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RIGHT TO VOTE OF ADULT WARD UNDER GUARDIANSHIP AND THE THEORY OF CONSTITUTIONAL RIGHT TO THE PURSUIT OF CREATING ONE'S OWN LIFE IN THE TWENTY-FIRST CENTURY

ISAO TAKENAKA[1]

Abstract:

The number of the elderly with diminished cognitive capacity or adults with insufficient competence is increasing in aging Japan, America, and the world in the twenty-first century. Almost all countries have a statute creating adult guardianship systems to "protect and assist" such elderly or adults. But the current Article 11(1)1 of the Public Office Election Act of Japan provides that an adult ward under guardianship has no right to vote. How could the "protection and assistance" for adult wards under guardianship be to deprive such adults of the right to vote?

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[1] Isao Takenaka, Professor of Law, Doshisha University Law School in Japan (Kyoto-City), was Visiting Scholar, Stetson University College of Law, and was under the guidance of Professor Rebecca C. Morgan for a year during mid-October 2010 and mid-October 2011. Email: itakenak@law.stetson.edu; itakenak@mail.doshisha.ac.jp.

At first, I would like to say thanks to good friends who kindly read my draft of this Article and checked my English at Stetson University College of Law, mainly, Professor Lance N. Long (Legal Skills) , Professor Jeffrey J. Minneti (U.S. Legal Research and Writing), and J.D student Caitlein J. Jammo. And I would like to say thanks to all faculties and staffs who kindly have been giving lots of support to my sabbatical research at Stetson University College of Law, mainly, Professor Rebecca C. Morgan (Elder Law), Ms. Darlene Krizen (Coordinator of the Center for Excellence in Elder Law), Professor John F. Cooper (Constitutional Law), Ms. Paryzek Velaine (Manager of Office of International Programs), Ms. Pamera Burdett (Law Librarian), and Mr. Robert Brammer (Law Librarian).

And I would like to say thanks also to very kind friends supporting me there, Stetson University College of Law, previous Dean and Vice President Darby Dickerson, Professor Royal D. Gardner (International Environmental Law), Professor Bruce R. Jacob (Constitutional Law), Professor Michael P. Allen (Constitutional Law), Professor Joseph F. Morrissey (Constitutional Law), Professor Mark D. Bauer (Administrative Law), Professor Bradley A. Areheart (Disability Law), Professor Darryl C. Wilson (Real Property), Professor Stephen M. Everhart (Chinese Legal System), Professor Roberta K. Flowers (Ethics in the Practice of Elder Law), Mr. Slade Duke (Consumer Protection Program Fellow), Professor Ann M. Piccard (Legal Skills), Professor Jason Palmer (Legal Skills) and Professor Candace Zierdt (Contracts) .

This Article argues that Article 11(1)1 of the Public Office Election Act is unconstitutional as to Article 15 of the 1946 Japanese Constitution. In February 1, 2011, an adult ward and guardian filed a suit in the Tokyo District Court for a declarative judgment that this statute is unconstitutional and that the plaintiff has a legal right to exercise the right to vote in the next national and local election. This is the first and a very important constitutional lawsuit about the issue of the constitutionality of the restriction of the right to vote of adult wards under guardianship in Japan. This is now in progress.

This Article also comments that this specific issue should be analyzed as part of the basic issue of "analysis of constitutional guarantees of fundamental human rights of adult with insufficient competence in constitutional jurisprudence of twenty-first century" and in light of the theory of the "constitutional right to the pursuit of creating one's own life based on Article 13 of the 1946 Japanese Constitution."

I. Introduction

Enacted and proclaimed on May 3, 1946 and executed on November 3, 1947 after the World War II, the Constitution of Japan includes social right provisions (Articles 25,[2] 26,[3] 27,[4] and 28[5]).

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[2] Article 25 of the Constitution provides as follows.
(1) All people shall have the right to maintain the minimum standards of wholesome and cultured living.
(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

[3] Article 26 of the Constitution provides as follows:
(1) All people shall have the right to receive an equal education correspondent to their ability, as provided by law.
(2)All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

[4] Article27 of the Constitution provides as follows: "All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law. Children shall not be exploited."

[5] Article 28 of the Constitution provides as follows: "The right of workers to organize and to bargain and act collectively is guaranteed."

As a post war welfare state controlled by constitutional social right provisions, Japan has so many laws that should be enacted in order to make the daily life of various Japanese citizens meaningful. For instance, the United States federal and state legislatures have enacted many statutes relating to welfare state.[6]

This Article[7] analyzes the constitutionality of depriving adult wards of the right to vote in the newly amended Japanese adult guardianship system of 1999–2000. This Article is part of my research on the "Constitutional Analysis of Elder Law."[8]

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[6] Although the United States Constitution does not include the constitutional social right provision, Congress (federal legislature) has enacted lots of statutes to deal with the problems in American welfare state. And there are state constitutions which provide the obligation of state legislature to protect the poor etc. Under such state constitutions, state legislatures have enacted lots of welfare laws. For instance, Alabama State Constitution (ALA.. CONST. art IV, § 88) provides that "It shall be the obligation of State Legislature to require the county to enact adequate clauses to protect the poor." *See generally* Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue,* 35 Drake L. Rev. 205 (2005); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* (U of Chi., Public Law Working Paper No. 36, 2003); William C. Rava, *State Constitutional Protections for the Poor*,71 Temple L. Rev. 543 (1998); Helen Hershkoff, *Welfare Devolution (?Revolution) and State Constitutions*, 67 FORDHAM L. REV. 1043 (1999). As a Japanese book describing American situation, see Mayuko Kasai, *Seizonken no Kihanteki-igi (The Normative Significance of Constitutional Welfare Rights)* (Seibundo 2011).

[7] This Article is basically based on my two articles written in Japanese. Isao Takenaka, *Seinenhikokennin no Senkyoken no Seiyaku no Gokensei (Constitutionality of Restriction of the Right to Vote of Adult Ward Under Guardianship),* 61Doshisha U. L. Rev. 135 (2009) [hereinafter Takenaka, *Constitutionality of Restriction*]; Isao Takenaka, *Seinenhikokennin no Jikojinseisozokikyuken to Senkyoken (Constitutional Right to the Pursuit of Creating One's Own Life and Right to Vote of Adult Ward under Guardianship)* in Makoto Arai et al., *Seinenkokenhosei no Tenbo (New Vista of Adult Guardianship System)* (Nihonhyoronsha 2011).

[8] In 1995, I started "Constitutional Analysis of Elder Law," that is, "analysis about legal problems surrounding the aged society (at that time) from the standpoint of constitutional law jurisprudence" in my article, Isao Takenaka, Koreisha no Jinken to Kenpogaku (Fundamental Human Rights of the Elderly and Constitutional Law Jurisprudence in Japan), 29:1 Sandai L. Rev. 22–59 (1995). Japan became "the aging society" (more than 7 percent) in 1970, "the aged society" (more than 14 percent) in 1995 and "the super-aged society" (more than 20 percent) in 2007. *See e.g. History of Health and Welfare Policies for the Elderly in Overview of the Long Term Care Insurance System* (Oct. 2008), *available at* http://www.mhlw.go.jp/english/ wp/policy/dl/03.pdf; International Comparison of Rate of Aging and Supply Scale of Social Security, http://www.mhlw.go.jp/seisaku/2009/09/dl/03e.pdf (accessed Jan. 31, 2012).; Japan Aging Research Center, http://jarc.net (accessed Jan. 31, 2012).

In my article of 1995 abovementioned, I pointed out as follows:

> Under the standpoint that every person (every human beings) will have the fundamental human rights unconditionally (regardless of a particular capacity, ability or competence), it follows that a particular category of right of

In order to deal with "the aged society," the Long-Term Care (Nursing Care) Insurance Act was enacted in 1997 and executed in 2000.[9] According to the Ministry of Health, Labor and Welfare,

> [t]he basic principles of the long term care insurance system are to support the independence of the elderly and maintain their dignity. It is a system to provide

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> "Fundamental Human Rights of the Elderly" does not exist. Nonetheless if I dare to say about the fundamental perspective to analyze the subject of "the Elderly and Fundamental Human Rights" from the standpoint of constitutional law jurisprudence, it must be the perspective of analyzing the constitutionality of statutes which provide different treatment(different handling) between group of senior person (the elderly) and group of other non-senior adult person because there are so many adult persons with insufficient physical, mental and economic capacity (ability or competence) among the group of senior person (the elderly) compared with the group of non-senior adult person.

Takenaka, *Constitutionality of Restriction*, *supra* note 7, at 147; Koji Sato, *Jinken no Kannen to Shutai (Notion and Subject of Fundamental Human Rights)*, 61 Public L. Rev. 411–412 (1999).

Concerning the development of new field of "Elder Law" mainly as a practice area since 1980s in the United States, see Rebecca C. Morgan, *Introduction: Teaching Elder Law*, 40 Stetson L. Rev.1 (2010). In 1972, the National Senior Citizens Law Center (http://www.nsclc.org/) was founded. In 1985, Section of "Aging and the Law" was founded in the Association of American Law Schools (http://www.aals.org/), which is a non-profit organization of 170 law schools in the United States. In 1987, the National Academy of Elder Law Attorneys, Inc. (http://www.naela.org/) was founded as a professional association of attorneys who are dedicated to improving the quality of legal services provided to seniors and people with special needs. *See also e.g.* Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases and Materials* (Michie Co. 1992) (This is "the first edition of the first casebook on the emerging field of aging law and policy"); Lawrence A. Frolik, *Later Life Legal Planning*, in *Theories on Law and Aging: The Jurisprudence of Elder Law* 11–30 (Israel Doron ed.,Springer Publications 2010); Lawrence A. Frolik, *Developing Field of Elder Law: A Historical Perspective*, 1 Elder L.J. 1 (1993); Lawrence A. Frolik, *Developing Field of Elder Law Redux : Ten Years After*, 10 Elder L.J. 1 (2002); Nina A. Kohn, *The Lawyer's Role in Fostering an Elder Rights Movement*, 37 Wm. Mitchell L. Rev. 49 (2010); Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. Leg. Educ. 414 (2010); Rebecca C. Morgan, *Future of Elder Law*, in *Theories on Law and Aging: The Jurisprudence of Elder Law* 145–153 (Isareal Doron ed., Springer Publications 2010); Rebecca C. Morgan, *Elder Law in the United States: The Intersection of The Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103 (2007); Husako Seki, *America Koreishaho no Enkaku (The Developing Field of Elder Law in the United States)*, 16:2 Yokohama Kokusai Keizaihougaku 33 (2008) (available at http://kamome.lib.ynu.ac.jp/dspace/bitstream/10131/6555/1/210_02.pdf).

[9]Concerning the structure of Long-Term Care Insurance System, see http://www.mhlw.go.jp/english/policy/ care-welfare/care-welfare-elderly/dl/long-term_care_health_and_walfare_services_for_the_elderly.pdf.

> elderly people with the necessary care services in a comprehensive and unified manner when they are in conditions that require care, so that they can live an independent life at home or in their residential area.[10]

The Long-Term Care Insurance Act applies mainly to the elderly more than sixty-five years old.[11]

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[10] *See supra* n.9.

[11] Long-Term Care Insurance Act, Act No. 123 (Dec. 17, 1997) (available at http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=01&dn=1&yo=%E4%BB%8B%E8%AD%B7%E4%BF%9D%E9%99%BA%E6%B3%95&x=71&y=7&ky=&page=1.

Article 1(Purposes) provides as follows:

> The purposes of this Act are to improve health and medical care and to enhance the welfare of citizens. With regard to people who are under condition of need for long-term care due to disease, etc., as a result of physical or emotional changes caused by aging, and who require care such as for bathing, bodily waste elimination, meals, etc., and require the functional training, nursing, management of medical treatment, and other medical care, these purposes are to be accomplished by establishing a long-term care insurance system based on the principle of the cooperation of citizens, solidarity, and determining necessary matters concerning related insurance benefits, etc., in order to provide benefits pertaining to necessary health and medical services and public aid services so that these people are able to maintain dignity and an independent daily life routine according to each person's own level of abilities.

Article 7(Definitions) provides as follows:

> (1)The term "Condition of Need for Long-Term Care" as used in this Act means a condition assumed to require care on a continual and steady basis for the whole or a part of basic movements in daily activities such as bathing, bodily waste elimination, meals, etc., due to physical or mental problems during the period specified by an Ordinance of the Ministry of Health, Labor, and Welfare, and said condition shall conforms to any of the categories stipulated by an Ordinance of the Ministry of Health, Labor, and Welfare according to the degree of needed care (herein referred to as a "Category of Condition of Need for Long-Term Care") (except when said condition is subject to a Needed Support Condition).
>
> * * *
>
> (3) The term "Person Requiring Long-Term Care" as used in this Act means a person defined by any of the following items:
>
> (i) a person that is in a Condition of Need for Long-Term Care and is the age of 65 or older;
>
> (ii) a person that is in a Condition of Need for Long-Term Care and is the age of 40 to less than the age of 65, and the physical or mental problems that are the causes of said Condition of Need for Long-

In 1999, in order to embody an important revision of the adult guardianship system, four statutes were enacted and executed simultaneously with the Long Term Care Insurance Act in 2000: (a) the Act Concerning Partial Amendment of the Civil Code, (b) the Act Concerning Guardianship Contracts, (c) the Act Concerning the Establishment of Legal Frameworks in Conjunction with the Enforcement of the Act concerning Partial Amendment of the Civil Code, and (d) the Act Concerning Registration of Guardianships. The basic philosophy of the amendment of adult guardianship system in 1999–2000 was to promote "the harmony between the idea of esteeming principal's self-determination and the idea of protection of principal in question."[12] These statutes do not provide an age requirement for their application.

Current Civil Code defines three types of adults with "insufficient competence" according to the degree of insufficiency: (a) adult wards (Articles 7–10), [13] (b) curators

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> Term Care are a result of diseases that are caused by the physical or mental changes due to aging, specified by a Cabinet Order (herein referred to as "Specified Disease").

[12]Homusho-Minjikyoku-Sanjikansitsu, *Seinenkokenseido no Kaiseinikansuru YokosianHosokusetsumei* 4 (The Ministry of Justice Civil Affairs Bureau Counselor Room "Outline tentative plan amplification concerning revision of seniority support system")

[13] Article 7 of the Civil Code (Ruling for Commencement of Guardianship) provides as follows:

> With respect to any person who constantly lacks the capacity to discern right and wrong due to mental disability, the family court may order the commencement of guardianship at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian of a minor, the supervisor of the guardian of a minor, the curator, the supervisor of the curator, the assistant, the supervisor of the assistant, or a public prosecutor.

Article 8 (Adult Ward and Guardian of Adult) provides as follows: "A person who has become subject to the ruling of commencement of guardianship shall be an adult ward, and a guardian of an adult shall be appointed for him/her."

Article 9(Juristic Act of an Adult Ward Under Guardianship) provides as follows: "A juristic act performed by an adult ward may be rescinded; provided, however, that, this shall not apply to any act relating to daily life, such as the purchase of daily household items."

Article 10 (Rescission of Ruling for Commencement of Guardianship)provides as follows:

> When the cause set forth in Article 7 ceases to exist, the family court must rescind the ruling of the commencement of guardianship at the request of the person in question, his/her spouse, any relative within the fourth degree of

(Articles 11–14),[14] and (c) persons under assistance (Articles 15–18).[15]

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kinship, the guardian (hereinafter referring to the guardian of a minor and the guardian of an adult), the supervisor of the guardian (hereinafter referring to the supervisor of the guardian of a minor and the supervisor of the guardian of an adult), or a public prosecutor.

[14] Article 11 of the Civil Code (Ruling of Commencement of Curatorship) provides as follows.

> With respect to any person whose capacity is extremely insufficient to appreciate right or wrong due to any mental disability, the family court may order the commencement of curatorship upon a request by the person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian, the supervisor of the guardian, the assistant, the supervisor of the assistant, or a public prosecutor; provided, however, that, this shall not apply to any person in respect of whom a cause set forth in Article 7 exists.

Article 12(Person under Curatorship and his/her Curator) provides as follows: "A person who has become subject to the ruling of commencement of curatorship shall be the person under curatorship, and a curator shall be appointed for him/her."

Article 13(Acts Requiring Consent of Curator) provides as follows:

> (1) A person under curatorship must obtain the consent of his/her curator if he/she intends to perform any of the following acts; provided, however, that, this shall not apply to the acts provided for in the proviso of Article 9:
>
> (i) receive or use any principal;
> (ii) borrow any money or guarantee any obligation;
> (iii) perform any act with the purpose of obtaining or relinquishing any right regarding real estate or other valuable property;
> (iv) take any procedural action;
> (v) make a gift, make any settlement, or agree to arbitrate (referring to the agreement to arbitrate as provided in paragraph (1), Article 2 of the Arbitration Act (Act No. 138 of 2003));
> (vi) accept or renounce any inheritance, or partition any estate;
> (vii) refuse an offer of a gift, renounce any bequest, accept the offer of gift with burden, or accept any bequest with burden;
> (viii) effect any new construction, renovation, expansion, or major repairs; or
> (ix) make any lease agreement with a term which exceeds the period set forth in Article 602.
>
> (2) At the request of the person provided in the main clause of Article 11, or any curator or any supervisor of the curator, the family court may make a ruling that the person under curatorship must obtain the consent of his/her curator even in cases he/she intends to perform any act other than those set forth in each item of the preceding paragraph; provided, however, that this shall not apply to the acts provided for in the proviso to Article 9.
>
> (3) With respect to any act which requires the consent of the curator, if the curator does not give consent in cases where the interest of the person under curatorship is unlikely to be prejudiced, the family court may, at the request of the person under curatorship, give permission in lieu of the consent of the curator.
>
> (4) An act which requires the consent of the curator may be rescinded if it was performed without such consent or any permission in lieu thereof.

Article 14(Rescission of Ruling of Commencement of Curatorship) provides as follows:

(1) When the cause provided in the main clause of Article 11 ceases to exist, the family court must rescind the order of the commencement of curatorship at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian of a minor, the supervisor of the guardian of a minor, the curator, the supervisor of the curator, or a public prosecutor.
(2) At the request of the person prescribed in the preceding paragraph, the family court may rescind, in whole or in part, the ruling under paragraph (2) of the preceding Article.

[15] Article 15(Ruling of Commencement of Assistance) provides as follows:
(1) With respect to any person who has insufficient capacity to appreciate right or wrong due to any mental disability, the family court may rule the commencement of assistance upon a request by the person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian, the supervisor of the guardian, the curator, the supervisor of the curator, or a public prosecutor; provided, however, that, this shall not apply to any person who has the cause set forth in Article 7 or the main clause of Article 11.
(2) The ruling of commencement of assistance at the request of any person other than the person in question shall require the consent of the person in question.
(3) The ruling of commencement of assistance must be made concurrent with the ruling under paragraph (1) of Article 17 or the ruling under paragraph (1) of Article 876-9.

