The Tradition and the Modernization of Adult Guardianship System

——From the Comparative Law Perspective on Adult Guardianship Systems in China and Canada

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ABSTRACT

Adult guardianship system is an effective legal mechanism to help incapacitated adults who have lost the ability to make proper judgments and decisions on their own. Although China has taken reforms in adult guardianship laws since the 2010s, there are still some shortcomings in China's current adult guardianship laws and a systematic regime has not yet been formed. By contrast, Canada's adult guardianship system has developed from an inadequate one to a much-improved one by establishing its social security system and welfare service. This thesis makes an overall comparison between China's and Canada's adult guardianship regimes in three aspects, namely the guiding principles, the diversity of models and alternatives, and the procedural safeguards. Consequently, this thesis concludes the following possible ways China could refer to Canada's experience in this regime. First, systematic reforms in adult guardianship are required for China, since China lacks a global perspective in the legislative activities of adult guardianship. Second, the priority for China to take reforms is to understand the guiding principles rather than introduce the regime directly from the West, and also, China should figure out how to transplant these principles and specific institutions in the context of Confucianism. Third, China should pay more attention to the procedural safeguards in adult guardianship. At last, as to the substantive law in this field, China should diversify adult guardianship models and alternatives, and make the court-ordered adult guardianship the last resort to accommodate ward's various needs and maximize their self-determination capacity.

Resume

Le système de tutelle pour adultes est un mécanisme juridique efficace qui permet de venir en aide aux adultes ayant perdu leurs facultés à faire de bons jugements ou à prendre des décisions de leur propre chef. Bien que la Chine ait entrepris depuis les années 2010 des réformes quant aux lois régissant le système de tutelle pour adultes, il existe encore quelques lacunes ou imperfections, et un régime systématique n'a pas encore été mis en place. En revanche au Canada, le système de tutelle pour adultes est passé d'un modèle inadéquat à un modèle très amélioré par l'établissement du système de sécurité social et des services sociaux. Ce mémoire dresse une comparaison globale entre les régimes de tutelle pour adultes du Canada et de la Chine selon trois aspects : les principes directeurs, la diversité des modèles et des solutions de remplacement, et les garanties procédurales. Cette étude comparative nous permet de faire ressortir des voies que la China pourrait utiliser comme référence pour tirer profit de l'expérience canadienne. Premièrement, il apparaît que des réformes systématiques du système de tutelle pour adultes sont requises en Chine étant donné que la Chine manque d'une perspective globale du point de vue législatif en regard au système de tutelle pour adultes. Deuxièmement, la priorité pour la Chine dans une perspective d'entreprendre des réformes est de comprendre les principes directeurs plutôt que de copier simplement un régime occidental; par ailleurs, la Chine devrait déterminer comment transplanter ces principes conducteurs ainsi que des institutions spécifiques dans le contexte du confucianisme. Troisièmement, la Chine devrait porter plus d'attention aux garanties procédurales de la tutelle pour adultes. Finalement, en ce qui concerne l'essence de la loi dans ce domaine, la Chine devrait diversifier les modèles de tutelle pour adultes ainsi que les alternatives et veiller à ce que le système de tutelle ordonné par le tribunal

soit le dernier recours pour répondre aux divers besoins de l'intervenant et maximiser sa capacité d'autodétermination.

CONTENTS

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INTRODUCTION

As it enters the 21st Century, China encounters many of the problems of an aging society.[1] Older citizens lack the knowledge to efficiently manage their property, and there are insufficient care, nursing, assistance and treatment services available. The adult guardianship system, which aims to help incapacitated adults who have lost the ability to make proper judgment and decisions on their own,[2] plays an important role in solving the complicated problems which arise in an aging society. Although China has taken reforms in adult guardianship laws since the 2010s, a systematic regime has not yet been formed.[3] Compared with other adult guardianship systems in the contemporary world, China still has a long way to go before realizing the modernization of adult guardianship.[4]

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[1] It is generally acknowledged that a country has reached what is known as an 'aging society' when its share of citizens aged over 60 hits 10 percent, while China's elderly citizens in this age group had been up to 241 million by 2018, occupying 17.3% of the total population, which made China the only one country with more than two hundred million elderly persons in the world. The details will be discussed in the section of "The Changing Demographic Situation" in Chapter I. See *China's Elderly Population Continues to Rise, with 241Million Now 60 or Over*, 27th February 2018, online:<https://gbtimes.com/chinas-elderly-population-continues-to-rise>.

[2] The terms 'adult' and 'ward' are used in this thesis to refer to those who may come within a guardianship regime due to some decision-making impairment.

[3] To be more specific, the adult guardianship was first stipulated in China's *General Principles of Civil Law* and the *Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of Civil Law*, in which the stipulations are very general and lack feasibility. In 2012, the *Elderly Protection Law* was amended, which expands the reach of adult guardianship's protection to incapable elderly people generally and introduces voluntary adult guardianship; in the same year, the *Mental Health Law* was enacted, which is relevant to decision-making for impaired persons' medical treatment. However, until then, China's adult guardianship was still in fragmentary pieces of laws, rather than in an organized system. The third reform took place in 2017 when the *General Provisions of Civil Law* was promulgated, which replaces the *General Principles* and initially establishes an integrated adult guardianship Framework. See L Willmott, *Guardianship and health decision in China and Australia: A Comparative Analysis*, Asian Journal of Comparative Law, 12(2), 2017, at 11.

[4] The concept of "modernization of adult guardianship" in this thesis is proposed in contrast to the "tradition of adult guardianship". At the beginning of Chapter I and Chapter II, this paper concludes that both traditions of adult guardianship in China and Canada were plenary and paternalistic. However, their current regimes were no longer alike. Canada's adult guardianship regime has removed the characteristics of being plenary and paternalistic through several long-term reforms since World War II, and all of 13 jurisdictions in Canada have gradually established their comprehensive adult guardianship regimes; while the Chinese adult guardianship laws still keep the traditional values, such as heteronomy, state's direct intervention, and collective interests. Therefore, in such a context, the modernization of adult guardianship means a process to eliminate the traditional characteristics rooted in the early adult guardianship laws, and the establishment of a systematic adult guardianship regime. A more specific description of the modernization of adult guardianship would be provided in Chapter III.

By contrast, Canada's adult guardianship system has developed from an inadequate one to a much-improved one by establishing its social security system and welfare service.[5] China's and Canada's adult guardianship laws share many common characteristics in their traditions, but Canada's current regime is more advanced and comprehensive compared with China's, especially in the aspects of the guiding principles, fair procedures, and the diversity of guardianship alternatives. Therefore, this comparative legal study aims to provide positive inspiration for the Chinese adult guardianship's development by examining the changing characteristics of Canada's system from past to present.

