2021).

³⁷ Katherine B. McCoy, "The Growing Need for Third-Party Special Needs Trust Reform," 65 *Case Western Reserve Law Review* 2 (2014): 461-485.

³⁸ Zhang Suhua, "The Dilemmas and Solutions in the Implementation of the Appointed Guardianship System," *Oriental Law* 2 (2020): 128.

³⁹ Yu Fei, "An Interpretive Study of Guardians' Liability under the Civil Code," *Law and Economy* 2 (2021): 19.

⁴⁰ *Opinions of the General Office of the State Council on Promoting the Development of Elderly Care Services*, stipulates that qualified social organizations are supported to accept entrustments from special elderly individuals and handle matters such as their admission to nursing homes.

pathway to identify reliable candidates for appointed guardianship, creating synergistic opportunities between community-based mutual care and the appointed guardianship system.

B. Strengthening the protection of notarization procedures and the reasonable design of the appointed guardianship agreement

To address the institutional challenges in the establishment stage of appointed guardianship — where insufficient regulatory details often lead to the frustration of elderly individuals' subjective intentions — it is imperative to enhance the protection of notarization procedures and promote reasonably designed agreements based on the principle of substantive equality and in consideration of the unique physical and mental conditions of elderly adults.

First, notarization should be employed to reinforce the evidential validity of the appointed guardianship agreement and authenticate the genuineness of expressed intent, thereby reducing the risk of the agreement's validity being contested. Rooted in the consensual and fiduciary nature of the relationship between the ward and the guardian, such agreements fall within the scope of contract notarization under Article 11 of China's *Notarization Law*. As such, they are eligible for notarization and can be confirmed through this process. In practice, guided by model cases from China's Ministry of Justice, notaries are required to explain the legal implications, risks, and consequences to all parties involved (including the guardian), and assess their capacity for civil conduct and authenticity of expressed intent. Besides, the notarization agency needs to promptly upload the notarized agreement signed by the parties to the national management system after issuing the notarized documents in accordance with the procedures.⁴¹ Although the notarized documents are subject to archival retention, under the Ministry of Justice's *Notice on Optimizing Notarization Services to Better Serve Enterprises and the Public*, notarization agencies are prohibited from disclosing agreement content to third parties and must strictly verify the identity and true intentions of elderly applicants, especially in real estate matters. This ensures confidentiality, with third parties generally barred from arbitrary access to such content. Thus, parties can notarize their agreements while protecting their privacy, thereby helping prevent disputes and reduce litigation. Although notarization is not legally mandatory for appointed guardianship agreements currently, such arrangements — as a distinctive alternative to statutory guardianship — are founded on the ward's genuine and voluntary special needs. Within this context, notaries play a vital role in factual verification and evidence gathering, and notarization significantly contributes to preserving evidence, safeguarding the ward's autonomy, and ensuring the implementation of the appointed guardianship system. From the perspective of mitigating third-party recognition risks, notarization agencies carry substantial public credibility, and both relevant institutions and individuals generally place high trust in notarized documents, thereby strengthening evidential reliability. Regarding the inherent risks of invalidity of the appointed guardianship agreement, the notarization process provides legal consultation conducted by notaries, who perform professional and neutral reviews of both the form and substance of the agreement. This facilitates the timely identification and resolution of potential flaws, ensuring that the agreement is reasonable, valid, and lawful, thereby promoting smooth guardianship operations. Furthermore, upon the ward's death, the notarization agency may serve as the will executor in accordance with the testator's intentions.⁴² The application of notarization to both wills and appointed guardianship agreements can uphold the individuals' free will and dignity during and beyond their lifetime, while also mitigating potential direct conflicts between heirs and guardians.⁴³ Indeed, the integration of

⁴¹ Yang Cuiting, "The Ministry of Justice Publishes Three Guiding Notarization Cases for the First Time," Chinese Government Legal Information Network, accessed June 1, 2024, http://www.moj.gov.cn/pub/sfbgw/gwxw/xwyw/szywbnyw/202102/t20210201_147960.html.