Article16 (Person under Assistance and Assistant) provides as follows: "A person who has become subject to the ruling of commencement of assistance shall be a person under assistance, and an assistant shall be appointed for him/her."

Article 17(Ruling Requiring Person to Obtain Consent of Assistant) provide as follows:
(1) At the request of the person provided in the main clause of paragraph (1) of Article 15, or any assistant or supervisor of the assistant, the family court may make the ruling that the person under assistance must obtain the consent of his/her assistant if he/she intends to perform any particular juristic act; provided, however, that the act for which such consent must be obtained pursuant to such ruling shall be limited to the acts provided in paragraph (1) of Article 13.
(2) The ruling set forth in the preceding paragraph at the request of any person other than the person in question shall require the consent of the person in question.
(3) With respect to any act which requires the consent of the assistant, if the assistant does not give consent in cases where the interest of the person under assistance is unlikely to be prejudiced, the family court may, at the request of the person under assistance, give permission which is in lieu of the consent of the assistant.
(4) An act which requires the consent of the assistant may be rescinded if it was performed without such consent or any permission in lieu thereof.

Article 18(Rescission of Ruling of Commencement of Assistance) provides as follows:
(1) When the cause provided in the main clause of paragraph (1) of Article 15 ceases to exist, the family court must rescind the ruling of commencement of assistance at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, the guardian of a minor, the supervisor of the guardian of a minor, the assistant, the supervisor of the assistant, or a public prosecutor.

(2) At the request of the person prescribed in the preceding paragraph, the family court may rescind, in whole or in part, the ruling under paragraph (1) of the preceding Article.

(3) In cases the ruling under paragraph (1) of the preceding Article and the order under paragraph (1) of Article 876-9 are to be rescinded in their entirety, the family court must rescind the ruling of commencement of assistance.

Article 19 (Relationship between Rulings) provides as follows:

(1) In cases any ruling for commencement of guardianship is to be made, and the person in question is a person under curatorship or the person under assistance, the family court must rescind the ruling of commencement of curatorship or commencement of assistance pertaining to such person in question.

(2) The provisions of the preceding paragraph shall apply mutatis mutandis in cases where the person in question, upon ruling of commencement of curatorship, is an adult ward or a person under assistance, or in cases where the person in question is, at the time of the ruling for commencement of assistance, an adult ward or a person under curatorship.

Article 20(Right of Demand by Person who is Counterparty to Person with Limited Capacity) provides as follows:

(1) The person who is the counterparty to a person with limited capacity (hereinafter referring to any minor, an adult ward, a person under curatorship, and a person under assistance who has become subject to the ruling under paragraph (1) of Article 17) may, after such person with limited capacity has become a person with capacity (hereinafter referring to a person free of any limitation on capacity to act), issue to such person a notice which demands, by establishing a certain period which is one month or more, that he/she should give a definite answer on whether or not such person will ratify such act which may be rescinded within such period. In such case, if such person fails to send any definite answer within such period, he/she is deemed to have ratified such act.

(2) The second sentence of the preceding paragraph shall likewise apply in cases where, while such person with limited capacity has not yet become a person with capacity, the person who is the counterparty to the person with limited capacity issues to the statutory agent, curator, or assistant of such person a notice prescribed in the preceding paragraph with respect to any act which is under the authority of any such officer, and the statutory agent, curator or assistant fails to issue any definite answer within the period referred to in such paragraph.

(3) With respect to any act which requires any special formalities, if no notice to the effect that the perfection of such formalities has been completed is issued within the period set forth in the preceding two paragraphs, it is deemed that such act has been rescinded.

(4) The person who is the counterparty to a person with limited capacity may issue a notice to any person under curatorship, or to any person under assistance who has been made subject to the ruling under paragraph (1) of Article 17 which demands that he/she should obtain the ratification of his/her curator or assistant, as the case may be, within the period set forth in paragraph (1) above. In such case, if the person under curatorship or person under assistance fails to issue, within the applicable period, a notice to the effect that such ratification has been obtained, it is deemed that such act has been rescinded.

Adult wards under guardianship can be defined as adult persons whose guardian was appointed by family court because the adult person "constantly lacks the ability to discern right and wrong due to mental disability" in regard to Articles 7 and 8 of the Civil Code. It is important to note that "constantly lacks" includes the situation where an adult ward's competence is temporarily recovered. For instance, Article 973 of the Civil Code provides that an adult ward can exert his will with the attendance of two or more doctors when he temporarily recovers the capacity to discern right and wrong.[16]

The restriction of an adult ward's right to vote is provided, not by the Civil Code, but by the Public Offices Election Act. Article 11(1)1 of the Public Offices Election Act provides, "An adult ward shall not have the right to vote and to be elected."

However, "the idea of protection of principal in question" is part of the basic philosophy of the adult guardianship system as amended in 1999–2000. How can we say depriving an adult ward of the opportunity to exercise the right to vote falls within the protection of that principal?

In this Article, I will first point out the problematic lack of serious analysis of fundamental human right guarantees of adult

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Article 21(Fraudulent Means Committed by Person with Limited Capacity) provides as follows: "If a person with limited capacity manipulates any fraudulent means to induce others to believe that he/she is a person with capacity, his/her act may not be rescinded."

[16] Article 973 of the Civil Code (Will of an Adult Ward) provides as follows:

> (1) For an adult ward to make a will at a time that his/her decision-making capacity has recovered temporarily, not less than two doctors shall be in attendance.
>
> (2) A doctor in attendance of the making of a will shall make an entry on the will to the effect that the testator was not in a condition lacking decision-making capacity at the time of making the will, sign it, and affix his/her seal; provided that in the case of a will by sealed and notarized document, he/she shall make an entry to that effect on the sealed document, sign it, and affix his/her seal.

wards in post war constitutional Japanese law jurisprudence. In doing so, I will briefly describe the basic structure of constitutional guarantees of fundamental human rights to adult persons with insufficient competence. Secondly, I will describe the constitutional basis of adult guardianship system. Thirdly, I will analyze the constitutionality of depriving adult wards of the opportunity to exercise the right to vote.

My main arguments can be summarized as follows:

(i) The guarantee of the "constitutional right to the pursuit of creating one's own life" should be similarly applied to not only individuals with sufficient competence, but also individuals with insufficient competence, including adult wards under guardianship.

(ii) The current adult guardianship system should be understood as one that embodies constitutional economic freedom (Article 21(1) and 29)[17] and the constitutional right to self-determination (Article 13).[18]

(iii) In light of the Judgment of the Grand Bench of the Supreme Court on September 14, 2005[19], Article 11(1)-1 of

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[17] Article 22(1) of the Constitution provides as follows: "(1) Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."
Article 29 of the Constitution provides as follows:
(1) The right to own or to hold property is inviolable.
(2) Property rights shall be defined by law, in conformity with the public welfare.
(3) Private property may be taken for public use upon just compensation therefor."

[18] Article 13 of the Constitution provides as follows: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs."

[19] Supreme Court, Grand Bench, Sept. 14, 2005, 59:7 Minshu 2087 (available at http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu-.No..82%2C.2001.-Gyo-Hi-.No.76%2C.2001.-Gyo-Tsu-.No.83%2C.2001.-Gyo-Hi-.No.77.html).

the Public Offices Election Act is unconstitutional and in violation of Article 15(1)[20], Article 15(3)[21], Article 43(1)[22], and the proviso of Article 44[23] of the Constitution because it completely and categorically precludes Japanese citizens who are adult wards under guardianship from the exercise of the right to vote in national and local elections.

Therefore I propose that Article 11(1)1 of the Public Offices Election Act should be repealed or amended to allow adult wards to exercise their right to vote.

II. *Adult Persons with Insufficient Competence and the Constitutional Right to the Pursuit of Creating One's Own Life Is Guaranteed Under Article 13 of the Constitution of Japan.*

A. Insufficiency of Constitutional Analysis about Constitutional Guarantees of Fundamental Human Rights of Adults with Insufficient Competence

Unlike the pre-war Meiji Constitution of 1889, the 1946 Constitution of Japan contains epoch–making clauses that guarantee fundamental human rights. Post-war constitutional law jurisprudence has limited the analysis of "guarantees of fundamental human rights of individuals with insufficient competence" to situations involving minors within the purview of the "Principle of Prevention of Harm to Self." It has not seriously

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[20] Article 15(1) of the Constitution provides as follows. "The people have the inalienable right to choose their public officials and to dismiss them."
[21] Article15 (3) of the Constitution provides as follows: "Universal adult suffrage is guaranteed with regard to the election of public officials."
[22] Article 43(1) of the Constitution provides as follows: "Both Houses shall consist of elected members, representative of all the people."
[23] Article 44 of the Constitution provides as follows: "The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."

analyzed the issue of constitutional guarantees of fundamental human rights of adult persons with insufficient competence, such as the elderly with dementia, the mentally retarded, and the mentally ill. Until April 2011, no Japanese textbook of constitutional law referred to the adult guardianship system.[24]

Therefore, I will first describe briefly the basic structure of constitutional guarantees of fundamental human rights of adult persons with insufficient competence.

B. Adult Wards Under Guardianship and the Concept of Concrete Human Beings in Constitutional Law Jurisprudence

Constitutions in the eighteenth and nineteenth centuries were structured based on the concept of "abstract human beings," that is, human beings understood abstractly as rational actors as compared with animals. Moreover, constitutional law theories of fundamental human rights were predicated on the assumption of the so-called "complete individual" who possesses the ability or competence to do everything autonomously and independently with respect to the intellectual, physical, and economic aspects of one's life.

In contrast, the 1946 Constitution of Japan, like other countries' constitutions in the twentieth and twenty-first centuries, is structured based on the concept of "concrete (actual) human beings" as implied in Article 25 of the Constitution. The Constitution contemplates not only individuals who have the ability to do everything autonomously for themselves, but also other various concrete individuals including individuals with

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[24] Professor Koji Sato's textbook published on April 20, 2011 is the first one which describes adequately constitutional problems relating to adult guardianship system. Koji Sato, *Nihonkokukenporon (Theory of Japanese Constitution)* 138–139 (Seibundo 2011).

insufficient competence, those with physical and/or mental disabilities, the poor, minors, the elderly, and those who are adult wards under guardianship etc...

C. The Constitution as a Legal Rule for Coexistence of Various Concrete Individuals

In this Article, I use the words "Past People," "Present People," and "Future People" in the relationship to the 1946 Constitution of Japan. Past people are those who could participate in the enactment procedure of the Constitution. Present people are those who could not participate in the enactment procedure of the Constitution, such as persons born after the 1946 Constitution. Future people are those who will be born in the future.

Present people are thought to be legally controlled by this 1946 Constitution enacted by past people. Constitutional law theory dictates that legal rules enacted by past people apply to present people under a theory of substantial justification rather than a theory of procedural justification. The reason why present people can be justifiably controlled by that legal rule must be that the content of legal rule of this Constitution is acceptable to present people. Therefore, public authorities and present people are required to interpret this Constitution systematically and consistently as a legal rule acceptable to all present concrete individuals.

If this current Constitution cannot be interpreted systematically and consistently as a legal rule acceptable to all Japanese citizens, individuals with sufficient competence and individuals with insufficient competence can exercise the power to amend the Constitution according to the procedure provided by Article 96.[25] The basis of this constitutional theory of substantive

[25] Article 96 of the Constitution provides as follows:.

justification can be found in Article 13 of the Constitution, the core of the 1946 Constitution.

D. Constitutional Principle of Proper Treatment on the Basis of the First Sentence of Article 13 of the Constitution

The first sentence of Article 13 of the Constitution provides, "All of the people shall be respected as individuals." I interpret this principle of "respecting individuals" as proclaiming the constitutional principle that the government should provide proper treatment to all concrete individuals, including individuals with insufficient competence.

E. Constitutional Right to Proper Treatment on the Basis of the Second Sentence of Article 13 of the Constitution and Constitutional Right to the Pursuit of Creating One's Own Life

The second sentence of Article 13 provides, "their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." The source of the concept of "right to life, liberty, and the pursuit of happiness" in Article 13 can be historically traced to the second sentence of the United States Declaration of Independence on July

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(1) Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

4, 1776. The United States Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[26] I interpret this "right to life, liberty, and the pursuit of happiness" provision as the "constitutional right to proper treatment of all concrete individuals by public authorities."[27]

Moreover, it should be noticed that the text of Article 13 is not "right to happiness" but "right to the pursuit of happiness." The right to the pursuit of happiness" provision clarifies that the content of happiness should not be one-sidedly decided by public authorities but should be primarily decided by each individual for himself or by someone within an intimate association relationship.[28] Intimate associations between two people with sufficient competence, a person with sufficient competence and a person with insufficient competence, or two people with insufficient competence are constitutionally guaranteed as "Sinmitsuna Jintekiketsugo no Jiyu" (a constitutional freedom of intimate association),[29] part of the constitutional right to self-

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[26] The United States Declaration of Independence, which was primarily drafted by Jefferson, was adopted by the Second Continental Congress on July 4, 1776. *See e.g.* ushistory.org, *United States Declaration of Independence*, http://www.ushistory.org/declaration/document/ (accessed Jan. 31, 2012).

The first and second article of the Virginia Declaration of Rights adopted unanimously by the Virginia Convention of Delegates on June 12, 1776 and written by George Mason, is

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Id.

[27] Isao Takenaka, *Kenpojono Jikoketteiken (Constitutional Right to Self-Determination in Japan)* 44 (Seibundo 2010).

[28] *E.g.* Koji Sato, *Kenpo (Constitutional Law)* 443 (3d ed., Seirinshoin 1995).

[29] In 1995, I advocated the right concept of "Shinmitsuna Jintekiketsugo no Jiyu" (constitutional freedom of intimate association) in Japanese constitutional law jurisprudence. In doing so, I got a hint and suggestion from Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale. L.J.624, 629 (1980), and *Robert v. United States*, 408 U.S. 609, 617–618 (1984), which held that there are

determination. This constitutional right of self-determination is one of the unenumerated rights guaranteed by Article 13.

The "right to life, liberty and the pursuit of happiness" should be interpreted as every concrete individual's constitutional right to irreplaceable humane existence and the pursuit of creating of one's own life," which I call the "Constitutional Right to the Pursuit of Creating One's Own Life"

F. Constitutional Right to the Pursuit of Creating One's Own Life and Private and Public Happiness and Right to Vote

The Constitutional right to the pursuit of creating one's own life is the right to create one's own life in one's own way, not only with respect to private life and the pursuit of private happiness, but also with respect to public life and the pursuit of public happiness. This includes participating and taking part in the government process, which also has a crucial influence over one's private life. The right to vote in government elections is a fundamental human right, which is defined as "an important constitutional right for existing and living a life as a human being."[30]

Historically, the constitutional right to vote was not necessarily guaranteed to every adult person. Long and patient endeavors were required in order to achieve the expansion of this right to vote. For instance, in the United States long after the Declaration of Independence of 1776 proclaimed that "all men are

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"constitutional freedom of intimate association" and "constitutional freedom of expressive association" among the constitutionally protected "freedom of association". Isao Takenaka, *Kenpojono Jikoketteiken (Constitutional Right to Self-Determination in Japan)* 188–189 (Seibundo 2010).

[30] Isao Takenaka, *Kenpojono Jikoketteiken (Constitutional Right to Self-Determination in Japan)* 38 (Seibundo 2010).

created equal," the right to vote was not guaranteed to African Americans, former slaves.[31]

The restoration of the right to vote to all races was achieved in 1871 mainly through the Thirteenth Amendment[32] to the United States Constitution and the Voting Rights Act of 1965 that abolished the literacy test.[33] The restoration of the right to vote to women was achieved in 1920.[34] In Japan, this right to vote was not restored to women until 1945.[35]

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[31] *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,26 (New Press, 2010) ("There was no contradiction in the bold claim made by Thomas Jefferson in the Declaration of Independence that all men are created equal if Africans are not really people.").

[32] The Thirteenth Amendment to the U.S. Constitution, provides as follows.

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
2. Congress shall have power to enforce this article by appropriate legislation.

Amendment 15 to the U.S. Constitution provides as follows:

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
2. The Congress shall have power to enforce this article by appropriate legislation.

[33] Echoing the language of the Fifteenth Amendment to the U.S. Constitution, the Voting Rights Act of 1965 (42 U.S.C. §§ 1973–1973aa-6) prohibits states from imposing any "voting qualification or prerequisite to voting, or standard, practice, or procedure to deny or abridge the right of any citizen of the United States to vote on account of race or color." Specifically, Congress intended the Act to outlaw the practice of requiring otherwise qualified voters to pass literacy tests in order to register to vote, a principal means by which Southern states had prevented African-Americans from exercising the franchise.

[34] *See e.g.* History.com, *The Fight for Women's Suffrage,* http://www.history.com/topics/the-fight-for- womens- suffrage#a3 (accessed Jan. 31, 2012). Amendment 19 to the U.S. Constitution (Ratified 8/18/1920) provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

[35] In Japan universal adult suffrage for men was implemented in 1925.There had been long history of the female suffrage movement. The female suffrage movement was included in five large reform command issues by Command Secretary MacArthur under the occupation by Allied Forces after the Potsdam Declaration on August 15th, 1945 was accepted by Japanese government. Female suffrage (the right to vote) was provided by the revision of House of Representatives Election Act on December 17, 1945.

The major issue of this Article is whether, now in the twenty-first century, the right to vote should be expanded to adult persons with insufficient competence and whether there are satisfactory reasons to justify depriving adult persons with insufficient competence of the right to vote. If I borrow a certain United States disputant's words, we might be able to say that this will be "the last suffrage movement" in the twenty-first century.[36]

G. Categories of Proper Treatment Mandated by Article 13 of the Constitution

The manner and content of proper treatment of each concrete individual mandated by Article 13 of the Constitution should be individualized corresponding to that individual's judged needs. The manner and content of proper treatment mandated by Article 13 of the Constitution can be divided into two types. Type (A) is the proper treatment which can be explained by esteeming the right to self-determination. Type (B) is proper treatment which cannot be explained by esteeming the right to self-determination.

Type (A) is subdivided into two types. Type A_1 is the proper treatment which esteems the principal's self-determination at the time of treatment. Type A_2, is the proper treatment which esteems a person's will, desire, or advance directive expressed prior to the time of the treatment.[37]

H. Principles Justifying Restriction of Constitutional Right

"Public welfare" in Article 13 of the Constitution can be understood as principles justifying restrictions of fundamental human rights. This justification principle can be said to include at

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[36] Kay Schriner et al., *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities* ,27 Publius 75–96 (Summer, 1997).