The following chapters will unfold in a "specific-general" structure and four dominant methodologies are applied in the research.[6] Chapters I and II adopt the methodology of historical research to reflect the developments of adult guardianship systems in China and Canada respectively. Chapter I starts by reviewing the impacts of Confucianism on the traditional adult guardianship. Then, it examines China's several reforms in the *General Principles*, the *Elderly Protection Law*, the *Mental Health Law* and its existing framework including the recently enacted *General Provisions*. The

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[5] Recent news reported that Canada was getting a new "Dementia Village" to help locals suffering from dementia and Alzheimer's. "Dementia Village" is modeled as a senior's care community where patients suffering from dementia were able to live in a more normal environment with others suffering from the same illness. Vancouver Island has got its first publicly funded dementia village in January 2019, which is the second "Dementia Village" in Canada (The first one was built in Quebec). See *Canada Is Getting A New "Dementia Village" To Help Locals Suffering From Dementia And Alzheimer's*, online:< https://www.narcity.com/ca/bc/vancouver/news/canada-is-getting-new-dementia-village-to-help-locals-suffering-from-dementia-and-alzheimers>; Scott Stanfield, *Vancouver Island to get its first publicly funded dementia village*, Cowichan Valley Citizen, Jan 21st 2019, online:https://www.cowichanvalleycitizen.com/news/vancouver-island-to-get-its-first-publicly-funded-dementia-village/.

Moreover, Canada's welfare system is attracting many immigrants from all of the world, especially the Chinese people, who are one of the largest minority groups immigrating to Canada. Canada has advanced *Social Assistance Mechanism*, which is the modern version of the ancient Poor Laws. The *Social Assistance Mechanism* is the last resort for needy Canadians who do not qualify for other income security programs or whose income from those other programs is still inadequate. For the *Social Assistance Mechanism*, the largest categories of recipients are the blind, the disabled, the aged and mothers with dependent children. See Keith Banting, *Welfare State and Canadian Federalism (2nd Edition)*, (Kingston and Montreal: McGill-Queen's University Press), at 11.

[6] As the name suggests, the "specific-general "structure means the paper involves movement from specific details to broader statements. In this paper, Chapters I and II will focus on the specific institutions of the Chinese adult guardianship laws and those of the Canadian laws respectively, and Chapter III will proceed to the conclusive part which provides a comparative analysis and thus is more general. The concept of the "specific-general texts" is discussed in Swales, J.M & Feak, C.B, *Academic Writing for Graduate Students* (3rd ed.), (Ann Arbor: University of Michigan Press, 2012). at 55.

analysis will show that China's current framework is not comprehensive enough to prevent abuse and neglect of wards.[7] As such, the thesis turns to focus on the origins and the reforms of Canada's adult guardianship in Chapter II. Canada's adult guardianship originated from the *Parens Patriae Law* in the UK and the *Napoleonic Code* in France and has gone through nationwide reforms since World War II. As a result, Canada has successfully transformed the traditional plenary and paternalistic adult guardianship to a new adult guardianship regime with diverse alternatives.[8] With the methodology of comparative legal research, Chapter III moves on to conclude the experience in Canada's successful reforms and the required elements in modern adult guardianship by analyzing Canada's regime, and to propose four steps for China to realize a modern systematic adult guardianship regime.

Adult guardianship is an institution to provide adequate protection for incapable persons while upholding their rights to autonomy, therefore, this topic is close to the issues of human rights protection in essence and a value-orientated research must be carried out throughout this research. The guiding principles could reflect the value orientation and value judgment in adult guardianship, because they form the foundation for specific adult guardianship rules.[9] Therefore, Chapter III analyzes how these guiding principles work and the related cases in Canada's adult guardianship regime and how China should establish the guiding principles in the *General Provisions*.

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[7] A ward is a person, usually a minor or incompetent, who has a guardian appointed by the court to care for and take responsibility for that person. See the definition in *Black's Law Dictionary* (8th ed.), Bryan A. Garner (Editor in chief), at 2077.

[8] Compared with the early adult guardianship laws, Canada's current adult guardianship regime has diverse alternatives, and after three waves of reforms, the long-term plenary guardianship and the substituted decision-making are used as last resorts and various paternalistic safeguards are removed. See R. M. Gordon, *Adult Guardianship and Adult Protection Legislation in Canada: Recent Reforms and Future Problems*, Canadian Journal on Aging, Vol.14, Sup.2, 1995, at 90-98.

[9] The guiding principles include the best interests of the wards, respecting adult's right to autonomy, a presumption of competence, considering adult guardianship as a last resort, choosing the way of guardianship as the least restrictive one, taking adults' wishes into account, etc.

Furthermore, since adult guardianship is an interdisciplinary subject not only related to the law but also involved with other social science, it requires mixing perspectives and interdisciplinary research on these two countries' social and cultural backgrounds, including some professional knowledge of history, demographics and Confucianism.

For a more specific goal, this thesis attempts to make a significant contribution to the body of research on China's future reforms in adult guardianship regime through a lens of comparative law. Few works and papers compare China's and Canada's adult guardianship regimes, let alone discusses how Canada's legislation in adult guardianship could inspire China's development. By comparing these two countries' adult guardianship laws from past to present, this research analyzes these two regimes' feasibility, advantages, and disadvantages from three aspects, namely the guiding principles, substantive law, and the procedural safeguards. To conclude, this research is trying to transplant the Canadian adult guardianship's advanced ideas and effective safeguards to China based on respecting China's Confucian tradition and the regime of socialism with Chinese characteristics.

For a more general goal, this paper aims to provide a more accurate understanding of the role that adult guardianship plays to protect human rights instead of being used as a state's governing tool. The research also contributes to the current literature by exploring the nature, the purpose and some other characteristics of adult guardianship. To be brief, this paper concludes the nature of adult guardianship is a product of value orientation, value judgment and value selection. As such, adult guardianship has the characteristic of universalism across the world and needs to be solved by all countries' efforts rather than merely a domestic legal issue settled by one state.