⁴² Li Chenyang, "The Chinese Notarization Practice of Appointed Guardianship for the Elderly," *China Notary Journal* 6 (2017): 27.

⁴³ Yang Ni, "Selling Ward's Property to Cover Medical Expenses Leads to Lawsuit by Will Heirs," *People's Court Daily*, May 27, 2021.

notarization with appointed guardianship has already been piloted in local legislation such as the *Shanghai Municipal Regulations on the Protection of the Rights and Interests of the Elderly*. Although notarization is not compulsory in Shanghai,⁴⁴ the regulations explicitly recognize that notarization can corroborate appointed guardianship agreements, thereby helping guide the choice of verification methods in the practical implementation of the appointed guardianship system and establishing a foundational framework for notarization's role in future dispute resolution. Particularly in the absence of a robust supervision system within appointed guardianship at present, the involvement of notarization agencies enhances the reliability, stability, and security of appointed guardianship agreements, representing a currently effective countermeasure. It is therefore advisable to conduct a systematic exploration into notarization as a supportive mechanism for guardianship agreements, to minimize institutional risks and maximize social benefits of appointed guardianship. Future legal developments may consider drawing on Article 1113-3 of the *Civil Code* of China's Taiwan region, which explicitly stipulates that "the conclusion, modification of an adult guardianship agreement shall be made in the notarization made by the notary public."

Second, the introduction of model texts for appointed guardianship agreements, along with the design of specific rules tailored to the unique characteristics of such arrangements, will strengthen the detailed protection of the elderly's subjective intentions when opting for this system. Given that individuals entering into appointed guardianship agreements are likely middle-aged or elderly persons anticipating potential cognitive impairment, the provision of a well-structured and comprehensive model appointed guardianship agreement — supplemented with easily recognizable guidance — can more effectively assist them in understanding, deciding, and expressing their intentions. This, in turn, enables appointed guardianship to more fully safeguard the various legitimate interests of prospective wards. Therefore, grounded in the principle of substantive equality and accounting for the distinctive nature of appointed guardianship agreements for the elderly, it is advisable to enhance the model design of rights and obligations clauses that protect the genuine will of the ward.⁴⁵ First, to specify the objective factual basis, methods, and authorities for determining an individual as having no or limited capacity for civil conduct (as opposed to the UK's lasting power of attorney system, which focuses on mental capacity rather than civil behavior capacity);⁴⁶ second, to stipulate prohibited actions for guardians, including asset disposal, daily care, and medical decisions; third, to define the scope of asset management, protection, and disposal after an individual is confirmed to have no or limited capacity for civil conduct; fourth, to outline the duties and rights of guardianship, covering matters such as arrangements of the basic necessities of life, medical rehabilitation, and litigation; fifth, to set conditions for terminating or changing the appointed guardian; and lastly, to specify categories of property that the guardian may not freely dispose of without unanimous consent from a family council of the ward, except where evidence shows such disposition is clearly in the ward's best interest.⁴⁷ Furthermore, the model agreement can define the degree and manner of the guardian's intervention based on the ward's residual mental capacity, thereby refining the protection of the ward's subjective will. In scenarios where the ward completely lacks any mental capacity, the agreement should stipulate that the appointed guardian must prioritize the "principle of the ward's best interest" when making decisions or undertaking actions. Where the ward retains some mental capacity (e.g., limited and gradually declining discernment, as is common among the elderly), the guardian should be required to prioritize the "principle of respecting the ward's true will to the greatest extent possible," assisting the ward in autonomous decision-making or other activities through such means as thoroughly

⁴⁴ Pursuant to the provisions of the *Legislation Law*, since guardianship for the elderly constitutes a fundamental civil institution, it must be prescribed by law.

⁴⁵ Dai Wei, "A Notarization Interpretation of Article 33 'Appointed Guardianship' in the General Principles of Civil Law," *China Notary Journal* 7 (2017): 28.

⁴⁶ Wan Fang, "The System Design of Appointed Guardianship in China," *Journal of Law Application* 4 (2023): 79.