[37] Isao Takenaka, *Kenpojono Jikoketteiken (Constitutional Right to Self-Determination in Japan)* 46–47 (Seibundo 2010).

least three types,[38] (α) principles justifying restrictions to prevent harm to others, which can be applicable to all kinds of freedom and rights, (β) principles justifying restrictions to prevent harm to self, which can be applicable to all kinds of freedom and rights, and (γ) principles justifying restrictions for other government interests that are applicable only to economic freedom.

Type (β) can be subdivided into (β_1) "Weak" principles of prevention of harm to self which apply to individuals with insufficient competence (weak paternalism), and (β_2) "Strong" principles of prevention of harm to self which apply to individuals with sufficient competence (strong paternalism).

When the legislature restricts constitutional economic freedoms and the right to self-determination in the statute of adult guardianship system, the statute must satisfy constitutional requirements for justification required under weak principles of prevention of harm to self. That is, a concrete manner and content of restriction concerned in that statute should be the one that fulfils the three following requirements: (a) highly regarding the way of life, way of thinking, and sense of values of the intervened adult person with insufficient competence," (b) using the least restrictive means, and (c) explaining the manner and content of the restriction and acquiring consent of the guardian about the manner and content of the restriction.

Moreover, the purpose of restrictions based on weak principles of prevention of harm to self must be giving protection and benefits to the restricted person. Needless to say, public authorities must explain and prove that the person in question is protected and benefited by that restriction. I call this requirement the "requirement of the major premise for constitutional

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[38] *Id.* at 91–97.

justification of restrictions based on the weak principle of prevention of harm to self."

III. *Constitutional Basis of Adult Guardianship System*

A. Categories of Proper Treatment Mandated by Article 13 of the Constitution and Adult Guardianship System

The current adult guardianship system can be understood basically as prescribing type (A_1) and type (A_2) of proper treatment. However, in the case of adult persons who have never had sufficient competence since birth and the elderly with profound dementia, the adult guardianship system can be understood as prescribing type (β).

B. Constitutional Freedom and Right to Self-Determination as Constitutional Basis of Adult Guardianship System

The current adult guardianship system should be understood as the law system for guaranteeing the constitutional economic freedoms including property rights and the liberty to choose one's occupation (guaranteed by Article 22(1) and 29) and the right to self-determination (guaranteed under Article 13).[39]

However, the recent social welfare service legislation (for instance, the Long Term Care Insurance Act[40] and the Services and

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[39] Isao Takenaka, *Seinenhikokennin no Jikojinseisozokikyuken to Senkyoken (Constitutional Right to the Pursuit of Creating One's Own Life and Right to Vote of Adult Wards under Guardianship)*, in Makoto Arai et al., *Seinenkokenhosei no Tenbo (New Vista of Adult Guardianship System)* 216 (Nihonhyoronsha 2011); Isao Takenaka, *Seinenhikokennin no Senkyoken no Seiyaku no Gokensei (Constitutionality of Restriction of the Right to Vote of Adult Wards under Guardianship System in Japan)*, 61 Doshisha U. L. Rev. 139–140 (2009).

[40] *See supra* n.11.

Supports for Persons with Disabilities Act[41]) has adopted the legal system of receiving social welfare services through contract-making. Therefore, the adult guardianship system has come to the aid of adult persons insufficiently able to make contracts and ensures that their constitutional social rights are protected.

C. Principles Justifying Restriction of Constitutional Rights Under Adult Guardianship System

The limitation of the ability to perform juristic acts provided by current adult guardianship statute (for instance, Articles 9 and 20 of the Civil Code[42]) is restricting constitutional economic freedoms, restricting the right to self-determination, and based on above mentioned weak principle of prevention of harm to self.

IV. *Constitutionality of Restriction of the Exercise of the Right to Vote of Adult Ward Under Guardianship.*

A. Disqualification Clauses Relating to Adult Ward Under Guardianship and the Deprivation of the Right to Vote

In Japan, voting is not mandatory. Various administrative statutes other than the Civil Code disqualify adult wards from becoming public officers. However, it is very doubtful that these disqualification clauses make up the entirety of the adult guardianship system. Particularly, it must be seriously analyzed by what principle Article 11(1)1 of the Public Offices Election Act is constitutionally justified in depriving adult wards under guardianship of the opportunity to vote. Additionally, when

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[41] Services and Supports for Persons with Disabilities Act, Act No. 123 (Nov. 7, 2005) (available at http://www.japaneselawtranslation.go.jp/law/detail/?id=143&vm=&re=02).

[42] *See supra* nn. 13, 15.

analyzing this problem of voting disqualification of persons with insufficient competence, it must be made clear that disqualifying someone from the right to vote is not on the same level as disqualifying someone from public office.

B. 2005 Supreme Court Judgment Holding the Strict Scrutiny Standards of Judicial Review on Constitutionality of Restriction of the Exercise of the Right to Vote of Japanese Citizens

Article 15(1) and (3) of the Constitution provides, "The people have the inalienable right to choose their public officials and to dismiss them" and "Universal adult suffrage is guaranteed with regard to the election of public officials." However, Article 11(1)1 of the Public Offices Election Act provides that adult wards under guardianship have no right to vote or be elected to public office.

The Grand Bench of the Supreme Court [43] held the following on September 14, 2005:

> In light of the purport of the Constitution mentioned above, it is unallowable in principle to restrict the people's right to vote or their exercise of the right to vote, aside from imposing certain restrictions on the right to vote of those who have acted against fair elections, and it should be considered that in order to restrict the people's right to vote or their exercise of the right to vote, there must be grounds that make such restriction unavoidable. Such unavoidable grounds cannot be found unless it is deemed to be

[43] *See supra* Supreme Court, Grand Bench, Sept. 14, 2005, 59:7 Minshu 2087.

> practically impossible or extremely difficult to allow the exercise of the right to vote while maintaining fairness in elections without such restrictions. Therefore, it must be said that it is in violation of Article 15(1) and (3), Article 43(1), and the proviso of Article 44 to restrict the people from exercising the right to vote without such unavoidable grounds.

This is so called "strict scrutiny test," the most stringent standard of judicial review.

In addition, the 2001 United States federal district court, in *Doe v. Rowe*,[44] held that Article II, Section I of the Maine Constitution, which provides for the disenfranchisement of those persons under guardianship by reason of mental illness, was unconstitutional because it violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution[45].

C. Constitutionality of Article 11(1)1 of the Public Offices Election Act: Constitutionality of Purpose and Means of Restriction of the Right to Vote of Adult Ward under Guardianship

The legislative intent of Article 11(1)1 of the Public Offices Election Act is not clear. The following three public purposes might be possible:[46]

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[44] *Doe v. Rowe*, 156 F. Supp. 2d 35(D. Me. 2001).

[45] Amendment 14 to the U.S. Constitution provides as follows:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[46] *See* Jap. Fedn. of B. Assns., Nihonbengoshirengokai, *Seinenkokenseido nikansuru Kaizenteigen (Improvement Proposal Concerning Adult Guardianship System of May 6, 2005)*

(i) An adult person who does not have judgment ability necessary for voting should be excluded from election process in order to secure fairness and integrity of election.

(ii) An adult ward cannot practically exercise the right to vote because the adult ward does not have sufficient ability to understand right or wrong.

(iii) The misbehavior and inducement by the people other than adult wards would be caused if the exercise of the right to vote of adult wards would be admitted.

First, concerning purpose (iii), even if we assume that such misbehavior would occur, it is necessary to prevent this misbehavior by strictly punishing a malfeasant. Deprivation of the right to vote cannot be a constitutionally justifiable means to deal with such problem.

Purpose (ii) is not a constitutionally justifiable purpose to restrict the exercise of the right to vote. It is clear that the fact, in itself, that the adult ward practically cannot exercise the right to vote does not mean that the fairness and integrity of the election is impaired.

Thirdly, there are procedural and substantive constitutional problems concerning purpose (i). According to present constitutional law theory, the procedural requirement of notice and hearing about the content of disadvantage imposed by public authority requirements must be satisfied in order to restrict fundamental human rights. However, under the current adult guardianship procedure, there is neither notice nor an opportunity to refute the deprivation of the right to vote when adult guardianship is granted by Family Court to the adult ward. Such current procedure is unconstitutional in the violation of the right to

a proper procedural treatment guaranteed under Article 13 of the Constitution.

A more fundamental constitutional problem is a substantive one of whether the restriction of the right to vote of adult ward is substantively constitutional even if this procedural justification requirement is satisfied. Assuming the purpose of restriction (i) is a compelling government interest, the means used for that public purpose is constitutionally required to be narrowly tailored to that public purpose. Means that precisely fit the compelling governmental interest must be neither over-inclusive nor under-inclusive. The adult guardianship system, provided by the Civil Code, targets adult persons with insufficient ability of property management. However, the current Public Offices Election Act does not tailor the definition to an adult person who lacks the ability required for the exercise of the right to vote but borrows the concept of adult ward under guardianship from the Civil Code. As a result, once an adult person in question was proclaimed as adult ward by Family Court, the right to vote of that adult person is deprived uniformly and categorically even if that adult person has been ably exercising the right to vote so far and continuously keeps political interest in elections and politics. Additionally, there is no justification to deprive the right to vote from an adult ward who temporarily recovers the ability required for voting at the time of election. In this respect, the current statute must be unconstitutional because it adopts over- inclusive means.

Even if Family Court were to decide on a case-by-case basis whether an adult ward lacks the ability required for voting, the current statute remains unconstitutional because it also adopts under-inclusive means.

Therefore, Article 11(1)1 of the Public Offices Elections Act is unconstitutional because it violates Article 15(1) and (3), Article 43(1), and the provision of Article 44 of the Constitution in

terms of the strict scrutiny standard of judicial review in the aforementioned 2005 Supreme Court Judgment.

In the future, the constitutional issue will become important whether or not under the Constitution the legislature can adopt a legal system with criteria and a procedure that are not arbitrary in order to determine whether every adult person has the ability required for voting.

V. *Recent Developments and New Vistas of Constitutional Law Jurisprudence in the Twenty-First Century*

In 2010, ten years since the execution of the revised adult guardianship system, the World Congress on Adult Guardianship was held for the first time in Yokohama, Japan. The "Yokohama Declaration"[47] was adopted on the final day of the conference, October 4, and made proposals to improve the current adult guardianship system. Furthermore, it declared, "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."

Moreover, on February 1, 2011, an adult ward and a guardian filed a suit in a Tokyo District Court, seeking the declarative judgment of the unconstitutionality of Article 11(1)1 of the Public Offices Elections Act. This is a very important and the first case on this constitutional issue in Japan. This can be understood as part of the international trend since the 1990s of re-

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[47] 2010 Yokohama Declaration (Oct. 4, 2010) (available at http://www.guardianship.org/spotlight/10/IGN_Yokohama_Declaration_2010.pdf).

examining the deprivation of the right to vote of the adult person with insufficient competence.[48]

These recent developments will ensure that the constitutional guarantees of fundamental human rights of adult persons with insufficient competence is handled sincerely and patiently in the twenty-first century.

To borrow a word of Professor Paul A. Freund, we constitutional law scholars should face this endeavor through maintaining "cross lights" and "passion."[49] As the people's representatives, the Japanese legislative branch should consider this grave constitutional issue sincerely right now and repeal or amend Article 11(1)1 of the Public Offices Election Act on its own initiative without waiting for the result of this constitution lawsuit. We should work to devise a legal system that assists and supports the right to vote for adult persons with insufficient competence.

I hope that through patient endeavors, our society and the world will develop so that both individuals with sufficient competence and individuals with insufficient competence will be able to coexist and enjoy the constitutional right to the pursuit of creating one's own life.

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[48] *See e.g.*, *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622; *Alajos Kiss v. Hungary*, Application no. 38832/06, Council of Europe: European Court of Human Rights, 20 May 2010 (available at http://www.unhcr.org/refworld/docid/4bf665f58.html); Principles Concerning the Legal Protection of Incapable Adults (adopted by the Council of Europe Committee of Ministers on February 1999) (available at http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf); The Hague Convention of 13 January 2000 on the International Protection of Adults (available at http://www.hcch.net/upload/ outline 35e.pdf; The United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/ 500/79/ PDF/N0650079. pdf?OpenElement); Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity (adopted by the Council of Europe Committee of Ministers on 9 December 2009) (available at https://wcd.coe.int/ViewDoc.jsp?id=1563397&Site=CM).

[49] "New vistas give a false light unless there are cross-lights.. Paul A. Freund, *On Law and Justice* 22 (Belknap Press of Harv. U. Press 1968); Koji Sato, *Nihonkokukenporon (Theory of Japanese Constitution)* preface (Seibundo 2011).

Editor's Note

The following article is an editor-annotated speech. The speech was given at the World Congress on Adult Guardianship Law 2010 in Yokohama, Japan on October 4, 2010, by Ms. Leilani Tuala-Warren. Ms. Tuala-Warren is the Executive Director of the Samoa Law Reform Commission, which was tasked with updating and modernizing the laws of the nation of Samoa. The International Guardianship Network, an international non-profit and non-governmental organization dedicated to the implementation of the UN Convention on the Rights of Persons with Disabilities, asked Ms. Tuala-Warren to speak on the panel about the development of adult guardianship laws. The panel consisted of six speakers, Ms. Tuala-Warren and speakers from Hong Kong, Singapore, Japan, Korea, and Taiwan.

UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND CONSEQUENCES FOR SAMOA'S NATIONAL GUARDIANSHIP LAWS

LEILANI, TUALA-WARREN

Samoa Law Reform Commission, Office of the Attorney General, Samoa

Talofa lava and konichua, warm greetings from Samoa. On behalf of the Prime Minister of Samoa, Tuilaepa Lupesoliai Sailele Malielegaoi, the Attorney General, Aumua Ming Leung Wai, and the government of Samoa, I would firstly like to thank Mr. Arai Makoto and the organizing committee for the invitation to the Congress, the opportunity to present and the assistance received in getting me here. Samoa is a small island nation in the South Pacific Ocean with a population of approximately 180,000.[1] We are a new member of the International Guardianship Network and very proud of it.

I am Leilani Tuala-Warren, the Executive Director of the Samoa Law Reform Commission established in November 2008.[2] The Samoa Law Reform Commission has been given the task to look into the creation of workable adult guardianship laws in Samoa.

The structure of this presentation is as follows:

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[1] Nearly ninety-five percent of the population is between the ages of 15 and 64, while only five percent is over the age of 65, but the life expectancy is 72 years. CIA, The *World Factbook: Samoa,* https://www.cia.gov/library/publications/the-world-factbook/geos/ws.html (posted Nov. 10, 2011).

[2] Off.of Attny. Gen., *Samoa Law Reform Commission,* http://www.ag.gov.ws/Divisions /LawReformCommission/tabid/3196/language/en-US/Default.aspx (accessed Dec. 2, 2011).

1. The current situation in Samoa in relation to the United Nations Convention on the Rights of Persons with Disabilities;

2. What is needed in Samoa in terms of law reform;

3. Lastly, I will comment on the Yokohama Declaration.

What is the current situation in Samoa Re: UN Convention on the Rights of Persons with disabilities?

Samoa's entry into the global disability environment commenced in 1998 when we became a signatory to the *Proclamation on the Full Participation and Equality of People with disabilities in the Asian and Pacific Region*[3] and consequently in 2003 when as a forum nation Samoa adopted the Biwako Millennium Frameworks for Action Towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific (BMF).[4]

To date, Samoa has not ratified nor is it a signatory to the Convention on the Rights of Persons with Disabilities (CRPD).[5] A

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[3] This proclamation was made to mark the beginning of the Asian and Pacific Decade of Disabled Persons that lasted from 1993–2002. Soc. Dev. Div. of UN ESCAP, *Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region,* http://www.un.org/depts/escap/decade/backgr.htm#proclamation (last updated Dec. 19, 1997).

[4] The Biwako Framework was adopted at the May 2002 meeting of the Economic and Social Commission for Asia and the Pacific held to mark the end of the Asian and Pacific Decade of Disabled Persons. It is a regional framework of actions necessary to improve inclusion and remove barriers for people with disabilities. The deadline for compliance by signatory nations is 2012. UN Econ. & Soc. Commn. for Asia & Pacific, *Biwako Millennium Framework,* http://www.unescap.org/esid/psis/disability/bmf/bmf.html (accessed Dec. 2, 2011).

[5] First promulgated on March 30, 2007, the UN CRPD is an international human rights treaty designed to promote and protect the rights of persons with disabilities and ensure full protection under the laws of all signatory nations. The Convention has fifty articles that cover wide-ranging topics from voting rights to cultural and recreational inclusion. As of the publication of this article the Convention had 149 signatories and 103 parties that have ratified it. Convention on the

number of other Pacific islands have either ratified or signed on to the CRPD (Cook Islands, Vanuatu, Fiji, Tonga and Solomon Islands). Samoa being a member of the Pacific Islands Forum Secretariat, it is highly likely that Samoa will follow suit at some stage soon.[6]

Since 2003, the Samoan Government has been very active and committed in developing national initiatives in full collaboration with persons with disabilities, Disabled Person's Organizations and Non-Governmental Organizations.

In line with its commitment under BMF Samoa has established a National Disabilities Taskforce in line with a Cabinet Directive (FK (08) 37) dated 25 September 2008.[7] The Disabilities Taskforce is made up of representatives from a number of Government Ministries, Non-Governmental Organizations and Disability Organizations.

Samoa's commitment is further revealed by its approval in April 2009 of a National Policy on Disability together with an accompanying Implementation Plan 2009–2012.[8] The National Policy is based on the following principles:

Rights of Persons with Disabilities, http://www.un.org/disabilities/convention/conventionfull.shtml (accessed Dec. 2, 2011).

[6] As of the publication of this Journal, Samoa still has not become a signatory to the UN Convention on the Rights of Persons with Disabilities. List of signatory nations available at Convention on the Rights of Persons with Disabilities, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en.

[7] The National Disability Taskforce is made up of representatives from several different groups. The groups currently represented on the Taskforce are the Ministry of Education; the Ministry of Sports and Culture; the Samoa Umbrella of Non Government Organizations; Ministry of Women, Community, and Social Development; and National Disability Advocacy Organization (NOLA). Email from Kaisarina Salesa, Legal Analyst, Samoa Law Reform Commission, to Jessica Flammer, Editor, Journal of International Aging, Law and Policy, *National Disability Taskforce* (Oct. 13, 2011, (time) EST) (copy on file with Journal).

[8] The National Policy on Disability was drafted in 2008 by members of the National Disability Taskforce. The primary participants were the Government of Samoa and the Ministry of Women, Community, and Social Development, a non-profit and non-governmental organization

- Recognition of the equality of all people and their human rights;
- All should have access to buildings, public spaces and information;
- There should be no discrimination;
- All have the right to participation and inclusion in society;
- Respect for the human dignity of all people; and
- Care and respect for all people.