I. THE CHINESE ADULT GUARDIANSHIP SYSTEM: FROM A TRADITIONAL CONFUCIAN WAY TO A MODERN LEGAL FRAMEWORK BASED ON SELF-DETERMINATION

Under the long-term impact of Confucianism, China's adult guardianship gradually evolved from a familial duty to a legal regime. In ancient times, the Chinese seldom enacted any laws to provide the way in which the incapacitated adults would be helped. Instead, such issues were attached firmly with the family, and family members had a moral responsibility to act as the dominant guardians. However, since China encounters many of the complicated problems of an aging society, adult guardianship can be no longer within the private realm and solved by only every single family. On the contrary, the demographic crisis requires it to be placed under the public sphere, adjusted by various legal regimes and public policies.

Above is a general background of the Chinese adult guardianship's tradition and the modern challenge. This chapter will elaborate on the role of the family in the Chinese adult guardianship's tradition, how Confucianism influences the Chinese understanding of individual rights and interests, and China's three recent reforms in adult guardianship. To be more specific, this chapter will unfold as follows. Section 1 explains why the traditional Chinese adult guardianship needs to transform to a new form from the perspective of the conflict between the traditional culture and the contemporary demographic challenge. Section 2 introduces the historic reforms of the Chinese adult guardianship laws and the currently established guardianship regime and analyzes the progress and deficiency in the three reforms. A conclusion follows in Section 3 which provides several suggestions for future improvements in the Chinese adult guardianship regime.

i. The Conflict between Confucian Tradition and Emerging Social Challenges

1.Tradition: The Confucian Family-oriented Features in Adult Guardianship

1) The Traditional Adult Guardianship Belongs to the Private Realm Without Any Legal or Public Intervention

Unlike the rule of law in the western legal tradition, Confucianism does not consider law as an effective governance tool.[10] Instead, it proposes a rule of virtue as a guiding principle. To be more specific, the tradition of Confucianism primarily seeks to induce and persuade, rather than command, oblige and punish. Confucius insisted that people ruled by law would not have a sense of shame, they followed and obeyed merely out of fear of legal sanctions, and that was not a civilized way to rule people. Instead, Confucius stressed a mild method of moral education and persuasion to achieve the rule of virtue. Influenced by Confucianism, informal traditions are more dominant than formal laws in China.[11] Many issues and conflicts were solved within the private realm, including care for adults with diminished capacity, which was considered as a family matter dealt with through familial relationships and moral bonds without the state's involvement; thus, there had been no comprehensive adult guardianship laws or elder laws in China for a long time. The issue of elderly care should first proceed from the family then the local communities and society, and the state only acts as the last resort.[12] The order of the family, community, and government constitutes the multilayer system to provide welfare assistance in China.

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[10] Confucianism is a guide for perfectionists to behave properly with virtues, whose primary aim is social harmony and order. There are two most essential elements in Confucianism; one is benevolence (*Ren* 仁), which means care for others and the other is rites (*Li* 礼), which means hierarchy. See Chan J. *Confucian Perfectionism: A Political Philosophy for Modern Times,* (Princeton: Princeton University Press, 2014).

[11] H Patrick Glenn, *Legal Traditions of the World (Fifth Edition)*, (Oxford: Oxford University Press, 2014), at 320.

[12] On the judicial level, the Chinese people's courts seldom step into adult guardianship, except in the following limited situations. First, where a close relative or an interested party of an adult incapable of discerning or fully discerning his or her conduct can file an application to court to make a determination that the adult has no capacity or limited capacity for civil conduct.[12] Second, where there is a dispute over the appointment of guardians which cannot be resolved by the local committees.[12] Third, where a guardian falls under certain circumstances, the relevant individual or organization can apply to the court for disqualifying the guardian. See *General Provisions,* Art. 36.

The next part explains how the family comes into play in adult guardianship, and why the state was not involved in the protection for adults with diminished capacity.

2) Family Plays an Important Role in the Adult Guardianship

The family was the most important social institution for cultivating virtues in ancient China; it played a more significant role than the state in the traditional adult guardianship because it was perceived as an overarching body for providing supervision for family members with diminished capacity.[13]

Moral responsibilities in the family were mainly derived from two Confucian theories. On one hand, Confucianism holds a core idea of Li that emphasizes hierarchy, rites, and propriety; Li is the order everywhere which exists in the whole country and even in every family. For example, the father as the head of the family is in charge of managing and coordinating every aspect of family life so that he has the authority and the responsibility to make decisions for vulnerable family members. On the other hand, under the Confucian thought of filial piety(Xiao 孝) and reverence(Jing 敬), children are obliged to serve the old.[14] Article 26 of *the General Provisions* stipulates that adult children have the obligation of support, assistance, and protection for their parents. As a Chinese saying goes, "yang er fang lao" which means the Chinese parents bring up children to be looked after in their old age. Moreover, four generations living together under one roof is an ideal family structure in China. In such a sizeable thriving family, once one of the family members becomes incapacitated, the others can help him/her.

[13] Cora Chan, Rebecca Lee, *Adult Guardianship Law in China: Traditional Values and Modern International Developments,* Comparative Perspectives on Adult Guardianship, edited by A. Kimberly Dayton, (Durham: Carolina Academic Press, 2014), at 127.
[14] *Ibid.*

Therefore, if the males with authority, young generations, and other family members fulfill their ethical responsibilities, no adult would be left uncared for.[15]

The significance of family in the current adult guardianship is mainly reflected in the selection range of the guardian in *the General Provisions*, which indicates that the fulfillment of the ethical responsibilities amongst family members is one of the most important premises of effective adult guardianship. [16]

3) Weak Awareness of Individual Rights

In the western world, individual rights are much valued. On the contrary, no explicit concept of rights can be found in the Confucian thought as it prioritizes obligations over rights. The collective interests of the family which require every family member's obedience and submission are much more important than individual rights. If every person gives up a bit of personal preference and autonomy, the social harmony and stability can be attained. As a result, values such as individuality, equality, and autonomy are demoted by Confucianism.[17]

Accordingly, the Chinese people have a very weak awareness of individual rights, and the traditional adult guardianship is full of paternalism which only connects with kinship and emphasizes how to monitor and restrict the incapable persons, without respecting their dignity and the rights of self-determination. For example, in the past, the incompetent persons under the adult guardianship would entirely lose the freedom to make their own choices and independence of persons, no matter the extent to which

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[15] *Ibid*, at 123.

[16] According to Article 28 of the *General Provisions*, the guardian of a physically or mentally ill person shall be in the following order: (1) spouse of the adult, (2) parents or children of the adult, (3) other close relatives of the adult, (4) other individuals or organizations approved by the government; this means that the particular family members, usually the immediate relatives, will automatically become guardians of the ward in the statutory guardianship. Even in the designated guardianship, the court should appoint the guardian in this order.