⁴⁷ Fei Anling, "Adult Appointed Guardianship in China's Civil Code: Concepts and Rules," *China Legal Science* 4 (2019): 124.

explaining the implications and consequences of relevant matters and providing necessary advice.⁴⁸ Indeed, since the entry into force of the *UN Convention on the Rights of Persons with Disabilities (CRPD)*, many countries have begun reforming laws concerning legal capacity,⁴⁹ shifting the legal model — within reasonable bounds — from substitute decision-making towards supporting the expression of intent by persons with mental or physical impairment. For the elderly, the aforementioned institutional optimization of appointed guardianship agreements can more comprehensively implement and safeguard their subjective intentions and demands for interests, thereby assuring them that their daily care, medical decisions, and property management can be entrusted entirely or partially to an appointed guardian with confidence.

C. Refining the fiduciary standards for appointed guardians and strengthening guardianship supervision mechanisms

To address the institutional challenges in the operation stage of appointed guardianship — where inadequate accountability mechanisms easily lead to infringement of the personal or property rights and interests of the elderly — it is essential to refine the fiduciary standards for appointed guardians and strengthen supervision, based on the inherent attributes of the fiduciary relationship.

First, specific behavioral standards for guardians of elderly wards should be introduced, pre-establishing priority orders for situations where principles conflict, thereby providing operable guidelines for guardians in matters such as personal care and property management for the elderly. For example, in addition to prohibiting actions such as self-dealing, dual agency, and malicious collusion, more detailed restrictions should be imposed to prevent guardians from exploiting their authority to seek any improper personal benefit. The standards should also enumerate various routine obligations that guardians must fulfill to maximize the ward's interests. Regarding property management, requirements should include the filing or registration of the ward's assets, detailed rules for execution and liquidation, and a prohibition against mixing the guardian's property with that of the ward. Guardians should also be obliged to maintain regular records of asset changes and report them to the supervisor.⁵⁰ Building on this, a guardianship supervisor (to be discussed below) should hold the guardian accountable for asset depreciation or unreasonable use, thereby reducing the risk of misappropriation of the ward's property. For personal guardianship, comprehensive records of the ward's physical and mental condition, as well as medical and medication choices, must be maintained. The right of the appointed guardian to resign should be cautiously regulated. At the same time, a stance of "assuming risk where doubt exists"⁵¹ should be adopted toward the guardian; upon the emergence of any major issue, the replacement of the guardian should be promptly considered. With regard to a guardian's request to be replaced, reference may be made to Article 422 of the *Swiss Civil Code*: "The deputy may request to be discharged at the earliest after serving a term of four years. Prior to this, the deputy may request to be discharged for good cause." In addition, a minimum term of service and its exceptions may be established, with full attention to the specifics of individual cases. Consideration should also be given to providing alternative guardians with an appropriate transition period to ensure the ward continues to receive proper care.⁵²

⁴⁸ Lu Xiaoming, "Correcting the Functional Distortion of Appointed Guardianship under the Implementation of the Civil Code," *Journal of Zhejiang Gongshang University* 1 (2023): 78-79.

⁴⁹ Elionóir Flynn and Anna Arstein-Kerslake, "The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?," *32 Berkeley Journal of International Law* 2 (2014): 124-143.

⁵⁰ Yang Lixin, "The Formulation of the General Principles of Civil Law and the Improvement of China's Guardianship System," *The Jurist* 1 (2016): 103.

⁵¹ Cao Xingquan, "The Positioning of Beneficiaries' Interests in Trustees' Duty of Loyalty: Between Monism and Balancing," *SJTU Law Review* 2 (2019): 24.