The Disabilities Taskforce is currently executing and monitoring such implementation. All this work under the BMF should be completed by 2012, which is the end of the ten-year year life span of the BMF. At present, the rights of persons with disabilities (both physical and intellectual) can be protected partially, not fully, under the laws of Samoa. Many laws require reform to better address the needs of persons with disabilities.

Samoa has a Mental Health Act 2007, which encourages voluntary care, support and treatment within family and community of those with mental incapacity.[9] The Act makes it an offence to assault, mistreat or neglect any person with a mental disorder or mental incapacity under his or her care, oversight or control. This Act is a good start for Samoa in terms of adult guardianship law although amendments must be made if Samoa ratifies the CRPD.

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located in Samoa. The policy and subsequent Implementation Plan 2009–2012 identified seven target areas in line with the Biwako Framework. Ministry of Women, Community & Soc. Dev., *Samoa National Policy for Persons with Disabilities 2009–2012,* http://www.mwcsd.gov.ws/summary_policydisability.html (accessed Dec. 2, 2011).

[9] The Mental Health Act is the foundation for a system to protect the physical person and rights of people with disabilities. The Act addresses judicial and administrative procedures to be observed in proceedings involving a person with a disability. It also addresses voluntary care within the family and community and the requirements for physical and mental assessments for people with disabilities. Samoa Mental Health Act 2007, www.paclii.org/ws/legis/num_act/mha2007128.rtf (accessed Dec. 2, 2011).

The latest effort by Samoa is when the Samoa Law Reform Commission finalized its Final Report on the review of the Crimes Ordinance 1961, which includes recommendations to reform the Ordinance to address concerns by persons with disabilities, for example the recommendation for the creation of an offence of sexual exploitation of persons with significant impairment.[10] In the course of its review, SLRC also consulted Disability Organizations and received submissions from individual persons with disabilities.

This leads me to the second part of this presentation: what is needed in Samoa in terms of law reform.

What is needed in Samoa in terms of law reform?

In all law reform, it is important to recognize the cost constraints. There is no use having an excellent piece of legislation that cannot be implemented. In a Discussion Paper developed by the Ministry of Women, Community and Social Development for the National Disabilities Taskforce, a number of issues and obstacles were identified that need addressing in order for Samoa to successfully meet its commitments under BMF and facilitate a move towards ratifying the CPRD.

An important concern highlighted in the paper is the cost that would be involved in implementing obligations under CRPD. There are concerns that any further obligations that might arise under CRPD would strain the disability specific funding recently allocated from the Government's budget to the Taskforce to assist in fulfilling commitments under the BMF.

Therefore it would be necessary to carry out the cost analysis before Samoa ratifies the CRPD.

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[10] The Final Report on the Crimes Ordinance 1961 was submitted to the Prime Minister of Samoa in June of 2010. Off. of Attny. Gen., supra n. 2.

On the other hand the implementation of commitments under the BMF will be completed by 2012. Therefore, it is highly likely that Samoa would ratify CRPD around 2012.

In any case, the BMF has generally been accepted as a bridge for governments to develop their future strategies and policies in line with the CRPD. Therefore, whilst Samoa is fulfilling its commitment under the BMF it is at the same time setting itself up to ratify the CRPD.

An important component of Samoan society is customary law. Customary law is recognized by the Constitution as a source of law for Samoa.[11] Customs and practices need to be codified in specific legislation, referred to in legislation or brought before the courts of law of Samoa in order for them to be recognized as part of local customary law.

In the absence of custom recognition legislation, reliance has been on certain customs and practices referred to in the Village Fono Act 1990.[12]

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[11] The Constitution of Samoa begins with the declaration that Western Samoa shall be based on Christian principles and Samoan custom and tradition. The Constitution also provides in the definition of "law" that any custom that has gained the force of law in Western Samoa meets the definition of law. Pacific Islands Leg. Info. Inst., *Constitution of the Independent State of Western Samoa*, http://www.paclii.org/ws/legis/ consol_act/cotisows1960535/ (accessed Dec. 2, 2011)

[12] The Village Fono Act was implemented to empower village assemblies, Alii ma Faipules, to govern law and order, health, and social issues within the village community. The rules set forth by the Village Fono must be based on the custom and usage of the village and jurisdiction of the Village Fono only extends to people who normally reside in that village. FAOLEX, *Village Fono Act 1990,* http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search_type=query&table=result&query=ID:LEX-FAOC037645&format_name=ERALL&lang=eng (accessed Dec. 2, 2011).

The Village Fono Act is currently under review by the Law and Justice Sector as of September of 2011. The Law and Justice Sector is a commission established under the Attorney General of Samoa to review legislation and suggest improvements to the legislature. The Village Fono Act of 1990 is currently under review because of concerns about the misapplication of the Act by village leaders and religious freedom in the villages, as well as increased crime rates among the youth of Samoa. C.

The Village Fono Act 1990 validates the power and authority of the Village council, which must be exercised in accordance with the customs and usages of each village.

The caring and supporting of the elderly and disabled is a strong part of the Samoan way of life. In Samoan custom, the elderly are viewed as "human treasures" to use the phrase associated with the Convention on the Preservation of Biological Diversity. This, coupled with Christianity, strengthens the respect for the elderly, as they are not only viewed as a source of wisdom but also a source of blessings if you care for them. Neighboring families will bring food to an elderly person to get blessings.

In Samoa, elders contribute to village politics and family decisions. They are often part of the decision-making process for bestowal of chiefly titles and use of customary land. Such customs and practices are encouraged and preserved under the Village Fono Act.

However, not all Samoan families are subject to the rule of the Village Fono. These are families who may be living on the sixteen percent of land in Samoa that is either freehold land or leased public land. The reaches of Village Fono do not extend over such land tenures. Samoa also has an aging population and as more children move to town and become career-oriented, neglect and abuse of the elderly and disabled will occur.

Therefore, to care for those families not subject to the control of a Village Fono and keeping in mind the dynamicity of culture, which poses a threat to the custom and practice of caring for elderly and disabled Samoans, Samoa would benefit from giving

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Tone, Samoa Observer, *Village Fono Act Reviewed*, http://www.samoaobserver.ws/index.php ?option=com_content& view=article&id=35323:village-fono&catid=1:latest-news&Itemid=50 (posted Sept. 5, 2011, 3:10 p.m. SST).

effect to the provisions of the CRPD but keeping in mind available resources and our local customs and practices.

Lack of disability dimensions across current legislation and the use of denigrating language in various clauses across different legislation is a significant issue to ensuring compliance. Enactment of legislation is an important goal of the BMF and it has become a priority with a reference to the Law Reform Commission in 2010. For example, the absence of a consistent definition of what constitutes a 'disability' in current legislation is an obstacle to meeting policy targets and to ensuring equal opportunities and equal treatment and the prevention of discrimination.[13]

A further point is that although Samoa has not ratified the CRPD, its laws must be consistent with the fundamental rights and freedoms cemented in the Samoan Constitution. These rights and freedoms are wide enough to cover rights under the CRPD. This is because the rights and freedoms guaranteed in the Samoan Constitution were adopted from the Universal Declaration of Human Rights.

What about the Yokohama Declaration?

Samoa's current objectives and developments under BMF are in line with the spirit of the Yokohama Declaration.[14]

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[13] The National Policy on Disability provides a working definition for 'disability' for the purposes of its policy statements. The Policy defines "disability" as resulting from the association between a person with physical, mental and intellectual aspects and the environmental and attitudinal barriers she/he may face in villages and the wider society. Ministry of Women, Community & Soc. Dev., *supra n. 8*, at 4.

[14] The Yokohama Declaration was adopted at the first World Congress on Adult Guardianship Law in Yokohama, Japan in October of 2010. The Declaration sets forth broad principles and norms that should be considered in the context of adult guardianship such as mental capacity, protection measures, and the importance of legislation. The Declaration also sets forth the guidelines for a competent guardian. Intl. Guardianship Network, *Yokohama Declaration*, http://www.international-guardianship.com/yokohama-declaration.htm (accessed Dec. 2, 2011).

The findings of a Report on the Population and Housing Census 2006 released by the Samoa Bureau of Statistics in July 2008 reveal that the issues acknowledged in the Yokohama Declaration are spot on and affecting Samoa.[15]

For example: Increase in older people—reveals that the median age (indicates at which half of population is older and half is younger) of Samoa is 21 years. It is conceivable that as population matures there will be a tremendous increase in the number of older people (60+). People aged 60+ currently constitute seven percent (12,612) of the total population of 180,741. Persons with disabilities constitutes one percent of the total population (it is unclear from the report whether they considered disability due to old age or not). Impact on Resources—The Population and Housing Census 2006 conducted a dependency ration study that showed that there has been an increase in old age dependency since 1981 calling for increase in pension welfare for people aged 65+.

Samoa can reform its current Mental Health Act 2007 to reflect the spirit of the Declaration (explicitly address the rights of elderly persons and standards for adult guardianship). The current provisions are wide enough to encompass such concerns but perhaps it is better to address them more specifically.

The Declaration makes reference to signatories affirming the guiding principle and provisions of the Convention on the International Protections of Adults and the CRPD. Samoa has not ratified this Convention. Harmonizing Samoa's legislation and policy to meet the obligations of the CRPD and other Conventions is a formidable task requiring significant resources. After the

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[15] Report of the Samoa Bureau of Statistics, Population and Housing Census 2006. Samoa Bureau of Statistics, *Census and Survey Reports,* http://www.sbs.gov.ws/Products/Publications/Reports/tabid/3471 /language/en-US/Default.aspx (accessed Dec. 2, 2011).

Yokohama Declaration, a report by a technical expert is required that looks at the different fiscal and infrastructure implications for Samoa that arise from ratification. Robust adult guardianship laws in Samoa are critical. The Samoa Law Reform Commission will be working on this.

In summary, I am here to learn from this World Congress for the moving forward of Samoa's adult guardianship laws in a realistic and achievable manner. I note the recent Singapore Mental Capacity Act 2010 and hope to learn from them.[16]

Thank you for your time.

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[16] The Singapore Mental Capacity Act 2010 addresses guardianship issues for adults with mental and physical disabilities. The Alzheimer's Disease Association of Singapore endorsed the Act as providing a clear legislative framework to help Singaporeans through the guardianship process. Alzheimer's Disease Association Singapore, *Mental Capacity* Act, http://www.alz.org.sg/caregivers/mental-capacity-act (accessed Nov. 3, 2011). A guide to the Singapore Mental Health Act 2010 in English is available. Off. of Pub. Guardian, *Guide to the Mental Capacity Act for Donees,* http://www.publicguardian .gov.sg/Resources/Flipbooks/Mental_Capacity_Act_%28donees%29/English/index.html (accessed on Dec. 2, 2011).

Editor's Note

The following article is an annotated keynote lecture. The keynote lecture was given at the World Congress on Adult Guardianship Law 2010 in Yokohama, Japan on October 2, 2010 by Dr. Volker Lipp. Dr. Lipp is a full-time professor at the Georgia Augusta University Göttingen in Germany and holds the Chair for Civil Law, Civil Procedure, Medical Law and Comparative Law at the Faculty of Law. Coming from academia and Non-Governmental Organizations dedicated to research and practice within the field of adult guardianship law, the organizers of this first world congress on adult guardianship law asked Dr. Lipp to give a keynote lecture to the plenary session on the issue of autonomy and guardianship law in the light of the UN Convention on the Rights of Persons with Disabilities. The speaker wants to thank Dipl. Iur. Julian O. Winn for his valuable support. Mr. Winn is a law clerk at Düsseldorf regional court, Germany and a graduate research assistant at the Georgia Augusta University Göttingen.

GUARDIANSHIP AND AUTONOMY: FOES OR FRIENDS?

PROFESSOR DR. VOLKER LIPP & DIPL. IUR. JULIAN O. WINN[1]

Chair for Civil Law, Civil Procedure, Medical Law and Comparative Law
Institute for Private Law and Civil Procedure
Georgia Augusta University Göttingen, Germany

I. Introduction

For most of us, making decisions about our personal and daily lives is something that we take for granted. But if we were to reflect about it, it also is very likely a feature which we regard as being essential for us and our way of living. Decision-making is the key to our autonomy, and autonomy and individual freedom are fundamental values in modern societies. Consequently, individual freedom and autonomy are guaranteed and protected as human rights by international instruments.

However, the ability to make decisions on our own is determined by our personal mental capacities. Due to mental disability, disease or old age, some people may not be able to make autonomous decisions and may therefore need help and care by others. One important legal instrument of support and protection is the appointment of somebody (either a natural person or an institution, e.g. a public authority) who takes care of the affairs of this person, and who may decide on the person's behalf, if necessary.

In this essay, we will call an adult in need of such support a "ward" and the person taking care of the ward's affairs a "legal guardian." The term "guardianship" in this essay stands for the legal instrument of assistance and protection of the ward as such. It has to be pointed out, however, that we will be looking at "guardianship" from a comparative perspective. Hence, the term "guardianship" is used in a functional sense, and will refer to all legal instruments for the protection of incapable adults, regardless whether a specific national law calls this instrument "guardianship" or otherwise, or whether this law uses a single but comprehensive legal instrument for all affairs of the incapable adult like, for instance, German or Austrian law, or whether it has several different instruments, e.g. one for financial affairs and another for personal welfare decisions like Australian or Canadian law.

Traditionally, guardianship (in the broad, functional sense of the term) has been firmly linked with incapacitation, an order of a court or public authority restricting the legal capacity of the ward or even removing it completely. Incapacitation either is a precondition for the appointment of a guardian, or it is its consequence. According to the traditional approach, appointing a guardian and restricting legal capacity are inseparable. Due to his incapacitation, the ward is legally unable to take care of his personal affairs himself. Consequently, the guardian makes decisions instead of the ward and on his behalf. In doing so, the guardian will act according to what he thinks is in the ward's best interest. The ward's actual wishes have no legal relevance, neither for the legal guardian, nor for others. This holds true even when the ward would in fact still be able to make decisions himself. Hence, the ward is no longer an autonomous subject who decides for himself, but a mere object of care.

This traditional concept of guardianship law has been heavily criticized for depriving the ward of his right of autonomy and self-determination. Whereas a great number of countries still

follow the traditional approach, other countries have been taking up this criticism. They have reformed their guardianship law and introduced less restrictive legal measures in order to protect the autonomy of the individual.

In the light of this, the UN Convention on the Rights of Persons with Disabilities (CRPD)[2] means nothing less than a paradigm shift, for it treats people with disabilities as subjects and no longer as objects of care.[3] The CRPD explicitly states that people with disabilities have the same human rights and fundamental freedoms as people without disabilities.[4] Like others, people with disabilities are therefore recognized as individual subjects before the law. They have the right to live their lives autonomously, just as any other person without a disability.[5]

The CRPD is an international instrument of great significance since it was signed by major countries all over the world. Up to now, the CRPD has 147 signatories and already 96 ratifications.[6] Amongst those are countries such as the UK, France, Germany, Canada, Australia, New Zealand, India, and

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[2] United Nations Convention on the Rights of Persons with Disabilities, U/N-Doc. A/61/611. (Dec. 6, 2006) (available at www.un.org/disabilities/convention/ conventionfull.shtml) [hereinafter CRPD].

[3] Louise Arbour, Statement of the High Commissioner for Human Rights (May 12, 2006) (available at www2.ohchr.org/english/issues; click on "Disability and Human Rights"); United Nations, *Handbook for Parliamentarians* 4 (2007); Valentin Aichele, *Die UN-Behindertenrechtskonvention und ihr Fakultativprotokoll* 4 (2008); Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 Syracuse J. Int'l L. & Com. 287, 291 (2007); Don MacKay, *The Convention on the Rights of Persons with Disabilities: A Benchmark for Action*, 56 Int'l Rehabilitation Rev. 2 (2007).

[4] CRPD, art. 1, para. 1.

[5] CRPD, preamble, para. n; CRPD art. 3, para. a; Valentin Aichele & Jochen von Bernstorff, *Das Menschenrecht auf gleiche Anerkennung vor dem Recht: Zur Auslegung von Art. 12 der UN-Behindertenrechtskonvention*, 19 BtPrax 199, 202 (2010); Theresa Degener, *Die UN-Behindertenrechtskonvention. Grundlage für eine neue inklusive Menschenrechtstheorie*, 58 Vereinte Nationen 57, 58 (2010); Mary Keys, *Legal Capacity Law Reform in Europe: An Urgent Challenge*, 1 Eur. Y.B. Disability L. 59 (2009); Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights*, 30 Hum. Rts. Q. 494, 512-513 (2008).

[6] Numbers cited in text are correct as of November 25, 2010. There are 153 signatories and 106 ratifications as of November 11, 2011. Current status available at www.un.org/disabilities.

China, to name but a few. Japan, United States, and Russia are amongst the signatories but have not yet ratified the convention.

With regard to guardianship, CRPD Article 12 is of utmost importance. This article guarantees equal recognition before the law. Its meaning and its consequences for guardianship law and the rules on legal capacity have been discussed quite controversially. The vast majority of governments share the opinion that no legislative changes are required as a direct outcome of the CRPD. This notion, however, has been challenged by Non-Governmental Organizations (NGOs) and a number of academics alike.

A main issue is the incapacitation of the ward which traditionally is a precondition or at least a consequence of guardianship. Even those countries which reformed their guardianship laws and abolished incapacitation upon the appointment of a legal guardian provide for a separate court order restricting the legal capacity of the ward in certain cases, or invalidating legal transactions because of the state of mind when entering into that transaction.

Furthermore, CRPD Article 12 raises the fundamental question of whether guardianship as such is in accordance with this provision. It has been argued that legal guardianship is discriminating and violates the right to autonomy of the ward since a legal guardian has the power to make decisions on behalf of the ward. According to critics, CRPD Article 12 only allows assisting and supporting a disabled person with his own decision (so called supported decision-making) and prohibits deciding instead of, or on behalf of, the person concerned (so called substituted decision-making).[7]

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[7] Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Rights of Persons with Disabilities*, 86 (3d ed., Handicap Int'l 2010) (available at http://www.handicap-international.fr/fileadmin/documents/publications/

In this essay, we will argue that guardianship and autonomy need not necessarily be "foes," but may as well be "friends," and that Article 12 of the CRPD demands a reform of guardianship law and practice, not its abolition.