[17] Confucian ethics are often taken to stand in contrast to ethics that place individual autonomy and freedom to choose how to live. See D Wong, Chinese Ethics (Standford Encyclopedia of Philosophy), online:< https://plato.stanford.edu/entries/ethics-chinese/>, 2008.

they lost their capacity, they had to turn all the decision-making rights over to their guardians.[18] In this regard, the purpose of the traditional adult guardianship is more like a way of control, demand, and restriction rather than protection.

This phenomenon was also reflected in the former Chinese adult guardianship legislation. Before the *General Provisions* was adopted in 2017, the adult guardianship had been mainly regulated in the *General Principles of Civil Law('General Principles')*[19] and the *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of Civil Law ('Opinions')*[20]. The *General Principle* and the *Opinions* only stipulate that the courts may consult an individual with limited capacity before appointing the guardian, there is no more provision to accommodate the wards' wills throughout the guardianship process.[21]

2. Modernity: The New China's Aging Society

1)The Changing Demographic Situation

China's population is aging at a faster rate than almost all other countries. In the "*Blue Book of Aging: The Survey Report on the Living Conditions of China's Urban and Rural Older Persons (2018)"('Survey Report')*[22], the *China Research Center on Aging* reported that by the end of 2017, China's elderly citizens (over 60 years old) had been up to 241 million, occupying 17.3% of the total population, which made China

[18] Even for now, China's adult guardianship does not provide tailored guardianship to accommodate people's different degrees of incapacity. China's adult guardianship tradition tends to adopt an all-or-nothing approach to guardianship orders, which would be discussed in details in the end of Chapter I and in Chapter III. See Cora Chan, Rebecca Lee, *supra* note 13, at 132-133 and *supra* note 35.

[19] *The General Principles of Civil Law of the PRC* came into effect on Jan. 1, 1987, online:<http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm>.

[20] *Opinions on Several Issues concerning the Implementation of the General Principles of the General Principles of Civil Law of the PRC (For Trial Implementation)*, deliberated and adopted at the Judicial Committee of the Supreme People's Court on Jan. 26, 1988, online:<http://en.pkulaw.cn/display.aspx?cgid=3689&lib=law>.

[21] *Opinions*, Art. 14.

[22] This survey has been conducted every five years since 2000 by the *China National Committee on Aging*. The Blue Book analyses almost every aspect of the elderly people's current living situation based on the fourth sampling survey's data. See *The Blue Book of Aging: Survey Report on the Living Conditions of China's Urban and Rural Older Persons (2018)*, (Beijing: Social Sciences Academic Press (China), April 2018).

the only country with more than two hundred million elderly persons in the world.[23] Generally speaking, every four laborers are responsible for an elderly citizen.[24] This looming demographic shift presents considerable social and economic challenges for China.

The survey report also points out that with an increasing demand of being looked after and cared for, good quality and a vast amount of the senior community services for the frail or disabled elderly people are urgently required. The percentage of the urban elderly reporting a need for care rose from 8 percent to 14.2 percent between 2000 and 2015. In comparison, the rate in rural areas increased from 6.2 percent to 16.5 percent during the same time. Moreover, the need for care among the elderly aged 80 and above displayed a sharper increase, of which the rate substantially rose from 21.5 percent in 2000 to 41.0 percent in 2015, while those aged 79 and below requiring care rose from 5.1 percent to 11.2 percent.[25]

It is estimated that by the year 2050, the population of citizens over 65-year-old will be 487 million, and the ratio will have increased to 35%.[26] This trend is particularly worrisome for China. On one hand, the Chinese senior citizens' high demand for public supports whether on the local level or the national level cannot be met because of the long-term impact of the traditional Confucianism which insisted that elderly care belong to family matters. On the other hand, it is a massive burden for government finances and the legislative activities to create an elderly-friendly environment in a short time to solve the imminent task.

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[23] *The Blue Book of Aging: The Problem of the Chinese Aging Population Gets Worse*, 15th May 2018, Online:<http://finance.ifeng.com/a/20180515/16277266_0.shtml>.
[24] Online:<https://wxn.qq.com/cmsid/WXN2018060502212400>.
[25] China's Senior Care Demand Continue to Increase: Survey, 23rd, May 2018, online:<http://www.womenofchina.cn/womenofchina/html1/survey/1805/8148-1.htm>.
[26] This figure was given by the China National Committee on Aging(CNCA). *Supra* note 22.

2) The Problem of "Yang er fang lao" in the New Era

The idea of the "yang er fang lao" is no longer working in China. First of all, China's One-Child Policy completely contradicts the idea behind "yang er fang lao". Since Chinese families are allowed to have only one child, this child bears the entire burden of taking care of the parents and the grandparents without any siblings to give a hand. This practical dilemma has changed the Chinese family structure to a "4-2-1" form.[27] For now, the first generation of the "only child" has reached the middle age, concurrently their parents are getting older, and the traditional model used to care for the elders is no longer widely accepted in practice.

Indeed, when children grow up in China, many of them will no longer stay with their parents, let alone with their grandparents; they need to study at a university in another city where in most cases they will stay after graduation to find a well-paid job, live and have their own family, leaving their parents alone in their hometowns. Moreover, because of the rapid economic growth in China, many big cities are involved in a fierce competition for talent.[28] Relocation between different cities is quite frequent and common. Young people will often start a new life in places far from home, and they might change their living places several times during their lives. The left-behind parents are called *kongchao laoren*(空巢老人) in China, which means the empty-nested elderly.

Consequently, "Yang er fang lao" has become impractical and burdensome because of the One-Child Policy. Ironically, when China implemented the One-Child Policy in the 1980s, the government put forward a propaganda slogan that "only having one child

[27] The 4-2-1 family structure refers to the families in which three generations coexist in a variety of family forms. The structure emphasizes a social living community, including four older people (paternal and maternal grandparents), two parents, and one child. See Quanbao Jiang, Jesus J. Sanchez-Barricarte, *The 4-2-1Family Structure in China: A Survival Analysis Based on Life Tables*, European Journal of Ageing, Vol.8, No. 2, 2011.
[28] Chinese Cities Competing in Talent Grab, China Plus, 29th March 2018, online:<http://www.china.org.cn/china/2018-03/29/content_50766216.htm>.

is good, the state will take care of the elderly"; however, nowadays, the state is facing the unprecedented crisis of an aging population after 30 years' implementation of the One-Child Policy. Although China decided to allow couples to have two children instead of just one in 2016, this policy will make a positive impact on demographic trends only in decades to come.