⁵² Currently, an alternative approach under consideration is to emulate the stock option incentives used in the business sector, employing property rights incentives to foster guardians' long-term loyalty. The case of the octogenarian in Shanghai who notarized the gifting of a property worth 3 million yuan to a fruit stall vendor through an appointed guardianship agreement once sparked intense public debate. This reaction stemmed partly

Second, the systematic configuration of guardianship supervision mechanisms must be strengthened. To this end, a dedicated system for guardianship supervisors should be established, clarifying the supervisory bodies and their liability for inadequate oversight. A guardianship supervisor will monitor the guardian's conduct, regularly inspect the ward's physical and financial status, and ensure the guardian fulfills his or her duties. Simultaneously, they should report to the court to request the revocation of the guardian's qualification in a timely manner, either before harm occurs or when risk is imminent, thereby safeguarding the lawful rights and interests of the ward. Furthermore, when notarizing an appointed guardianship agreement, notarization agencies can proactively advise prospective wards and their relatives of the option to appoint a supervisor, guiding the parties in explicitly outlining the respective rights and obligations of all involved — integrating the appointed guardian, the ward, and the guardianship supervisor into the legal framework. Individuals, social welfare institutions, civil affairs departments, courts, and notarization agencies may all serve as eligible candidates for supervisor. The selection process may first allow the prospective ward to choose independently. If no choice is made, civil affairs departments or other public authorities should appoint a supervisor to protect the ward's rights. However, whether the primary supervisory body is a civil affairs department or another entity, the long-term supervisory duty will inevitably impose additional burdens. It is particularly challenging to monitor the economic exploitation of the ward by non-professional asset-managing guardians, necessitating heightened vigilance. It is also worth noting that a U.S. study⁵³ indicates that economic crimes against the elderly are often difficult to detect, as perpetrators are usually close to the victims, such as family members or long-term caregivers. Moreover, victims typically do not report abuse, and most guardianship supervisors lack systematic training in tracing signs of financial exploitation like asset transfers. To address this, a registration system could be established to continuously track changes in the ward's assets and financial flows during guardianship, thereby reducing the incidence of economic crimes against the elderly and facilitating ex post accountability and prosecution. Additionally, supervision of the guardian's asset management should involve professionals with financial backgrounds, or public welfare organizations could be encouraged to actively serve as guardianship supervisors. On this basis, similar to corporate supervisors, guardianship supervisors also bear corresponding fiduciary duties and associated liabilities.

Conclusion

The significance of legal reform lies in its capacity to effectively address social issues. When reality presents problems, the law must provide solutions in a timely manner according to circumstances, and prepare for foreseeable risks when necessary. Against the backdrop of an increasingly evident aging trend in China, the appointed guardianship system has emerged in response to social needs such as providing care for the elderly by non-relatives. However, the appointed guardianship system is still in its initial stage and faces numerous challenges and difficulties. In particular, the shortage of legal provisions and limitations in the professionalism and availability of appointed guardians hinder the elderly from opting for an appointed guardian. During the establishment stage, insufficient rules related to appointed guardianship agreements often lead to the frustration of the elderly's subjective intentions. During the operation stage, inadequate accountability mechanisms for appointed guardians readily result in infringements of the elderly's personal or property rights and interests. To address these issues, it is advisable to fully incorporate the principles of elderly welfare, substantive equality, and the fiduciary relationship and leverage the unique structure of appointed guardianship. This can be achieved by actively promoting a “trust

from public skepticism toward care provided by non-relatives and concerns about the effectiveness of a one-time gift as a sustainable incentive. A phased gifting mechanism, contingent upon the guardian providing responsible care year by year, could more effectively address these concerns. Naturally, as this falls within the scope of appointed guardianship agreements, it can be left to the autonomy of the parties involved.

⁵³ Linda S. Whitton, “Durable Powers as an Alternative to Guardianship: Lessons We Have Learned,” 37 *Stetson Law Review* 1 (2007): 7-52.

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+ appointed guardianship” model at the national level and cultivating a corps of appointed guardians, enhancing the notarization process to strengthen safeguards and design better agreements, as well as refining the fiduciary standards for appointed guardians and strengthening guardianship supervision mechanisms. These measures will fully unleash the institutional potential of the appointed guardianship system to protect the rights and interests of the elderly in an aging society.

(Translated by *JIANG Yu*)