If we ask for the impact of the CRPD on guardianship law it is essential to distinguish between different sets of questions:

- What are the requirements of the CRPD for a system of support if somebody is not able to decide for himself?
- Do the laws in our countries comply with these requirements? It is worth noting that, from the perspective of the CRPD, the problem is not the term "guardianship" but rather the effects of a specific legal instrument on the ward, whether we call it "guardianship" or otherwise. And these effects may vary from country to country even if they use the same terminology. Since there are different models of guardianship worldwide, we have to concentrate on some common features like the authority of the guardian to decide on behalf of the ward.
- Does the legal practice in our countries comply with these requirements? It has to be pointed out that Article 4 of the CRPD requires the countries to bring their law as well as their practice in line with the CRPD.

II. The UN Convention on the Rights of Persons with Disabilities

Throughout history, persons with disabilities were regarded as individuals who require protection and evoke sympathy.

HICRPDManual.pdf); *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities*, 16-17 (World Network of Users & Survivors of Psych. 2008) [hereinafter *Implementation Manual for CRPD*]; Klaus Lachwitz, *Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung*, 17 BtPrax 143, 146 (2008); Tina Minkowitz, *Submission to the Committee on the Rights of Persons with Disabilities—Day of General Discussion on CRPD Article 12, www2.ohchr.org/SPdocs/CRPD/DGD21102009/ WNUSP.doc (accessed Nov. 11, 2011).*

National as well as international politics were based on the ideas of public welfare and medical care for people with disabilities. On the international level, disabled people's affairs were located with the World Health Organization and the UN Economic and Social Council. International legal instruments regarded people with disabilities as objects of care and protection.[8]

In contrast to that traditional attitude, the CRPD is the first international instrument which regards people with disabilities from the perspective of human rights and not from a perspective of medical or social politics. The CRPD does not regard people with disabilities merely as patients or as clients of social services, i.e., as objects of medical or social care, but as persons who have the same human rights as any other person. Whilst the CRPD acknowledges the fact that people with disabilities have special problems in their everyday lives, it regards disabilities as normal components of human life and society. The human rights perspective on people with disabilities means nothing less than a paradigm shift from the traditional concept of integration towards a concept of inclusion and empowerment[9], and from treating people with disabilities as objects of care towards acknowledging them as subjects with equal rights, including the right of autonomy and self-determination.[10]

The rights enumerated in the International Bill of Rights,[11] in an ideal world, would be enough to protect everyone. "What the

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[8] For the historical background see Gerald Quinn et al., *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (UN 2002).

[9] *Cf.* CRPD, art. 3, lit. (c); Aichele, *supra* n. 3, at 6; MacKay, *supra* n. 3, at 2; Heiner Bielefeldt, *Zum Innovationspotential der UN-Behindertenrechtskonvention*, 10 (3d ed., Deutsches Institute für Menschenrechte 2009) (available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/essay_no_5_zum_innovationspotenzial_der_un_behindertenrechtskonvention_aufl3.pdf).

[10] *Supra* n. 3.

[11] The International Bill of Rights consists of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as the non-binding Universal Declaration of Human Rights.

Convention endeavors to do," said Don MacKay, Chairman of the committee that negotiated the CRPD, "is to elaborate in detail the rights of persons with disabilities and set out a code of implementation."[12]

The CRPD warrants these rights to "people with disabilities" as it states in Article 1, "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[13] Since it regards "disability" not as a mere medical fact, but as a social situation resulting from physical condition, the CRPD has a wide understanding of the concept.[14] Its scope of application reaches far beyond the traditional, medically oriented understanding of "disability." "Disability" may therefore include people with a physical handicap as well as those suffering from a mental disorder, or elderly people suffering from Alzheimer's disease.[15] Yet, not everyone who needs a legal guardian under national law also qualifies as a person with a "disability" under the CRPD. An illness does not automatically make somebody "disabled" in the sense of the CRPD, but some patients may need a legal guardian. However, since people with a disability very often are in need of legal guardianship, guardianship law as such must comply with the CRPD.

Since the CRPD is a multilateral international treaty, we have to pay attention to the rules for the interpretation of international treaties under public international law if we ask for the consequences arising from the CRPD for guardianship law. As

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[12] MacKay, *supra* n. 3, at 4.

[13] CRPD, art. 1, para. 1.

[14] CRPD, preamble, para. e.; CRPD, art. 1, para. 2.; United Nations, *supra* n. 3, at 12-13; for the background of the disability term see Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Hum. Rts. L. Rev. 1, 5, 23-24 (2008).

[15] CRPD, art. 1, para. 2; United Nations, *supra* n. 3, at 13.

an international treaty, the CRPD applies only to those states which join the convention. Moreover, it needs to be transformed into national law according to the rules of this state and its national law. International treaties are generally not self-executing and therefore do not stipulate rights and duties for citizens under national law without such a transformation.

The content of the CRPD has to be ascertained according to the rules for the interpretation of international treaties. The rules are mainly laid down in the Vienna Convention on the Law of Treaties (VCLT) of 1969.[16] According to VCLT Article 31, paragraph 1, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Pursuant to VCLA Article 32, the preparatory work of the treaty and the circumstances of its conclusion are supplementary means of interpretation "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable."

III. CRPD, Autonomy and Guardianship

1. Requirements of the CRPD for Guardianship

The principles of interpretation of international treaties mentioned above support the argument that guardianship as such may be in accordance with the requirements of the CRPD. It is rather unlikely that the aim of the CRPD is to abolish an instrument of legal protection which is in use all over the world unless it explicitly states so. Hence, the "burden of proof" for an incompatibility of legal guardianship with the CRPD is on the

[16] Vienna Convention on the Law of Treaties of 1969 (available at untreaty.un.org/ilc/texts/instruments/English/conventions/1_1_1969.pdf).

critics. In order to find out whether some common features of guardianship like incapacitation or the power of the guardian to decide on behalf of the ward are in violation of the CRPD, we need to have a closer look at its requirements.

Above all, the CRPD does not allow discrimination on the grounds of disability.[17] People with disabilities have the same rights as others[18] and also the right to self-determination and autonomy when exercising their rights.[19] Consequently, a disability per se may neither be the reason for appointing a guardian nor for restricting the legal capacity of the person concerned.[20] These measures can be justified only because of a factual inability to decide autonomously, no matter from what this inability may result.[21]

Secondly, the CRPD does acknowledge the fact that the "right to have rights" and the right of self-determination in exercising these rights remain dead letters if somebody is in fact not able to decide autonomously. If somebody lacks the ability to decide autonomously, the CRPD demands that the state provides support for the person concerned for the exercise of his rights.[22] Hence, the right of self-determination, as laid out in CRPD Article 12, has two elements. On the one hand, there is the right to fend off any interference by the state or by other persons with the autonomous decision-making process.[23] On the other hand, there

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[17] CRPD, art. 5.

[18] *Id.* at art.12, para. 1.

[19] *Id.* at art.12, para. 2.; *see also supra* n. 5.

[20] UN-Doc. A/HRC/10/48 para. 45; United Nations, *supra* n. 3 at 89; Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 Syracuse J. Int'l L. & Com. 405, 408, 410 (2007); *Implementation Manual for CRPD*, *supra* n. 7, at no. 2, annex no. 1a.

[21] Emmanuel A. Cárdenas R., *Legal Capacity of Persons with Disabilities: The CRPD's New Vision for Mexico and Other Civil Law Countries*, 58 Int'l Rehabilitation Rev. 11 (2009).

[22] CRPD, art. 12, para. 3.

[23] Cf. UN-Doc. A/HRC/10/48 para. 45; Aichele & von Bernstorff, *supra* n. 5, at 201-202; Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?* 34 Syracuse J. Int'l L. & Com. 563, 596 (2007); Minkowitz, *supra* n. 20, at 408;

is the right to get support in making decisions and exercising rights if somebody is not able to decide autonomously.[24]

For these measures of support, the CRPD, thirdly, provides guidelines in Article 12 paragraph 4. Any measure of support must

> respect the rights, will and preferences of the person, [be] free of conflict of interest and undue influence, [be] proportional and tailored to the person's circumstances, [be applied] for the shortest time possible and [be] subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

2. Supported versus Substituted Decision-Making

Having taken a closer look at the requirements of the CRPD, we can now try to answer the fundamental question: "Is legal guardianship per se in violation of CRPD Article 12?"

As mentioned above, it has been argued that legal guardianship discriminates and violates the right of autonomy of the ward since the guardian in most countries, if not everywhere, has the power to make decisions on behalf of the ward.[25] According to this argument, CRPD Article 12 only allows assisting and supporting a disabled person with his own decision (supported decision-making) and prohibits deciding instead of the disabled

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Gerald Quinn, *Disability and Human Rights: A New Field in the United Nations*, in *International Protection of Human Rights* 247, 262-263 (Catarina Krause & Martin Scheinin eds., Inst. for Hum. Rights 2009).

[24] *Cf.* UN-Doc. A/HRC/10/48 para. 45; United Nations, *supra* n. 3. at 89-90; Aichele & von Bernstorff, *supra* n. 5, at 202; Lawson, *supra* n. 23, at 597; Minkowitz, *supra* n. 20, at 408; Quinn, *supra* n. 23, at 263; *Implementation Manual for CRPD*, *supra* n. 7, at 16; Volker Lipp, *Freiheit und Fürsorge: Der Mensch als Rechtsperson* 75, 141 (Mohr Siebeck 2000).

[25] *Supra* n. 7.

person (substituted decision-making). Since guardianship follows the model of "substituted decision-making," it consequently has to be abolished and replaced by a new instrument implementing the model of "supported decision-making."

Yet, this reasoning does not meet peoples' needs and leads to manifestly unreasonable results. Nobody can deny that people who lack the ability to decide for themselves autonomously, such as patients in a persistent vegetative state (PVS) like Terri Schiavo,[26] need help. The case of Terri Schiavo makes it quite clear that there are cases where support within the meaning of CRPD Article 12 can only be given by deciding on behalf of the person concerned because a PVS patient simply cannot decide or communicate decisions himself. As one can see from this example, it is misleading if we regard "supported decision-making" and "substituted decision-making" as models which are mutually exclusive. There are cases where support is sufficient because the person concerned is partly still able to decide himself but needs support in the decision-making process. There are other cases where it is necessary that someone decides instead of this person. In these cases, it is an appropriate measure of support under CRPD Article 12 for a legal guardian to decide on behalf of the ward.[27] Legal guardianship, or more precisely the power to

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[26] Teresa Marie "Terri" Schiavo collapsed in her St. Petersburg, Florida home in full cardiac arrest on February 25, 1990. *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. 2d Dist. App. 2001). She suffered massive brain damage due to lack of oxygen and, after two and a half months in a coma, her diagnosis was elevated to a persistent vegetative state. *Id.* The resulting legal battle in the United States between the legal guardians and the parents of Terri Schiavo lasted from 1998 to 2005. *Id.*

[27] *Cf.* Declaration of Australia upon Ratification and Declaration of Canada, http://www.un.org/ disabilities (accessed Nov. 25, 2010); NSW Disability Discrimination Legal Centre Inc., *Article 12 of the CRPD—The Right to Equal Recognition before the Law* 4 (Sept. 2009) (available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DayGeneralDiscussion21102009.aspx; select the first article after the "Supporting material for the Day of General Discussions" heading); United Nations, *supra* n. 3, at 90; Aichele & von Bernstorff, *supra* n. 5, at 202; Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?* 34 Syracuse J. Int'l L. & Com. 429, 449-450, 460-461 (2007); Michael Ganner & Peter Barth, *Die*

decide on behalf of the ward which all guardianship laws worldwide confer to the guardian, is therefore not per se in violation of the CRPD.

The CRPD, however, sets up some very strict requirements for the use of this power. All the requirements of the CRPD for measures of support mentioned above are based on the basic idea that a person who needs help and assistance is to be treated as a person with equal rights, including the right of autonomy and self-determination.[28] In other words, the rights of the ward and, above all, his right of self-determination, have to be respected during guardianship as well as before. A modern guardianship law must focus on the autonomy of the ward instead of just his welfare.[29] The Council of Europe's Recommendation on the Protection of Incapable Adults of 1999[30] could prove a very helpful guideline for the implementation of the requirements of the CRPD since it is based on the same basic ideas and elaborates them in detail, namely:

- Each human being has to be recognized as a person before the law and enjoys legal capacity on an equal basis with others in all aspects of life.[31]
- Every person has the right to the support that he may require in exercising his legal capacity.[32]
- Measures of support and protection must be flexible and adjusted to the individual needs and situation of the person concerned.[33]
- Any measure may only be established or taken if it is necessary and proportional, and if it is the least restrictive

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Auswirkungen der UN-Behindertenrechtskonvention auf das österreichische Sachwalterrecht, 19 BtPrax 204, 206 (2010).

[28] *See supra* n. 5.

[29] United Nations, *supra* n. 3, at 90; for German law cf. Volker Lipp, *Rechtliche Betreuung und das Recht auf Freiheit*, 17 BtPrax 51 (2008); Lipp, *supra* n. 24, at 15, 75,122, 149.

[30] Council of Europe, Committee of Ministers, Recommendation No. R (99) 4.

[31] CRPD, art. 12, para. 1–2.

[32] *Id.* at para. 3.

[33] *Id.* at para. 4; Rec. (99) 4 Principle 2, 5, 6.

measure available on the person's fundamental rights and freedom.[34]

- All measures must respect the will and preferences of the person concerned.[35]
- Appropriate and effective safeguards have to be installed to ensure that these principles are followed in practice.[36]

These principles do not only apply when a court or public authority establishes a guardianship by appointing a legal guardian, but they are also to be respected by every legal guardian. In fulfilling his duties and exercising his powers, the guardian has to follow the same principles. In particular, the guardian

- Must primarily support the person concerned in making his own decision instead of deciding for him.
- May only substitute the decision of the ward if the ward - even with the support of the guardian - is unable to decide for himself.[37]

Hence, priority must be given to support over substituted decision-making. However, in some cases it is inevitable for the guardian to substitute the decision of the ward. Therefore, the question is not which model we should follow or whether the CRPD requires the signatories to abolish guardianship and to implement a model of supported decision-making. The problem at hand is in determining when support in decision-making is not sufficient and determining when it is necessary for a guardian to decide on behalf of the ward, and once those determinations have been made, how to implement appropriate and effective safeguards that ensure they will be followed in practice.

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[34] CRPD, art. 12, para. 4; Rec. (99) 4 Principle 5, 6.
[35] CRPD, art. 12, para. 4; Rec. (99) 4 Principle 9.
[36] CRPD, art. 12, para. 4.
[37] Volker Lipp, *supra* n. 29, at 53.

We may call a guardianship model implementing these requirements "supportive guardianship". In a system of "supportive guardianship", the right of the ward to autonomy and self-determination is also respected "within" guardianship, and namely by the guardian when exercising his powers. The power of the guardian to decide on behalf of the ward does not imply the right of the guardian to disregard the ward's will and to decide according to his own ideas and values. The guardian rather has to decide according to the ward's wishes and interests if the ward himself is unable to do so. Then the power of the guardian to decide on behalf of the ward becomes a means of support by representation, rather than an element of incapacitation.[38]

3. Incapacitation

Another main issue which has been discussed on a national as well as on an international level is whether Article 12 of the CRPD permits declaring an adult legally incapable.

As mentioned before, traditionally guardianship has been closely connected with incapacitation, an order of a court or public authority restricting the legal capacity of the ward, or even removing it completely. On a comparative level, we can identify two different models. Most countries follow the traditional approach, albeit with great differences, when the capacity of the ward is automatically restricted for all affairs taken care of by the guardian. Incapacitation either is a precondition for the appointment of a guardian, or it is its consequence. In the other model - which has been implemented in Germany by its fundamental reform of guardianship law in 1992 - the capacity of the ward is not automatically restricted when a guardian is appointed. The court may only restrict the capacity of the ward by a special order if necessary for his protection.

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[38] The problem has been discussed extensively with respect to German law by Lipp, *supra* n. 29, at 53, 55, and Lipp, *supra* n. 24, at 22.

If we look at Article 12 of the CRPD and its requirements, incapacitation has to meet, inter alia, the standard of CRPD Article 12, paragraph 4 for measures relating to the exercise of legal capacity. According to this provision, it has to be proportional and tailored to the person's circumstances and has to respect the rights, will, and preferences of the person. Therefore, any restriction of the legal capacity of the ward has to be assessed on the facts of the case according to the principles of necessity and proportionality and must be adjusted to his individual situation.[39] Since incapacitation has to be tailor-made and proportional according to the individual circumstances, it must not automatically cover all affairs of the ward. Rather, it has to be assessed where it is necessary. For example, it may be necessary for financial matters, but not for personal affairs such as aspects of health care. Or it may be necessary only for certain financial affairs, like business transactions, but not for common every day transactions.

Hence, Article 12 of the CRPD still allows restricting the legal capacity of a person, but only as long as the very strict conditions of Article 12 paragraph 4 of the CRPD are respected. An automatic incapacitation upon the appointment of a guardian, however, does not comply with the requirements of the CRPD.[40]

IV. Summary and Conclusions

In brief, the CRPD has a considerable impact on guardianship law, but Article 12 of the CRPD does not prohibit

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[39] *See* Thomas Hammarberg, Commissioner of Human Rights of the Council of Europe, *Persons with Mental Disabilities Should be Assisted but Not Deprived of Their Individual Human Rights*, http://www.coe.int/t/commissioner/viewpoints/ (accessed Nov. 25, 2010); Cárdenas, *supra* n. 21, at 12. For consequences on legal capacity in German law see Volker Lipp, *Die neue Geschäftsfähigkeit Erwachsener*, 2003 FamRZ 721 (2003).

[40] Day of General Discussion on Art. 12 CRPD, Committee on the Rights of Persons with Disabilities, Submission of the Mental Disability Advocacy Center and the Hungarian Association for Persons with Intellectual Disability, para. 10, Annex para. 2 (available at www.ohchr.org/EN/HRBodies/CRPD); Cárdenas, *supra* n. 21, at 12; Keys, *supra* n. 5, at 65, 82.

any form of substitution in decision-making, for example by a legal guardian. On the contrary, it requires the support by a legal guardian if somebody is not able to exercise his rights himself. Hence, the CRPD does not demand that guardianship as such be abolished.

However, it follows from CRPD Article 12 that guardianship as such as well the activities of a legal guardian on the case have to respect the fundamental principles of necessity and proportionality. Therefore, the guardian has to give priority to support over substituted decision-making. A guardianship model, following the requirements and principles of the CRPD could be described as "supportive guardianship".

Likewise, CRPD Article 12 does in principle permit to restrict the legal capacity of an adult in order to protect him, but only under the very strict conditions of CRPD Article 12, paragraph 4. An automatic incapacitation upon the appointment of a guardian, however, does not comply with this requirement.

Guardianship and autonomy—are they friends or foes? Looking at guardianship laws and guardianship practice worldwide, they very often are foes indeed. But they need not be enemies forever. If we were to take the rights and requirements of the CRPD seriously and implement the concept of "supportive guardianship" in law and practice, they will become friends.