3)The *Shidu* Problem(失独): Bereavement of the Only Child

Shidu is a phenomenon denoting the loss of a parent's only child. Parents who have lost their only child are known as *Shidu Fumu* (失独父母) in China.[29] According to a report from the *CNCA* in 2013, there were at least one million *shidu* parents in China, and the number was increasing by 76,000 a year.[30] As the *shidu* parents of the first generation of the One-Child Policy are now in their 50s and 60s, many of them are concerned about their old age without a child to rely on.

The bereaved parents are very worthy of sympathy because they are forced to accept a different way of life without any supports and care from their children, while society still holds a strong recognition of the traditional Confucian thoughts. Worse still, China lacks well-developed public services to care, nurse, and assist the elderly people and efficiently manage their property. At the same time, without a well-established adult guardianship system, *shidu* parents are totally isolated and quite helpless. For example, one bereaved mother said that she could not get surgery after being injured in a car accident because she did not have a child to sign the agreement for her operation, which highlights the plight of *shidu* families.[31]

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[29] Li Qian, *Despair Turns to Joy for a Mother at 60, Shanghai Daily*, 20th December 2013, online:<https://www.shine.cn/archive/national/Despair-turns-to-joy-for-a-mother-at-60/shdaily.shtml>.
[30] Fan Liya, *China's one-child policy has a legacy of bereaved parents facing humiliation and despair,* 19th August 2017, online:<http://www.scmp.com/magazines/post-magazine/long-reads/article/2107155/chinas-one-child-policy-has-legacy-bereaved>.
[31] See Kim Kyung-Hoon, *China: when an only child dies,* December 2015, Reuters,

Compared with other elders, old *shidu* parents are more emotionally and physically fragile. Some *shidu* parents said that they were not afraid of death, but of being sick. It shows that *shidu* parents in China lost not only their only child but also their dignity. Although the Chinese government has taken several actions to improve *shidu* parents' living conditions, the efforts are inadequate. For example, the government first raised the issue of subsidies for *shidu* parents in 2001, under *the Population and Family Planning Law*. Since 2007, the national minimum subsidy has been raised from 100 yuan per person per month to 340 yuan, an amount that falls far short of what is needed in China where there is little in the way of welfare or health benefits. Apart from the inadequate financial support, the Chinese government could not provide psychotherapy services for this special groups either.[32]

ii. The Legal Reforms of the Chinese Adult Guardianship

As described in the last section, there is an intense conflict between the traditional family structure supporting the elderly and the imminent demographic challenge, which have placed increasing constraints and doubts on the family-centered old age support system.[33] Accordingly, China has committed to supporting the aging population as a long-term state strategic task.[34] Alongside improvements on the health and social welfare systems for the elderly, reforms of the adult guardianship laws and a

online:<https://reut.rs/1OvIcVW>.

[32] According to an investigation published in 2013, over 1500 shidu families in 14 provinces of China, more than half of the shidu families had incomes below local living standards; nearly half of them suffered from depression and over 60% had chronic diseases, unlike other elderly people. See Liuyana, *Impoverishment of the Shidu People in China and Construction of their Aid System*, Chinese Social Science Journal, Vol.5, 2013, at 46; Yu Song, *Losing an only Child: the one-child policy and Elderly Care in China*, Reproductive Health Matters, Vol. 22, 2014, at 113.

[33] See Hsiao-hung Nancy Chen, Tsung-hsi Fu, *Older people's income security in China: the challenges of population ageing,* in *Ageing in East Asia: Challenges and Policies for the Twenty-first Century,* Fu T. H. Hughes R. (eds), (New York: Routledge, 2009).

[34] *Law of the PRC on Protection of the Rights and Interests of the Elderly*, Art. 4 (1).

comprehensive adult guardianship system are necessary to ensure that the elders with diminished capacity are well-protected in China.[35]

The following parts introduce three important reforms in the Chinese adult guardianship laws and analyze breakthroughs and deficiencies in every reform. The first is the *General Principles of Civil Law* ('*General Principles*') which set up a general framework of guardianship laws. The second is the *Elderly Protection Law*[36] and the *Mental Health Law*,[37] which were enacted in 2013 and symbolized the beginning of China's modernization in adult guardianship. The third is *the General Provisions of Civil Law* (*'General Provisions'*) promulgated in 2017, which replace the *General Principles* and initially establish an integrated framework of adult guardianship.

1. The Adult Guardianship in *the General Principle* and Its Deficiencies

In China's jurisprudence, there is no designated adult guardianship law; but rather the related provisions could be found in Article 16 to 18 of the *General Principle*, supplemented by *the Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of Civil Law (Trial Implementation) ('Opinions')*. The *General Principles* and *Opinions* initially shape the general framework of China's adult guardianship system that the incapacitated persons' relatives act as the dominant guardians, while communities undertake a supplementary role. However, the ill-conceived legislation has many deficiencies, which imposed practical limitations on the general adult guardianship.

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[35] Rebecca Lee, *Guardianship of the Elderly with Diminished Capacity: The Chinese Challenge*, International Journal of Law, Policy and the Family, Vol. 29, Issue 1, April 2015.

[36] *Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (2012 Revision),* promulgated by the Standing Committee, National People's Congress, 28th December 2012, effective on the 1st July 2013, amended on the 24th April 2015.

[37] *Mental Health Law of the People's Republic of China*, promulgated by the Standing Committee, National People's Congress, 26th October 2012, effective on 1st May 2013.

1) Deficiency 1: Restricted Scope of Protection: The Adult Guardianship Only Protected the Mentally Ill Persons

The Chinese civil laws distinguish the capacity for civil rights and the capacity for civil conduct. While all citizens are equal regarding their capacity for civil rights,[38] the law differentiates among persons with full, limited and no capacity for civil conduct. According to *the General Principle*, mentally ill persons who are unable to account for or fully account for their conduct shall be persons with no or limited capacity for civil conduct and shall be represented in civil activities by his agent ad litem.[39] Article 4 and Article 5 of the *Opinions* further elaborate on the standards to assess the degree of adult's mental incapacity, that the determination should be made from such aspects as the degree of connection of the adult's conduct with his life, his ability of understanding and foreseeing the consequence of the corresponding conduct and the objects of the conduct.[40]