THE ULTIMATE GUARDIAN: THE COURT'S ROLE IN GUARDIANSHIP ADMINISTRATION

REILLY F. MORRISON[1]

I. Introduction

In May 2011, Allan Dunn's neighbor, serving as the personal representative of his estate, entered his house with her sister to clean and sort through his belongings. Upon entering the house, the two sisters were greeted by a foul odor that led them to a grizzly discovery on Dunn's back porch. There, in an ice chest, they found the remains of an elderly woman. The remains were later identified as those of Dunn's wife, Margaret. Officials concluded that Margaret died of natural causes in 2000 and that Allan had placed her in the freezer so he could continue to collect her benefit payments. Dunn was appointed the guardian of Margaret's estate in 1999 and neighbors stated that they had not seen her since 2000. Dunn had repeatedly told his neighbors that she was being taken care of in a nursing home "up north."[2]

The story of Allan and Margaret Dunn is not the first story of a guardian abusing the system and the court failing to provide adequate oversight, and other stories have proven to be even worse.[3] Every time a story such as this surfaces, it raises the difficult questions of how such a scenario occurred under the watchful eye of the court and what can be done to prevent stories

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[1] J.D. expected May 2012, with a Certificate of Concentration in Elder Law, from Stetson University College of Law.

[2] Rodney Mitchell, *Investigators: Woman's Body Kept in Sun City Center Condo Freezer More Than a Decade*, St. Pete.Times (May 27, 2001) (available at http://www.tampabay.com/news/publicsafety/article1172013.ece).

[3] *See* ***Guardianships:*** *Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO-10-1046 app. III (Sept. 30, 2010) (describing several examples of abuse including the misappropriation and embezzlement of several wards' assets).

like these from occurring in the future. Whether rightly or wrongly, the sensationalism of these stories places a great amount of pressure on the court to reform the system and assure the public that these scenarios will not be played out again.[4]

The court has developed several new tools in an effort to change the public's perception of the process and assuage the frequently voiced concerns over it. Top among many of the complaints leveled at the system is the cost of a guardian and the opportunity it presents for abuse.[5] In an attempt to address these concerns and gain more power over the process, the courts have begun to rule in several opinions, and through statements made by judges in other forums, that the court is the "true" guardian of the ward.[6] Some Judges have opined that the individual commonly referred to as "the guardian of the ward" is not in fact a guardian, but a mere agent of the court.[7] Unfortunately, the principles of agency do not comfortably fit in the framework of guardianship. Imposing a principal-agent relationship between the guardian and the court creates a conflict of interest and a number of negative, unintended consequences.

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[4] Sen. Spec. Comm. on Aging, *Exploitation of Seniors: America's Ailing Guardianship System*, 109th Cong. 20 (2007) (Statement of Hon. Mel Grossman, administrative judge, Florida 17th Judicial Circuit Court, Fort Lauderdale, Florida) (noting that negative news articles can place cause judges to treat a case as a worst-case and therefore, apply more pressure on guardians.

[5] *See id.* at 4–5 (discussing the expense of a guardian and how it burdens and threatens the lower class); *see generally id.* (discussing the exploitation of wards at the hands of the guardian). This line of thinking has led the courts in Palm Beach County Florida to allow the clerk of the court to develop a hotline to report suspected guardian abuse and start its own investigation. This hotline is a novel idea that some believe greatly intrudes into the police powers delegated to the executive and is blurring the line of the court's role. Andy Reid, *Palm Beach County Launches Guardianship Fraud Hotline*, Sun Sentinel (Palm Beach) (Sept. 12, 2011) (available at http://weblogs.sun-sentinel.com/news/ politics/palm/blog/2011/09/palm_beach_county_launches_gua.html).

[6] *Seaboard Sur. Co. v. Boney*, 761 A.2d 985, 992 (Md. 2000); *see Wentzel v. Montgomery General Hospital*, 447 A.2d 1244, 1253 (Md. 1982); *Kicherer v. Kicherer*, 400 A.2d 1097, 1100 (Md. 1979); *Ownings v. Foote*, 818 A.2d 1149, 1156–1157 (Md. Spec. App. 2002), *reh'g denied*; Sen. Spec. Comm. on Aging, *supra* n. 4, at 19–20.

[7] *Seaboard Sur. Co*, 761 A.2d at 992; *Wentzel*, 447 A.2d at 1253; *Kicherer*, 400 A.2d at 1100; *Ownings*, 818 A.2d at 1156-1157; Sen. Spec. Comm. on Aging, *supra* n. 4, at 19–20.

In its rush to mend public perception, these courts are failing to see the forest for the trees and are hurting the guardianship system as a whole. This judicial philosophy is treating every guardian as a potential worst-case scenario and is driving away good ones as a result.[8] This Article will discuss this idea of the court as the true guardian of the ward and the guardian as its agent, the shortcomings of this view, and the negative consequences of this approach to mending the guardianship process. It will tackle this issue through examining guardian fee petitions in the State of Florida and how this policy creates unnecessary conflict.

Section two of this Article will look at the historic role of the court in protecting vulnerable individuals and the argument for the idea that the court is the true guardian and the court appointed guardian is a mere agent. The third section will discuss how the view of the court as the true guardian impacts guardian fee petitions in Florida. It will examine the statutory provisions for awarding fees and how the court is using its power as the true guardian to exert greater control over the guardian. Section four will look at the negative impact on the guardianship process of imposing a principal-agent relationship between the court and the guardian. Lastly, in section five, this Article will discuss the professionalization of guardians as a possible solution to solve some of the broad concerns many have of the guardianship process, including the concern over neglectful and abusive guardians.

II. The Court and Guardianship

A. The "Ultimate"[9] Guardian

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[8] Sen. Spec. Comm. on Aging, *supra* n. 4, at 20.
[9] *In re Farson's Estate*, 269 P.2d 600, 603 (Ariz. 1954).

The court is often viewed as the guardian of our rights and liberties.[10] However, its role in guardianship proceedings often seems antithetical to this idea. In a guardianship proceeding, the court adjudicates an individual, the ward, to be incapacitated, removes his rights, and appoints a guardian with a fiduciary responsibility to the ward to execute his rights.[11] The court's power in these proceedings is grounded in the common law doctrine of *parens patriae* and has since been codified in state guardianship laws.[12]

Parens patriae dates back to medieval chancery courts in England.[13] It has had a long history and translates from Latin as "father of the country."[14] The doctrine originally established the king as the protector of vulnerable children and incapacitated citizens.[15] English courts used the doctrine during the sixteenth century to create a wardship for those who were unable to care for themselves.[16] In the United States, the power of *parens patriae* is vested in the state and has been expanded to permit the states to act in a "quasi-sovereign" role to protect all of its citizens and its economy.[17]

Under the doctrine of *parens patriae* the court has a "plenary" power to grant whatever relief is necessary to protect the

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[10] Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 Alb. L. Rev. 841, 844 (2007).

[11] *Black's Law Dictionary* 776 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009).

[12] *Wentzel*, 447 A.2d at 1253.

[13] Jeffrey Blustein, *On the Doctrine of* Parens Patriae*: Fiduciary Obligations and State Power*, 2 Crim. Just. Ethics 39 (Summer/Fall 1983).

[14] *Wentzel*, 447 A.2d at 1253.

[15] George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?* 25 DePaul L. Rev. 895, 896–898 (1976).

[16] Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 Emory L.J. 195, 195–196 (1978). The court distinguished between "idiot" and "lunatics." *Id.* Idiots were individuals born a "fool" and lunatics were individuals that were just temporarily insane. *Id.* at 195n. 6, 196 n. 7. The crown became a trustee of lunatics, but took a beneficial interest in idiots. *Id.* at 196.

[17] Curtis, *supra* n. 15, at 907–914. "As a quasi-sovereign, the state no longer seeks to protect a dependent class; rather, its interest lies in the protection of the entire *patria*." *Id.* at 908

vulnerable individual.[18] This power and those vested in the court through state statutes make the court, as the Arizona Supreme Court called it in 1954, the ultimate guardian in guardianship proceedings.[19] However, some have taken this idea of the court as the ultimate guardian and have interpreted it to mean that the court is the true guardian of the ward.[20] This interpretation of the court as the true guardian is incorrect. The court's role as guardian in guardianship proceedings is no different than the role it serves as guardian of all of rights and liberties in civil and criminal proceedings. Calling the court the true guardian of the ward places the court in an inappropriately greater relationship to the ward than to other parties that appear before it.

B. The "True"[21] Guardian

The belief that the court is the true guardian of the ward diminishes the role of the individual, commonly refer to as the guardian. It vests far more power in the court than the court's current responsibility of insuring that the ward is being protected, and creates in the judge a greater duty to the ward than to other individuals.[22] Such a principle poses a potential threat to the due process interests of the guardian.

There are a string of cases in Maryland that further this view of the court as the true guardian.[23] The leading case in Maryland is *Kircherer v. Kircherer*.[24] In this case, the ward's husband and son were appointed co-guardians.[25] The husband and

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[18] *Wentzel*, 447 A.2d at 1253.

[19] *In re Farson's Estate*, 269 P.2d at 603. In its opinion, the Court sought to affirm the powers granted to probate judges by the legislature. *Id.*

[20] *Seaboard Sur. Co.*, 761 A.2d at 992; Sen. Spec. Comm. on Aging, *supra* n. 4, at 19-20.

[21] *Seaboard Sur. Co.*, 761 A.2d at 992.

[22] Fla. Stat. § 744.372 (2011).

[23] *See Seaboard Sur. Co.*, 761 A.2d 985; *Wentzel*, 447 A.2d 1244; *Kicherer*, 400 A.2d 1097; *Ownings*, 818 A.2d 114 (speaking in terms of the court as the true guardian of the ward).

[24] 400 A.2d 1097.

[25] *Id.* at 1098.

his adopted son had a poor relationship and each sought to remove the other as guardian.[26] The court dismissed the case stating that both parties forfeited their appeal when they accepted their positions as guardian.[27] However, in its dicta, the court admonished the chancellor's decision to appoint the parties as co-guardians and stated, "the court is the guardian."[28] This opinion has been repeatedly cited by other courts to argue the idea that the court is the true guardian.[29]

The court appointed guardian is placed in a subservient position as a result of elevating the court to the position of true guardian of the ward. In its opinion in *Kircherer*, the court states that the guardian is "merely an agent" of the court.[30] The Honorable Mel Grossman, administrative judge for Florida's 17th Judicial Circuit Court, reinforced this view in a hearing before the Special Committee on Aging of the United States Senate when he stated that the guardian is "acting as an agent for the court" and is not really a guardian at all.[31]

It may seem frivolous and sound like this is an argument over semantics when distinguishing between the use of the word "true" and "ultimate," but words have meaning and those meanings have consequence in the legal realm. "True" and "ultimate" are different words with different meanings and different connotations. "Ultimate" means the final or conclusive end to a process.[32] It is

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[26] *Id.*

[27] *Id.* at 1100. The court state that they could not accept portions of an order they found to be favorable while at the same time seeking to appeal other portions of the same order that they found to be unfavorable. *Id.*

[28] *Id.* The opinion also stated that the court should not be concerned about the day-to-day decisions of a guardian and that an annual report is usually sufficient to insure that the ward is being protected and cared for. *Id.* at 1101.

[29] *Seaboard Sur. Co.*, 761 A.2d at 992; *Wentzel*, 447 A.2d at 1253; *Ownings*, 818 A.2d at 1156; *Mack v. Mack*, 618 A.2d 744, 750 (Md. Ct. App. 1993).

[30] *Kircherer*, 400 A.2d at 1100.

[31] Sen. Spec. Comm. on Aging, *supra* n. 4, at 19–20.

[32] *Webster's New World Dictionary of the American Language* 1541 (David B. Guralnik ed., 2d ed., World Publig. Co. 1970).

something that cannot be gone beyond.[33] "True" means the rightful, lawful, or legitimate; not false.[34] Calling the court the true guardian implies that the court appointed guardian is not a guardian at all and has a greatly diminished responsibility to the ward. Calling the court the ultimate guardian is a more accurate description. It implies that the process has layers of guardians, with each responsible for protecting the ward, and that the court is just the last option, the backstop to the whole process. Making the court *the* guardian rather than *a* guardian creates problems in the system.

C. "No one can serve two masters."[35]

Under the current law, treating the guardian as an agent of the court creates a built in conflict of interest and a very complicated situation for the guardian. It requires the guardian to serve as both a fiduciary to the ward and an agent of the court. This makes him responsible for acting in the best interest of the ward while simultaneously carrying out the will and interest of the court. While the interests of the two parties are often the same, and they should be the same, there are scenarios where the interests of the two parties diverge.

Interestingly, the court is using dubious support in its use of escalating language to grant the court greater control over guardians.[36] In *Kircherer*, the first case the court cites to support its argument is the 1853 case of *Ellicott v. Warford*.[37] This case deals not with a guardianship, but with a former guardian who was subsequently appointed the receiver of the deceased ward's estate.[38] In its opinion, the court does not call the receiver an agent

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[33] *Id.*
[34] *Id.* at 1526.
[35] *Matthew* 6:24 (New Intl.).
[36] *Kicherer*, 400 A.2d at 1100.
[37] *Ellicott v. Warford*, 4 Md. 80 (1853).
[38] *Id.*

of the court, but merely an officer of the court.[39] The other case the court in *Kircherer* cites is *Seattle-First Bank v. Brommers*.[40] This case, unlike *Ellicott*, does deal with a guardian-ward relationship.[41] However, similar to the court's opinion in *Ellicott* the guardian is not referred to as an agent of the court, but as an officer of the court.[42] Serving as an agent of the court is very different from serving as an officer of the court. An officer of the court has a duty of candor and is required to obey court rules.[43] Lawyers themselves are typically referred to as officers of the court.[44] It would be incorrect to call an attorney an agent of the court since his duty is to his client. Likewise, there is no doubt that the guardian is an officer of the court, but it is incorrect to call a guardian an agent of the court because his duty is to the ward.

The idea of the guardian as a mere agent of the court presents several conceptual and practical issues. First, it harkens to the Biblical passage that states, "No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other."[45] Second, the guardian has a duty that runs to the court and the ward, but there is no such duty running towards the guardian.[46] If the interests of two parties' conflict, the guardian is left "holding the bag" with few options at his disposal. Lastly, the role of the guardian does not fit the classic definition of an agent.[47] An agency is a fiduciary relationship where a principal appoints an agent to act on his behalf and under his control.[48] This definition does not accurately describe the court-guardian relationship since the guardian is to act on behalf of the

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[39] *Id.*

[40] *Seattle-First Nat. Bank v. Brommers*, 570 P.2d 1035 (Wash. 1977).

[41] *Id.* at 1036–1037.

[42] *Id.* at 1041. The opinion refers to the court as the "superior" guardian, a concept similar to that of the court as the "ultimate" guardian. *Id.*

[43] *Black's Law Dictionary*, *supra* n. 11, at 1195.

[44] *Id.*

[45] *Matthew* 6:24 (New Intl.).

[46] Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?* 37 Stetson L. Rev. 53, 57 (2007).

[47] *See Restatement (Second) of Agency* § 1 (1958).

[48] *Id.*

ward.[49] These issues frequently present themselves and can be best understood by examining guardian fee petitions.

III. Guardian Fee Petitions

A. Flordia Statutes § 744.108—Guardian's and Attorney's Fees—Relevant Statutory Law

The court's three most useful tools in overseeing guardians are annual plans, annual accountings, and guardian fee petitions. In Florida, an annual plan must be filed every year updating the court on the condition of the ward, the ward's needs, and how those needs will be met in the coming year.[50] An annual accounting must accompany the annual plan and present a full account of the ward's property.[51] The statutes do not require the guardian to file a petition for fees with any frequency,[52] but most jurisdictions stipulate requirements to the frequency of fee petitions in its administrative orders.[53] Petitions must be accompanied by an itemized description of all the services the guardian has provided.[54] While all three forms of oversight provide good examples for why the model of the guardian as an agent of the court presents issues, guardian fees perhaps presents the issues the clearest because it affects how professional guardians are paid and creates the greatest level of tension between the court and the guardian.

Florida Statutes § 744.108, entitled, "Guardian's and attorney's fees and expenses," sets out the standard and criteria for the court to approve guardian fees.[55] The statute entitles guardians

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[49] Fla. Stat. § 744.102(9); 39 C.J.S. *Guardian & Ward* § 2 (2011).
[50] Fla. Stat. § 744.3675.
[51] Fla. Stat. § 744.3678.
[52] Fla. Stat. § 744.374.
[53] *See Guardianship Procedures*, Administrative Order S-2010-101 at 9 (Fl. Thirteenth Judicial Circuit Dec. 9, 2010) (requiring them to cover no more than a twelve-month period).
[54] Fla. Stat. § 744.108(5).
[55] Fla. Stat. § 744.108.

to "a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward."[56] In this section, the legislature sets out nine criteria the court must consider in determining the reasonableness of fees.[57] Those criteria are

(a) The time and labor required;
(b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;
(c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;
(d) The fee customarily charged in the locality for similar services;
(e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
(f) The results obtained;
(g) The time limits imposed by the circumstances;
(h) The nature and length of the relationship with the incapacitated person; and
(i) The experience, reputation, diligence, and ability of the person performing the service.[58]

The ward's estate is responsible for paying court and attorney fees related to a fee petition unless the court finds the guardian's petition to be "substantially unreasonable."[59] Also, it is important to note that Florida Statutes § 744.391 states that the court must appoint a guardian ad litem for the ward if the guardian's interest becomes adverse to those of the ward.[60]

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Fla. Stat. § 744.391.

B. Conflict of Interest

Along with abuse, the cost of a guardianship to the ward is one of the main issues the court wrestles with.[61] As Ira Salzman described before the Senate Special Commission on Aging, fees for a guardian can add up quickly.[62] The simplest guardianships can consume as much as twenty-seven hours a year of the guardian's time at a rate of $40 an hour or more.[63] Those hours can increase greatly if the ward is ill or lives at home.[64] This calculation does not include attorney's fees that are also payable out of the ward's estate.[65]

In its role as the true guardian, the court is motivated to reduce the cost of a guardian—often at the expense of guardians themselves.[66] The court will often lower guardian fees with little explanation.[67] While fees cannot be arbitrarily reduced, the reasons the court often gives to justify its decision to lower fees are nothing more than pretext.[68] While reducing the cost of having a guardian may be a concern to society and in the short-term interest of the ward, it has a long-term detriment to the interests of both parties.

Being a guardian is a difficult and time-consuming task.[69] Those who agree to take on the role subject themselves to personal liability.[70] Guardians are constantly being second-guessed after the

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[61] *See* Sen. Spec. Comm. on Aging, *supra* n. 4, at 4.

[62] *Id.*

[63] *Id.*; Joint Circuit Workgroup on Guardian Fees, *Report* 1 (Dec. 6, 2004) (available at http://www.jud6.org/GeneralPublic/GuardianshipForms/Report%20of%20Guardian%20Fee%20Workgroup.doc). The workgroup included general magistrates and professional guardians from the Sixth and Thirteenth Judicial Circuits in Florida and made recommendations to the Administrative Judges to adopt a more uniform practice with regard to guardians in the two jurisdictions. *Id.*

[64] Sen. Spec. Comm. on Aging, *supra* n. 4, at 4.

[65] Fla. Stat. § 744.391.

[66] *See* Sen. Spec. Comm. on Aging, *supra* n. 4, at 4.

[67] *See In re Guardianship of Shell*, 978 So. 2d 885 (Fla. 2d Dist. App. 2008).

[68] *See id.*

[69] Sen. Spec. Comm. on Aging, *supra* n. 4, at 4.

[70] *Id.*

fact and are required to frequently appear before the court.[71] Dealing with the legal system is not a particularly enjoyable activity for many people and fixing the problems with the guardianship process at the expense of the guardian is unfair. It unduly burdens those who are in the best position to turn around public opinion of the guardianship process and curb abuse.

In re Guardianship of Shell is a great example of the many issues that present themselves in guardian fee petitions.[72] In this case, the guardian, Lutheran Services, filed a petition for guardian fees.[73] The Elder Justice Center (EJC) reviewed the petition and "recommended" certain reductions.[74] The court approved the fee petition with the recommended reductions, which prompted Lutheran Services to petition the court for a hearing.[75] The hearing was granted, but the court denied Lutheran Services' objections to the fee order.[76] On appeal, Lutheran Services argued that the probate court's order lacked competent and substantial evidence to support the reduction.[77] In its opinion on appeal, the court states that it has the discretion to deduct time claimed by a guardian for "noncore, delegable tasks that are better performed by others."[78] Among the items the guardian sought to be paid for that the court felt were delegable tasks were picking up a cake for the ward's birthday and making three phone calls in one day to the ward's doctor, which the court assumed was to set-up an appointment.[79] The appeals court ultimately affirmed the trial court's ruling

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[71] *Id.*

[72] 978 So. 2d 885.

[73] *Id.* at 887–888.

[74] *Id.* The EJC is a program created by the Thirteenth Judicial Circuit Court that acts as an auditor and reviews fee petitions. *Id.* at 887.

[75] *Id.* at 888.

[76] *Id.*

[77] *Id.* at 888–889.

[78] *Id.* at 889.

[79] *Id.* at 888. The guardian was being reimbursed at an hourly rate of $70. The ward was charged $21 for the three phone calls, which is a tenth of an hour for each conversation. *Id.*

because it stated that the guardian did not provide any further testimony as to the reasonableness of the charges.[80]

The statute does not state any requirement that the guardian delegate tasks to a third party.[81] Such a requirement would be unwieldy and require the court to micromanage the day-to-day tasks of the guardian. In *Shell*, the court hinted that it felt a stronger duty to the ward than the guardian.[82] This sentiment is the influence of the idea of the court as the true guardian. Such a position that the court's priority is to the ward is, as Lutheran Services rightly argued, an infringement on the guardian's right to due process.[83] The court's decision to reduce fees must be based on "competent substantial evidence."[84] The court supported its decision with little more than its notion that someone else should have performed the services and that the guardian did not adequately explain herself further at the hearing.[85] However, the court never finds or states that the tasks billed for were unnecessary or themselves unreasonable. It states solely that the guardian should have paid someone else $15 per hour rather than doing the tasks herself.[86] Unfortunately for Lutheran Services, the probate court's decision is very hard to overturn on appeal because it is reviewed only for an abuse of discretion.[87]

Throughout its initial hearing in the probate court and on appeal, Lutheran Services expressed its feeling of being

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[80] *Id.* at 891. The court also uses the dubious logic that the fee reduction in this petition was reasonable because the guardian had not challenged the court's reduction of fees in previous petitions. *Id.*

[81] *See* Fla. Stat. §§ 744.01–744.73.

[82] *Id.* at 889–890 (stating that the court has the duty and the right to protect the ward, but that it must award the guardian nothing more and nothing less than fair and reasonable compensation, which seems to imply that awarding guardian fees is contrary to the interest of the ward).

[83] *Id.* at 888.

[84] *In re Guardianship of Sitter*, 779 So. 2d 346, 348 (Fla. 2d Dist. App. 2000).

[85] *Shell*, 978 So.2d at 888, 891.

[86] *Id.* at 888.

[87] *Id.* at 890.

"micromanaged" and that continued micromanagement from the court and the "nitpicking" of its fee petitions would ultimately drive it out of business.[88] It stated that it did not appreciate and felt guardians should not be told how long an activity "should" take.[89] Ironically, Lutheran Services very perceptively pointed out how such micromanagement creates even more expenses to the ward through additional hearings.[90] The court largely dismissed these concerns despite it lauding Lutheran Services for being a "renowned nonprofit organization" and having "impeccable credentials" of serving as a guardian.[91] Sadly, Lutheran Services' warning held true and it no longer serves as a guardian in Hillsborough County, Florida.[92]

Shell is a good example of how the interests of the ward and the interests of the court can conflict, particularly over the long term. The court's concerns are society's concerns.[93] In guardianship matters, those concerns are keeping the cost of guardianship down, preventing abuse, and other broader ethical and policy concerns such as balancing the right to die with maintaining the ethical obligations of the medial field.[94] These larger societal concerns are in conflict with the guardian's duty to the ward, which is to act in his best interest. The day-to-day decisions of the guardian on how to execute the interests of the ward should not be micromanaged by the court.[95] Such micromanagement is too burdensome and costly to the court and the ward.

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[88] *Id.* at 888–889, 892.
[89] *Id.* at 892.
[90] *Id.*
[91] *Id.*
[92] *See* Lutheran Services Florida, *Guardianship Program: Services for Elderly and Disabled Adutls*, http://www.lsfnet.org/1/Services/Adult/Guardianship.htm (accessed Nov. 5, 2011) (serving as a guardian only for incapacitated individuals over eighteen years of age and living in Sarasota, Manatee, Escambia, Santa Rosa, Walton, Okaloosa, Charlotte, and DeSoto counties).
[93] Frolik, *supra* n. 46, at 58.
[94] *Id.*
[95] *Kicherer*, 400 A.2d at 1100.

The court is doing several things when it finds pretextual reasons to reduce the guardian's fees. One, it is saying that the cost of a guardian outweighs the benefit of a guardian. As a result, the court is implicitly stating that guardian's interests have become adverse to the ward because the guardian is not acting in the ward's best interest by charging the ward an unreasonable amount.[96] When the court finds the reasonableness of the guardian's fee petition to be in doubt, it should appoint a guardian ad litem to protect the ward's interest.[97] This would allow both the guardian and the ward to speak to the reasonableness of the petition, allow the court to remain impartial, and ensure the ward is being protected.[98]

IV. The Impact of the Court's Current Approach to Awarding Fees

Guardianship proceedings undoubtedly place the judge in a difficult position. They are tasked with the heavy burden of ensuring that those who are unable to protect themselves are not being taken advantage of. The consequence of poor judgment can be devastating. However, placing greater power in the hands of judges and reducing the guardian to a mere agent of the court is not the solution to the problem.

While the tragic stories of abuse at the hands of a guardian can hurt the image of the court, nothing hurts the court's authority more than the perception that it does not treat the individuals before it fairly. Arthur T. Vanderbilt, the Chief Justice of the Supreme Court of New Jersey, once said,

> It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the

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[96] *Shell*, 978 So.2d at 889 n. 1.
[97] *Id.*
[98] Fla. Stat. § 744.391.

> law. If they have respect for the work of their courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.[99]

Reducing the guardian to an agent of the court creates conflicting duties for the guardian and a tenuous relationship with the court. One of the reasons for such a tenuous relationship between the two parties is the court's motivation for relegating the guardian to serving as its agent and the presumption it creates. The court is motivated by the desire to correct the image of it having poor oversight of the system which leads to what Judge Grossman calls the default position that every case is a worst-case scenario.[100] This default position creates a presumption against the guardian of wrongdoing. Few people, if any, enjoy being accused of wrongdoing. Being a guardian is difficult work and they are often under compensated.[101] Treating guardians as wrongdoers and being overly critical of fee petitions will only serve to drive away guardians, particularly professional guardians, at the expense of the ward. Good people and good guardians are less likely to put up with the constant questioning of their integrity. It will ultimately lead to these individuals resenting the court and the role it plays.

Second, the guardian is in a tough spot under the view that it is a fiduciary to the ward and an agent of the court when the court's interest demands that guardian fees be lowered. The guardian has a duty to the court to reduce costs, but also has a continuing duty to the ward to ensure that his best interest is being cared for. Being placed in such a position forces professional guardians to make one of three decisions. The first is to take on more paying wards, while simultaneous reducing the number of

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[99] Arthur T. Vanderbilt, *The Challenge of Law Reform* 4–5 (Princeton U. Press 1955).
[100] Sen. Spec. Comm. on Aging, *supra* n. 4, at 20.
[101] *Id.* at 4.

hours and amount of attention each individual ward receives. The second option is to resign as guardian. And the third option is to continue to scrape along being under compensated until his business model is no longer feasible and he is forced to cease serving as a guardian. Ultimately, option three leads to option two. Neither of these options is particularly attractive. Other than appealing the decision, which may be costly and difficult to win, the guardian has nowhere to go since neither the court nor the ward owe him a duty.

The third problem with categorizing the guardian as an agent of the court is that it does not fit the definition of an agency.[102] The guardian's power comes from the court, but he is expected to act on the behalf and in the best interest of the ward.[103] There is no doubt that the court is responsible for supervising the guardian and has the power to limit the guardian's actions, but as historically understood, the guardian acts for the ward, not the court.[104] The guardian holds a duty to the ward and is liable to the ward in a manner in which the court is not. In an agency, the principal is liable for the actions of its agent,[105] but the ward is incapable of holding the court or the judge liable in a guardianship proceeding under the doctrine of judicial immunity, which grants judges immunity from damages as a result of acts carried out in their judicial discretion even if those acts are malicious.[106]

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[102] *Restatement (Second) of Agency* § 1.

[103] Fla. Stat. § 744.102; Fla. Stat. § 744.3715.

[104] Frolik, *supra* n. 46, at 57.

[105] *Id.*; 3 Am. Jur. 2d *Agency* § 262 (2011).

[106] *Pierson v. Ray*, 386 U.S. 547, 553–554 (1967) *Pierson* involved the liability of local police officers and judges under the Civil Rights Act, which makes any person liable who deprives another person of their civil rights under the color of law. The Supreme Court held that the Civil Rights Act did not abolish immunity for judges and that a judge is immune from liability even if he is accused of acting maliciously or corruptly because judges should not fear personal reprisal when making difficult decisions. *Id.*; *Stump v. Sparkman*, 435 U.S. 349, 356–357 (1978) *Stump* involved a suit against petitioner's mother, mother's attorney, medical staff, and the judge who ordered her to be sterilized at the age of fifteen. *Id.* The Supreme Court held that the judge could not be held liable despite his procedural errors, lack of specific statutory authority, and the informality of the proceedings. *Id.*

Calling the guardian an agent of the court does not make sense under our understanding of the guardian as a fiduciary to the ward. Viewing the relationship between the court and guardian as an agency creates several problems such as the court's liability and the potential for it to become an advocate rather than a referee and fact-finder. Guardianship is a distinctly unique area of law where the principles of agency do not aptly apply.

V. Potential Solution

As Ira Salzman reminded everyone before the Senate's Special Committee on Aging, it is important to remember that guardianship is a weapon against abuse.[107] The majority of guardians do their jobs well and are a valuable tool in the fight to protect vulnerable citizens.[108] Guardians are on the frontline of preventing abuse and should be given the tools to perform their job effectively.

One potential solution states could implement to improve the guardianship process is to professionalize guardians. Professionalism would require all guardians to have a baseline of education that would include learning the law that governs the field, the ethical standard they are obligated to uphold, and other practical skills such as managing the ward's funds and how to make decisions.[109] Guardians would also have to receive certification, which would include a background check, and participate in continuing education.

Professionalizing guardians would give guardians the respect they deserve, create a collegial environment between guardians, and promote self-regulation.[110] Parts of

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[107] Sen. Spec. Comm. on Aging, *supra* n. 4, at 3, 4.

[108] *Id* at 20. Judge Grossman estimated that 90 percent of guardians do their job well. *Id.*

[109] Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 Stetson L. Rev. 941, 966–967, 971–974, 977–981 (2002).

[110] *Id.*

professionalizing guardians have been implemented in some states, but not quite as robustly as it should be.[111] Many of the issues the court faces with guardians could be prevented from the beginning by selecting individuals who are qualified and knowledgeable about the role guardians are expected to play. While this solution may not directly address the issue of the cost of a guardian, it will be successful in achieving the goal of a guardianship – protecting vulnerable individuals from abuse.

VI. Conclusion

The court's job after the initial adjudication of incapacity is to oversee the guardianship by reviewing it annually and ensuring that the ward is being protected and that the guardianship is still appropriate.[112] In most situations, the court should stay out of second guessing the day-to-day decisions of the guardian.[113] Guardianship is not a perfect tool and there are ways it can be improved, but imposing a principal-agent relationship between the court and the guardian is an ineffective means of reform and will only lead to greater issues. The court should do a better job of partnering with guardians to ensure they are receiving the tools they need to be effective rather than treating guardians as wrongdoers and pawns of the court. The court and the guardian can provide greater protection for the ward by working together.

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[111] *Id.* at 974–977; *see* Fla. Stat. § 744.3145 (requiring guardians to receive a minimum of eight hours of instruction).

[112] Fla. Stat. § 744.372.

[113] *Kicherer*, 400 A.2d at 1100.

INTERNATIONAL ELDER LAW RESEARCH: AN UPDATED BIBLIOGRAPHY

This bibliography is an update to the work published in the Stetson University College of Law *Journal of International Aging, Law and Policy*, Volume 11. The original project was a group effort,[1] aimed at elder law practitioners and policy makers. As an update, this bibliography focuses on material published within the last five years in an attempt to supplement that original work.

Elder law, on an international field, encompasses differences in socio-legal systems, levels of development, and economic stability, all of which are reflected in a country's policy regarding issues related to aging. There are obvious, additional distinctions: civil versus common law; socialist versus capitalist economic systems; religious versus secular societies; and homogenous versus multi-cultural populations, which come together to determine underlying elder law policies.

A wide variety of search terms may be used to locate international elder law resources including the following:

Aged–Legal Status	Gerontology	Nursing Homes
Elder Abuse	Guardians	Older People
Elder Law or Elderlaw	Legal Assistance to the Aged	Retirement
Geriatrics	Long-term care - (topics)	Retirement Communities
		Senior Law

In addition, search terms related to specific legal topics may also be useful in locating pertinent resources. For example,

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[1] Pamela D. Burdett, M.A.L.I.S.; Wanita Scroggs, J.D., M.A.L.I.S.; Julieanne Stevens, J.D., M.L.S.: Rebecca S. Trammell, J.D., M.L.S.; and Sally G. Waters, J.D., M.L.S.

Consumer Fraud	Health Care Reform	Reverse Mortgages
Estate Planning	Living Wills	Succession
Financial Planning	Probate Law	Wills

For country specific resources, add the name of the country to the search term, or use "international" with various search terms to locate more broadly focused materials.

Materials in this bibliography are arranged in the following categories:

Agencies and Organizations that focus on international elder law issues

Conventions, Documents and Reports relating to international elder law

Web Sites and Databases with a specific international elder law focus

Journals and Books provides references to articles and titles focusing on international elder law arranged in the following topics:

General Legal Issues
Economic Policy
Health and Quality of Life
Housing Policy
Social Policy

International Elder Law Journals is a list of the major journals with a primary focus on international elder law issues.

It should be noted that this is a selective bibliography, and no attempt has been made to include every agency, organization,

convention, document, report, database, web site, article, or book relating to international elder law. Given the tremendous growth in resources in the area of international elder law such an undertaking is beyond the scope of this bibliography. Rather this bibliography is intended to serve as an overview of materials published in this field during the last ten years and to provide a starting point for further research in international elder law. The Authors welcome your comments and suggestions regarding this project.

Agencies and Organizations

AARP (formerly American Association of Retired Persons), http://www.aarp.org

> AARP is the leading nonprofit organization for people aged 50 and over in the United States; with over 35 million members. Its aim is to provide information and advocacy to enhance the quality of life for all persons as they age. The AARP website provides links to much information on international aging issues. A number of the specific links are included in this section
>
> AARP
> 601 E. Street NW
> Washington DC 20049
> 1-888-OUR-AARP (1-888-687-2277)
> AARP Global Aging
> http://www.aarpinternational.org
>
> Global Aging Program
> Contact the Global Aging Program at intlaffairs@aarp.org

AARP International Forum in Long-Term Care
http://www.aarpinternational.org/resourcelibrary/resourcelibrary_show.htm?doc_id=707449

AARP International: Resources

http://www.aarpinternational.org/resourcelibrary/

International and Regional Organizations and Networks Concerned With Aging

Organizations of Seniors around the world

AARP Public Policy Institute
http://www.aarp.org/research/ppi/

The AARP Public Policy Institute (AARP PPI) focuses on federal, state, and international policy research and analysis. Its aim is to foster public debate on issues involving the older population.

ADMINISTRATION ON AGING (UNITED STATES)
http://www.aoa.gov/

The Administration on Aging's website provides information about the agency itself, federal legislation on aging issues, and programs geared specifically to the older population and to caregivers. A section of the website deals specifically with international issues.

Administration on Aging
One Massachusetts Ave NW
Washington, DC 20201
Phone: 202-619-0724
E-mail: aoainfo@aoa.hhs.gov

AGEING AND ETHNICITY Web
http://www.priae.org

The Ageing and Ethnicity site provides information on issues related to elder ethnic minority persons throughout the world.

E-mail: info@priae.org

ALZHEIMER EUROPE
http://www.alzheimer-europe.org/

Alzheimer Europe, which has as its goal advancing the care and treatment of patients, is a non-profit composed of thirty-one organizations from twenty-six countries.

CENTER FOR DEMOGRAPHY OF HEALTH AND AGING (CDHA)
http://www.ssc.wisc.edu/cdha/

The Center for Demography of Health and Aging (CDHA), at the University of Wisconsin–Madison, sponsors research in several areas of aging, including inequalities in health care and international comparisons of health and aging. The Center is itself sponsored by the National Institute on Aging.