Overall, whether a person has the capacity for civil conduct is comprehensively assessed from his age, cognitive development, and mental state. However, the *General Principles* prescribe that only the person with mental illness could be eligible for a guardian. That is, persons who are elderly with intellectual, physical, or mental deterioration over time but have no mental disorders are excluded from protection by adult guardianship laws. Article 8 of the *Opinions* attempts to extend the coverage of adult guardianship provisions to patients with dementia; nevertheless, an elderly person may lose the capacity for decision-making without a dementia diagnosis, and so they

[38] *General Principles*, Art. 10.
[39] *General Principles*, Art. 13.
[40] However, the stipulation lacks the operability. On one hand, judges lack the professional knowledge about how to evaluate person's mental condition; on the other hand, there is no sufficient training for physicians to carry out evaluations of competency in a legal sense, thus, few physician is able to understand the relevant laws. Worse still, there is no provision about who has authority to do these evaluations. See Rebecca Lee, *supra* note 35.

also need guardians' assistance and protection.[41] Therefore, the adult guardianship's coverage stipulated in the *General Principles* and the *Opinions* should be enlarged; the requirement, 'mentally ill persons', which narrows the range should be removed; otherwise, the general guardianship laws cannot be applied on the vast majority of the elderly with diminished capacity or the physically or intellectually disabled persons.

2) Deficiency 2: Limited Types of Adult Guardianship

a. A Lack of Voluntary Adult Guardianship

Another deficiency regarding adult guardianship laws in *the General Principles* is the limited types thereof. The *General Principles* only provide two types of guardianship; one is the statutory guardianship automatically coming into effect on the declaration of a person as mentally ill on application by his relatives;[42] the other type is the designated guardianship, under which guardians would be appointed by the neighborhood or village committee in the place of the ward's residence when there is a dispute over the guardianship.[43] Strictly speaking, there is only one type of guardianship in *the General Principles*, i.e., the statutory guardianship, because in essence the designated guardianship belongs to and is complementary to the statutory guardianship; the only difference between these two types is the ways to select guardians. No matter by which method, the selected guardian must be the near relatives of the incapable person. It can be deduced that the incompetent person has no right to choose the guardian according to his wishes and grant a power of attorney. The lack of voluntary guardianship illustrates the absence of incapacitated persons' free will during the guardianship process. For instance, during the medical treatment, patients cannot

[41] *Ibid.*
[42] In the statutory guardianship, the near relatives specified will automatically and immediately become guardians in the given order of priority. See *General Principles*, Art. 17(1).
[43] *General Principles*, Art. 17(2).

decide the decision-maker in advance if he later loses capacity. There are two situations that the general adult guardianship laws fail to consider: First, what if the one that the incapable person wants to select as the guardian is not his near relative? Second, what if the incompetent person prefers another close relative in lower priority order?

b. A Lack of Supported Decision-Making

As mentioned before, *the General Principles* classify wards with impaired capacity at different degrees into two categories; namely those with totally impaired capacity who cannot account for their conduct and those with partially impaired capacity who cannot fully account for their civil conduct but might still maintain limited decision-making ability.[44] In the *General Principles*, these two kinds of persons automatically and immediately become wards under adult guardianship once they are legally declared to have no or limited capacity for civil conduct.

Despite the two categories of the wards' impaired capacity for civil conduct, China adopts an all-or-nothing approach to placing wards under the plenary guardianship. In other words, no matter the extent to which these persons' capacity has deteriorated, they would be entirely deprived of the power to make independent decisions and of their rights to autonomy in the field where they are deemed incompetent.[45]

It would be more reasonable if the wards were subject to a guardianship regime with various alternatives based on a gradation scale. At one end of the scale, the persons under the plenary adult guardianship are the wards without any competence for civil conduct; in this case, the wards would radically lose the right of autonomy because their will and decision-making rights would be completely substituted by guardians on

[44] *General Principles*, Art. 13.
[45] Chan and Lee also asserted that no actual differences exist in the duties and powers of the two categories of guardians. China is adopting a sweeping approach. See Cora Chan, Rebecca Lee, *supra* note 13, at 133.

personal and property affairs. Except for the wards at this end of the scale, other wards' decision-making competence would remain unimpaired at different degrees; thus, the law should respect their remaining capacity when they can make an independent determination.[46] Only when it comes to the affairs which the persons cannot handle by themselves, would the incapable person become a legal ward in need of assistance from a guardian. Although the *General Principles* state that mentally ill persons may engage in civil activities appropriate to their mental health, the law perceives the situation as an exception, which counters the principle of maximizing individual autonomy and the principle of normalization.[47] It would be more reasonable for the law to stipulate that persons with limited capacity shall live a normal life in most cases and only when they are involved with issues beyond their legal capacity, would guardians assist them; only when the assistance is not enough, would guardians make the substituted decisions for the wards.

Given that there are different levels of deterioration in wards' capacities, the adult guardianship regime should be constituted of more specific and various alternatives to accommodate wards' actual needs. Unlike the substituted decision-making which entirely removes wards' participation, the supported decision-making allows wards to maximize their abilities while requiring guardians to act as a supporting caretaker. For example, guardians may provide interpretation and plain language support, as well as assistance in representing the person to others who may not understand his or her ways of communicating.[48] In short, as long as a ward's capacity has not been completely lost,

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[46] Rebecca Lee, *supra* note 35.

[47] The principle of normalization requires to place mentally-ill and mentally retarded individuals in the community in which they could live lives that were as "normal" as possible in light of each individual's particular disability. See Lawrence Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, Stetson Law Review, Vol. XXXI, 2002, at 746.

[48] Anita Smith, *Are Guardianship Laws and Practices Consistent with Human Rights Instruments?* Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014), at 261.

their independence and legal capacity should still be respected and treated as valid; and guardians' power should be tailored in accordance with the capacity of each individual ward.

3） Deficiency 3: A Lack of Effective Supervisory Institution

Effective supervision can work in different processes of adult guardianship, such as the appointment of a guardian and fulfillment of the duty of guardianship. In most cases, the western governments act as an overarching body to oversee the guardianship processes,[49] while the state's supervision over guardians is absent in China's current adult guardianship laws.[50]

In light of the selection of guardians, there is no effective monitoring scheme to ensure that appropriate or qualified guardians are appointed. Only Article 11 of the *Opinions* requires several factors to be considered when the guardian candidates are being selected, such as physical health and economic conditions of the guardian, and the connection between the guardian and the ward in life. Nevertheless, the most important aspects, like the morality, education, career or any other relevant experience of the guardian and any potential conflicts of interests that should be avoided between the guardian and the ward are not emphasized by the general adult guardianship laws. In a word, the limited guardian candidates within the near relatives and the given priority order might not be the best choice for the incapable persons, but the ill-

[49] For example, in Canada, the *Office of Public Guardian and Trustee* and the court generally take the supervisory roles in adult guardianship laws. In most cases, the *OPGT* acts as the first line of supervision, while the court acts as the second line. The Canadian supervisory mechanism of adult guardianship will be discussed in the section of "Procedural Safeguards in Adult Guardianship" in Chapter II and in the section of "Clarifying Public Guardian and Trustee's and the Court's Supervision on Private Guardians" in Chapter III.

[50] Here the paper is discussing the state's public supervision, instead of the individual's supervision. As regards the individual monitoring, it might be inferred from Article 20 of the *Opinions*, which stipulates that the parties concerned who are listed in Article 17(1) and have not been designated as guardians be entitled to exercise supervisory duties by filing a complaint to the court. The parties are not state-appointed supervisors because their powers are not granted by the state. What's worse, due to the absence of the state's supervision, there is no further relief for the ward if the concerned parties fail to file a complaint.

considered situation could be improved if the state's supervision could intervene in the process to appoint guardians.

Worse still, the *General Principles* contain very few explicit provisions concerning the supervision over guardians' activities in practice. There are only a few general requirements that guardians should comply with when performing their duties; otherwise, they may be liable to compensate for the loss of the wards or even be disqualified.[51] The requirements lack operability since they are too general, and the issues like when guardians would fail to fulfill their guardianship duties and who has the monitoring authority over guardians' performance are not specified.

As more and more incidents like the neglect and abuse on the wards are arising, there has been growing criticism in the scholarly, legislation and judiciary in China concerning the absence of supervisory mechanisms.[52] Because the extensive powers conferred on guardians may compromise the rights and autonomy of wards,[53] guardians should be monitored and constrained by public supervisors no matter in the financial affairs or the personal care issues, so that the wards' interests will not be infringed upon. Otherwise, even a rule designed to be protective could result in harm rather than help for the disabled. For instance, Fang Jiake, a deputy director of Hetong Senior Citizens' Welfare Association, an NGO in Tianjin China, told the media that there were many cases in rural areas where legally appointed guardians who were distant relatives of the childless elderly persons never visited or cared for the elderly, but when the local nursing home or civil affairs bureau informed the guardian that the

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[51] *General Principles*, Art.18(3).

[52] See LiXin Yang, *The Advantages and Disadvantages of the Chinse Adult Guardianship Reform in the General Provisions of Civil Law ("WoGuo MinFaZongZe ChengNianJianHu ZhiDu GaiGe Zhi DeShi"*), Journal of Guizhou Provincial Party School, Issue 169, No.3, 2017; Hongjie Man, *The Deficiencies of Chinese Adult Guardianship in the General Provisions of Civil Law(Draft) ("MinFaZongZe(CaoAn) ChengNianJianHu ZhiDu De WenTi Yu BuZu"*), Journal of Beijing University of Aeronautics and Astronautics(Social Sciences Edition),Vol.30, Issue 1, January 2017, at 63; Hongjie Man, *Three Basic Questions Concerning the Adult Guardianship in the General Principles of Civil Law(Draft)* ("GuanYu MinFaZongZe CaoAn ChengNianJianHu ZhiDu SanGe JiBen WenTi"), Legal Forum ("FaXue LunTan"), Vol. 32, Issue 1, January 2017.

[53] Rebecca Lee, *supra* note 35.

ward had passed away, the guardian would immediately appear and ask for the inheritance of the elderly as compensation.[54]

2.The Modernization of Adult Guardianship in 2013 as a Part of the Reforms of Elder Laws

1) Challenges from Modern International Standards

From the analysis in the last section, many problems could be detected in the adult guardianship laws stipulated in the *General Principles*, which reflects the strong Confucian paternalism deeply rooted in the Chinese legal framework.

Since the 1980s, principles of the western guardianship, like the normalization, self-determination, best interests, and least-restrictive alternative,[55] have spread to China and gradually changed China's traditional adult guardianship laws. These new western ideas inspire the Chinese to try a different approach to adult guardianship in which Confucianism could embrace the modern international standards. With the ratification of the *United Nations Convention on the Rights of Persons with Disability (CRPD)* by China, China has been taking steps to adjust its adult guardianship framework to ensure that persons under guardianship can avoid unnecessary restrictions. There are two significant legislative activities in the 2010s representing China's efforts to reconcile the emerging international trend with the Chinese legal tradition; one is the amendment to the *Elderly Protection Law*, and the other is the enactment of the *Mental Health Law*.

[54] He Dan, *Guardianship Amendment Considered to Protect the Elderly,* China Daily, 27th June 2012, online:<http://www.chinadaily.com.cn/china/2012-06/27/content_15524684.htm>.

[55] The principle of least-restrictive alternative in adult guardianship refers to a course of action or an environment that allows the war to live, learn, and work with minimum restrictions on him/her. In following this course of action, a ward is provided a kind of setting which places minimal limits on the ward's rights and personal freedoms so as to enable the ward to meet his/her personal needs. See the legal definition of "least-restrictive alternative" at USLEGAL, online:<https://definitions.uslegal.com/l/least-restrictive-alternative-guardianship/>.

2) The Attempt to Reinvigorate Confucianism with Modern Relevance: The Amendment to *the Elderly Protection Law*

The Law on Protection of the Rights and Interests of the Elderly (‘*Elderly Protection Law*’) was first enacted in 1996. The amendment passed in December 2012 expands the Law from six chapters (50 articles) to nine chapters (86 articles) with three new chapters (38 new articles and 38 revised articles) added. [56] What follows is a discussion of several changes in elderly guardianship under the *Elderly Protection Law*, from which we can see that on one hand, traditional Confucian values are still deeply rooted; on the other hand, the modern international ideas like liberalism and self-determination are also embraced.

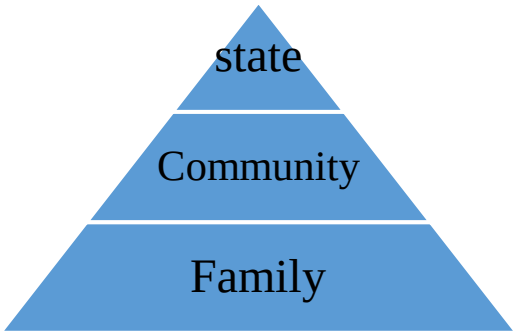
First, the *Elderly Protection Law* enlarges the protective range of adult guardianship, within which elderly persons are included. Mental illness or senile dementia is no longer the only standard for being eligible under the protection of adult guardianship in China.