Center for Demography of Health and Aging
University of Wisconsin–Madison
1180 Observatory Drive
Madison, WI 53706 USA

Phone: 608-262-9836
Fax: 608-262-8400

Email: cdha@ssc.wisc.edu

HASTINGS CENTER REPORT
http://www.thehastingscenter.org/publications~C~efault.aspx

The Hastings Center, founded in 1969, is a research institute devoted to the study of bioethics and health care. Much of its research centers on end-of-life issues, public health, and new technologies. The Center has a world-wide group of experts and researchers who examine current and breaking ethical and social issues in medical science.

The Hastings Center
21 Malcolm Gordon Road
Garrison NY 10524-4125
Telephone: (845) 424-4040
Fax: (845) 424-4545
Email: mail@thehastingscenter.org

HELPAGE INTERNATIONAL
http://www.helpage.org/Home

HelpAge International is a world-wide network putting together non-profit groups that work with disadvantaged older people throughout the world and seek to improve their quality of life.

PO Box 32832, London N1 9ZN, UK
Courier address
1st floor, York House, 207-221 Pentonville Road
London N 1 9UZ, UK
Telephone: +44 20 7278 7778
Fax: +44 20 7713 7993

INTERNATIONAL ASSOCIATION OF GERONTOLOGY AND GERIATRICS
http://www.iagg.info/

> With membership of over 45,000 professionals worldwide, in over 64 countries, the IAGG and its member groups provide research and training in gerontology and related fields. The IAGG has consultative status with the United Nations.
>
> E-mail: iagg@iagg.com.br

INTERNATIONAL FEDERATION ON AGEING
http://www.ifa-fiv.org/

> IFA is a network of groups and persons seeking to improve the lives of older persons throughout the world by changing policies and bringing public and private sectors together on social problems of the aging.
>
> Contact Information
> 351 Christie Street
> Toronto, Ontario, M6G, 3C3 Canada
> Telephone: 1-416-342-1655
> Facsimile: 1-416-392-4157

INTERNATIONAL GUARDIANSHIP NETWORK
http://www.international-guardianship.com/

IGN is a non-profit organization dedicated to providing support, information, and networking opportunities for guardians worldwide and to put the legal proceedings of the UN Convention on the Rights of Persons with Disabilities into practice.

Contact Information
Schneewittchenstraße 26 12555
Berlin, Germany
E-mail: btvtreptow@aol.com

INTERNATIONAL LABOUR ORGANIZATION (See UNITED NATIONS)

INTERNATIONAL LONGEVITY CENTER
http://www.ilcusa.org/who/world.htm

The non-profit International Longevity Center-USA has as its goal highlighting aging and longevity in positive ways, showing in its research and educational programs the contributions that the aging can make to the world.

The International Longevity Center is now located at the Mailman School of Public Health at Columbia University.

International Longevity Center
Mailman School of Public Health
Columbia University
722 W.168th Street
14TH floor
New York, NY 10032

Contacts:
Morriseen Barmore, mb3514@columbia.edu
Phone: 212-305-0424
Mario J. Panlilio, Jr., mp3070@columbia.edu
Phone: 212-305-4985

ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) AGEING SOCIETY
http://www.oecd.org/home/0,3675,en_2649_201185_1_1_1_1_1,00.html

More than thirty countries are members of the OECD, which issues publications and statistics regarding economic and social issues, including education, development, and science; the OECD also has relationships with over seventy other countries and groups. The OECD provides country surveys on major social and economic issues and helps policy-makers throughout the world decide on their positions and strategies. The OECD has specific information dealing with the implications of aging throughout the world.

Contact Information
2001 L Street NW, Suite 650
Washington, DC 20036-4922
Telephone: 202-785-6323
E-mail: Washington.contact@oecd.org

UNITED NATIONS (Specific International Elder Law Programs are listed below)
http://www.un.org/

UN ECONOMIC AND SOCIAL DEVELOPMENT
http://www.un.org/en/development/index.shtml

Division for Social Policy and Development
http://social.un.org/index

The UN's Division for Social Policy and Development has as its goal the cooperation of countries worldwide in improving the quality of life

for their aging and other possibly disadvantaged persons.

Department of Economic and Social Affairs, United Nations,
DC2-1320,
New York, NY 10017, USA

UN PROGRAMME ON AGEING
http://social.un.org/index/Ageing.aspx

Division for Social Policy and Development
United Nations
Division for Social Policy and Development
Department of Economic and Social Affairs, United Nations,
DC2-1320, New York, NY 10017

INTERNATIONAL LABOUR ORGANIZATION
http://www.ilo.org/global/lang--en/index.htm

The International Labour Organization (ILO) of the UN brings governments, workers, employers and employees all together to promote labor and decent work practices throughout the world.

4 route des Morillons
CH- 12 1 1 Genève 22
Switzerland
Switchboard: +41 (0) 22 799 61 11

Fax: +41 (0) 22 798 8685
Website: http://www.ilo.org
E-mail: ilo@ilo.org

WORLD HEALTH ORGANIZATION
http://www.who.int/en/

> The World Health Organization, United Nations agency for health, seeks to help all persons throughout the world attain the highest level possible of physical, mental and social well-being. The WHO sponsors programs and research aimed at all populations, including the aging.

WHO---Prevention of elder abuse
http://www.who.int/ageing/projects/elder_abuse/en/index.html

Conventions, Documents and Reports

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS
http://www.hcch.net/index_en.php?act=conventions.text&cid=71

EUROPEAN CONVENTION ON SOCIAL SECURITY
http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=078&CM=1&CL=ENG

> Council of Europe
> Social Policy Department
> G Building
> F-67075 Strasbourg Cedex
> Head of the Department: Annachiara Cerri (annachiara.cerri@coe.int)
> Co-Secretary of CDCS: Sheila Pidl (sheila.pidl@coe.int)

HELSINKI CONFERENCE ON DISSEMINATION OF EUROPEAN
RESEARCH RESULTS ON AGEING. 2006
http://cordis.europa.eu/life/src/conf-ageing.htm

ILO CONVENTION (C102) CONCERNING MINIMUM STANDARDS OF SOCIAL SECURITY.
http://www.ilo.org/ilolex/english/convdisp1.htm

ILO CONVENTION (C128) CONCERNING INVALIDITY, OLD AGE
AND SURVIVORS' BENEFIT CONVENTION
http://www.ilo.org/ilolex/cgi-lex/convde.pl?C128

LOLEX-International Labour Office
http://www.ilo.org/ilolex/english/

ILOLEX, a trilingual database, contains Conventions and Recommendations and other kinds of documents issued by the ILO.

MADRID INTERNATIONAL PLAN OF ACTION ON AGEING
http://www.un.org/ageing/documents/building_natl_capacity/guiding.pdf

The Madrid Plan lists the objectives and recommendations determined by the Second World Assembly on Ageing 2002.

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
www.un.org/disabilities/default.asp?id=150

UN ECONOMIC AND SOCIAL COUNCIL REPORT
Major Developments in the Area of Ageing since the Second World Assembly
on Ageing
http://www.globalaging.org/agingwatch/events/CSD/2006/majordev.pdf

Follow-up to the Second World Assembly on Ageing Report of the Secretary-General

UNITED NATIONS INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS
http://unstats.un.org/unsd/cr/family2.asp?Cl=220

UNITED NATIONS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
http://www2.ohchr.org/english/law/cescr.htm

UNITED NATIONS. Second World Assembly on Ageing, Madrid Spain, 8 - 12 April 2002.
http://www.un.org/swaa2002/

YOKOHAA DECLARATION
http://www.international-guardianship.com/yokohama-declaration.htm

The Yokohama Declaration affirms the importance of guardianship laws and sets goals for proper implementation of guardianship laws around the world. It was set forth at the first World Congress on Adult Guardianship Law in 2010 in Yokohama, Japan.

Websites and Databases

AARP AgeLine® DATABASE
http://www-static-w2-md.aarp.org/researh/ageline/searchestogo.html

AARP's AgeLine database, which is easily accessed via the Age Source web page, provides abstracts of research from medical and social science sources, and provides some consumer content as well. Links

are given for persons wanting to purchase the entire document. It can be searched at no cost.

AGE SOURCE WORLDWIDE
http://www.aarpinternational.org/database/

Information sources available on AARP's Age Source database have a specific focus on aging and are easily available on the internet. Age Source is searchable by subject, country, language, or any combination of those.

AGEING POPULATIONS RESOURCE GUIDE
http://www.eldis.org

ELDIS GATEWAY TO DEVELOPMENT INFORMATION
http://www.eldis.org/ageing/index.htm

Eldis is one of a family of knowledge services from the Institute of Development Studies, Sussex.

GLOBALHEALTH.GOV
http://www.globalhealth.gov

The Office of Global Health Affairs, part of the U.S. Department of Health and Human Services, represents the Department to other governments on international and refugee health issues. The website offers links to country information, world health statistics, global health topics, and fact sheets.

INTERNATIONAL AGING
http://www.aoa.gov/AoAroot/AoA_Programs/Special_Projects/Global_Aging/index.aspx

The AOA's Global Ageing resources page gives information from the UN, WHO, and other federal and nongovernmental sources.

INTERNATIONAL PROGRAMS (U.S. Social Security Administration)
http://www.ssa.gov/international/index.html

This site provides information about the U.S. program of international Social Security agreements, about receiving U.S. Social Security benefits outside the United States and about Social Security programs in other countries. Links to the text and detailed description of the Social Security agreements and Social Security web pages of other countries are included.

Web Bibliographies

PENN STATE'S DICKINSON SCHOOL OF LAW INTERNATIONAL
SOURCES ON AGING
http://law.psu.edu/academics/clinics_and_externships/elder_law_clinic_
bibliography/international_resources

PACE LAW SCHOOL'S RESOURCES FOR RESEARCH IN ELDER
LAW
http://libraryguides.law.pace.edu/content.php?pid=113977&sid=985663

VIRTUAL CHASE
http://virtualchase.justia.com/wiki/elder-law
Useful source of web links to all areas of elder law.

General Legal Issues

Journal Articles

Eve M. Brank, *Elder Research: Filling an Important Gap in Psychology and Law*, 25 Behavioral Sci. & L. 701 (2007).

Israel Doron, *Bringing the Law to the Gerontological Stage: A Different Look at Movies and Old Age*, 62 Intl. J. Aging & Hum. Dev. 237 (2006).

Richard L. Kaplan, *Honoring Our Parents: Applying the Biblical Imperative in the Context of Long-Term Care*, 21 Notre Dame J.L. Ethics & Pub. Policy 493 (2007).

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James H. Schulz & Robert H. Binstock, *Aging Nation: The Economics and Politics of Growing Older in America* (Johns Hopkins U. Press 2008).

Kim Dayton et al., *Elder Law: Readings, Cases, and Materials* (3d ed., Lexis-Nexis Publg. Co. 2007).

Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* (4th ed., West Group, 2006).

Rachel A. Pruchno & Michael A. Smyer, *Challenges of an Aging Society: Ethical Dilemmas, Political Issues* (Johns Hopkins U. Press 2007).

Robert H. Binstock & Linda K. George, *Handbook of Aging and the Social Sciences* (7th ed., Elsevier 2010).

UN Dept. of Econ. & Soc. Affairs, *World Economic and Social Survey 2007: Development in an Ageing World* (UN 2007).

Economic Policy

Journal Articles

T. Leigh Anenson & Karen E. Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*, 9 U. of Pa. J. Lab. & Empl. L. 495 (2007).

Allison Christians, *Taxing the Global Worker: Three Spheres of International Social Security Coordination*, 26 Va. Tax Rev. 81 (2006).

Richard L. Kaplan, *Crowding Out: Estate Tax Reform and the Elder Law Policy Agenda,* 10 Elder J.J. 15 (2002).

Elaine S. Kuntz, *Social Security Systems Around the World: Do Cultural Priorities Affect Their Development?* 18 Elder L.J. 99 (2010).

Elizabeth D. Tedrow, *Social Security Privatization in Other Countries - What Lessons Can Be Learned for the United States?* 14 Elder L.J. 35 (2006).

Lawrence H. Thompson, *US Retirement Income System*, 22 Oxford Rev. Econ. Policy 95 (2006).

Books

Nicholas A. Barr & Peter A. Diamond, *Reforming Pensions: Principles and Policy Choices* (Oxford U. Press 2008).

Gordon L. Clark et al., *Oxford Handbook of Pensions and Retirement Income* (Oxford U. Press 2006).

John Evans et al., *Pension Fund Governance: A Global Perspective on Financial Regulation* (Edward Elgar 2008).

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Health and Quality of Life

Journal Articles

Kathrin Becker-Schwarze, *Legal Restrictions of Physician-Assisted Suicide*, 12 European J. Health L. 1 1 (2005).

Amy Jo Conroy, *Curbing the License to Steal: A Discussion of English Law and Possible Reforms for the Durable Power of Attorney*, 44 Real Property, Trust & Estate L.J. (ABA) 31 (Spring 2009).

Kristina Ebbott, *A "Good Death" Defined by Law: Comparing the Legality of Aid-In-Dying Around the World*, 37 Wm. Mitchell L. Rev. 170 (2010).

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Penney Lewis, *Medical Treatment of Dementia Patients at the End of Life: Can the Law Accommodate the Personal Identity and Welfare Problems?* 13 European J. Health L. 219 (Sept. 2006).

Salla Lotjonen, *Medical Research on Patients with Dementia—The Role of Advance Directives in European Legal Instruments*, 13 European J. Health L. 235 (Sept. 2006).

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Books

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David John Doukas & William Reichl, *Planning for Uncertainty: Living Wills and Other Advance Directives for You and Your Family* (Johns Hopkins U. Press 2007).

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R. Turner Goins, & John A. Krout, *Service Delivery to Rural Older Adults: Research, Policy, and Practice* (Springer Publg. Co. 2006).

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Max Reiderer von Paar, *The German-American Estate Plan—You Say Tomato and Ich Sag Tomate*, Probate & Prop. 59 (May/Jun. 2007).

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Jef Breda & David Schoenmaekers, *Age: A Dubious Criterion in Legislation*, 26 Ageing & Society 529 (2006).

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Paul Grossman et al., *Lies, Damned Lies, and Statistics: How the Peter Principle Warps Statistical Analysis of Age Discrimination Claims*, 22 Lab. Law. 251 (2007).

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Books

Anne-Marie M. Cotter, *Just a Number: An International Legal Analysis on Age Discrimination* (Ashgate Publg. Ltd. 2008).

John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge U. Press 2006).

Malcolm Sargeant, *Age Discrimination in Employment* (Gower Publg. Ltd. 2006).

International Elder Law Journals

Abstracts in Social Gerontology.
Sage Publications, in association with the National Council on Aging, published quarterly. Staff reads and evaluates hundreds of books and journal articles each month from gerontological-related publications worldwide.

Ageing and Society. Journal of the International Federation on Ageing.
Cambridge University Press, published six times a year. Interdisciplinary and international, with extensive reviews, abstracts, and reports on research in specific areas.

American Journal of Alzheimer's Disease & Other Dementias.
Drexel University College of Medicine, published six times a year. For and by professionals on the frontlines, especially those who deal every day with patients having dementias and their families.

American University International Law Review.
Washington College of Law's International Legal Studies Program, published six times a year.

Arab Law Quarterly.
Published in the Netherlands, quarterly. Covers all aspects of Arab laws, both Shari'a and secular.

Boston College International and Comparative Law Review
Published biannually. One of approximately thirty law reviews in the United States that focus on international legal issues, and one of only two that publishes an annual survey of European Union law.

Canadian Journal on Aging
Published in Ontario, quarterly. Covers biology, health sciences, psychology, social sciences, and social policy and practice.

Elder Law Journal. United States
Published biannually. Estate planning, living wills, arrangements for long-term nursing care, as well as social work, gerontology, ethics, and medicine.

European Journal of Health Law
The Netherlands, published quarterly.

Generations, Journal of the American Society on Aging Research
United States, published quarterly.

Gerontology. International Journal of Experimental and Clinical Gerontology. Switzerland, published bimonthly.

Global Ageing
International Federation on Ageing, Canada, published three times a year.

Indian Journal of Gerontology
India, published quarterly. Contains research papers, popular articles and allied studies on ageing.

International Journal of Aging and Human Development
United States, published quarterly.

International Journal of Law & Psychiatry
United States, published six times a year. Multi-disciplinary forum for exchange of ideas and information among professionals.

International Journal of Law, Policy and the Family

Oxford University Press, Great Britain, published three times a year. Covers law that goes beyond the jurisdiction dealt with (or which is of a comparative nature), including literature specific to law and legal policy and in related discipline (such as medicine, psychology, demography, for example) of special relevance to law and the family.

International Journal of Population Geography
United States, published six times a year. Promotes the exchange of views on what constitutes best practice in population research.

International Journal of Social Welfare
Stockholm, Sweden, published quarterly. Focuses on global implications of the most pressing social welfare issues, with an inter-disciplinary approach examining those issues from the various branches of the applied social sciences.

International Legal Practitioner
Great Britain, published quarterly. Promotes the exchange of information amongst lawyers in general practice throughout the world, on the widest range of subjects, practices, and procedures.

International Social Security Review
Switzerland, published quarterly. The only international quarterly on social security, with articles on systems in different countries and in-depth discussions of topical questions; regularly has a comprehensive round-up of all the latest publications in the field. Quarterly.

Islamic Law and Society
United States, published annually. Research in both classical and modern Islamic law in Muslim and non-Muslim countries.

Journal of Aging and Health
United States, published bi-monthly.

Journal of Aging &Social Policy
Gerontology Institute, United States, published quarterly. International, interdisciplinary. Focuses on aging policy.

Journal of Applied Gerontology. The Official Journal of the Southern Gerontological Society
United States, published five times a year. International in scope, with information on the health, care, and quality of life of older persons.

Journal of Elder Abuse and Neglect
United States, published quarterly.

Journal of Geriatric Psychiatry and Neurology
United States, published quarterly. Research, clinical reviews, and case reports on neuropsychiatric care of aging patients.

Journal of Health Care Law & Policy
University of Maryland Law School, United States, published biannually.

Journal of Housing for the Elderly
Routledge, published four times a year.

Palliative Medicine: The Research Journal of the European Association for Palliative Care
Great Britain, published eight times a year. International, interdisciplinary journal dedicated to improving knowledge and clinical practice in the care of patients with far advanced disease.

Research on Aging: An International Bimonthly Journal
Duke University, Durham, North Carolina, published bimonthly.

Tax Management International Journal
BNA, United States, published monthly. Analysis by distinguished international tax practitioners on rulings, laws, regulations, treaties, and other natters.

Yale Journal of Health Policy, Law, and Ethics
United States, published bi-annually. Covers many interdisciplinary topics in health policy, health law, and biomedical ethics, for academicians, professionals, students, policy makers, and legislators in health care.