Second, the *Elderly Protection Law* still preserves the Confucian tradition by specifying the roles of family, community and the state in the elder care. Article 5 of the revised *Elderly Protection Law* constructs a multi-level social security system which shall be established gradually based on families and supported by communities and institutions. This provision maintains the Confucian thoughts that classify three tiers of assistance in adult guardianship structured like a pyramid. On the bottom is the first tier; where family, as the smallest unit in the society and the natural source of help based on the kinship, plays the most fundamental role in most cases.[57] In the middle,

[56] The revised *Elderly Protection Law* came into effect on 1st July 2013, online:<http://www.lawinfochina.com/display.aspx?id=12566&lib=law>.

[57] Chapter 2 of the *Elderly Protection Law* (Arts.13-27) on the ‘Maintenance and Support by Families’ highlights the dominant role of the family in the elderly care. For example, Article 13 specially affirms that the elderly shall be provided for mainly by their families, and their family members shall respect, care for and look after them. Moreover, compared with the previous laws, the revised *Elderly Protection Law* articulates for the first time that people should take care of the psychological needs of their elderly parents. Article 18(2) stipulates that family

community or social networks work as the second tier, which is constituted of many NGOs, village or neighborhood committees.[58] At the top is the state which is also the last resort, only handles the adult guardianship issues by the methods of legislation and judiciary (see Figure 1.1 below).[59]



(Figure 1.1)

Third, in addition to the preservation of the traditional Confucian values, the *Elderly Protection Law* also enriches them by absorbing the modern international ideas and advanced approaches. For example, Article 26 empowers elderly persons with full capacity to appoint a legal guardian in advance of losing capacity, which embodies the self-determination principle. Nevertheless, Article 26 is merely a broad-brush provision that should be applied by referring to the provisions regarding the mandate contract. Legally speaking, the legal relationship in voluntary adult guardianship belongs to the conditional civil juristic acts in nature, which becomes effective on the fulfillment of the condition. Under this contractual relationship, a mandatary will be entrusted to act as a guardian with power of representation relating to the mandatory's life, such as nursing, care, and property management once the mandatory's capacity for civil conduct is insufficient.[60] Regarding the legal application, the voluntary guardianship

members living apart from the elderly shall frequently visit or greet the elderly, which turns the traditional moral filial duty to legal responsibility.

[58] Article 7 of the *Elderly Protection law* encourages state organs, social groups, enterprises, public institutions, and grassroots self-governing organizations to adequately protect the rights and interests of the elderly.

[59] Article 28 and Article 29 of the *Elderly Protection Law* require the state to guarantee the basic need of the elderly through pension insurance and medical insurance systems subsidized by the state. Article 30 mandates the state to carry out the long-term nursing guarantee work to guarantee the nursing needs of the elderly.

[60] Rebecca, *supra* note 35.

has the priority that can exclude other guardianship types, the ward's residual capacity will be respected as much as possible. Article 26(2) states that if there is no mandate contract of guardian appointment in advance, the default adult guardianship regime, i.e., the statutory guardianship and the designated guardianship stipulated in *the General Principles*, will become applicable upon the incapable elderly person. Therefore, the application of the guardianship provisions in *the General Principles* has been broadened, which is no longer limited on the mentally ill persons only.

3) The Mental Health Law

Besides the *General Principles* and the *Elderly Protection Law*, the third significant development in China's adult guardianship is the *Mental Health Law*, which is China's first national mental health legislation and was influenced by the *CRPD* during the drafting process. [61] It is relevant to decision-making for medical treatment in some cases where the patient with a 'mental disorder' cannot make decisions about health care. The law prescribes a voluntary diagnosis and voluntary admission system, to prevent mentally ill persons from being involuntarily restricted and treated in psychiatric facilities.[62]

As described above, *General Principles* identify three possible legal capacities for with respect to civil conduct: full, limited and no capacity. However, the procedure to evaluate the person's mental condition and legal capacity is absent. Generally, family members can trigger the legal process of psychiatric assessment, and they are responsible for deciding whether individuals should be treated for mental disorder.

[61] The *Mental Health Law* was enacted in October 2012 and came into effect on 1 May 2013. Online:<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4198897/>.

[62] See *Mental Health Law of PRC*, Art. 30. However, Article 30 is contradictory. On one hand, the first sentence in the article indicates that inpatient treatment should usually be voluntary; on the other hand, the subsequent two clauses indicate that two additional conditions need to be met before involuntary commitment is mandatory.

However, Article 27 of the *Mental Health Law* reversely prohibits forcing persons to undergo a medical examination against their wills, except as otherwise provided by law. Article 30 also clearly emphasizes that inpatient treatment of mental disorders shall generally be voluntary unless the individual has been diagnosed as being severely mentally ill and considered a danger to himself or others. Moreover, Article 25 stipulates that only a qualified psychiatrist has the authority to determine whether the adult has a mental illness. These stipulations which reflect deinstitutionalization for psychiatric patients and the embracement of western principles of normalization and least-restrictive, liberate people from unnecessary residential institutions to re-integrate in the community and restart a new normal life.

There is more progress worth mentioning in the *Mental Health Law*. Article 5 introduces a human rights orientation to the law, which emphasizes the respect, understanding, and care for the mentally disordered persons, and prohibits the stigmatization, humiliation, abuse or any illegal restriction on them. This provision is a declaratory clause ensuring that the purpose of the law is to protect the mentally ill persons rather than restrict them. Article 40 (2) also states that any restraints, isolation or other medical measures should be protective instead of being punitive. Article 46 specifies that medical facilities and health care providers should not prevent mentally ill persons who are receiving inpatient treatment to communicate with the outside and to see the visitors, which protects the wards' communication rights under the guardianship during the inpatient treatment. Article 49 stipulates mentally ill patients' rights of being informed during the processes of diagnosis and treatment. In this sense, the *Mental Health Law* aims at defining the "safety circle" for persons with a mental disorder.

4) Conclusion

Notwithstanding the new developments of adult guardianship in the *Elderly Protection Law* and the *Mental Health Law,* the Chinese adult guardianship system had not been thoroughly established yet by 2013. The previous framework was a fragmented one, mainly comprised of the stipulations in the *General Principles* and the *Opinions,* which reflected the Confucian paternalism. Other guardianship related laws, including the *Elderly Protection Law* or the *Mental Health Law*, had significantly improved the human rights protections by embracing the modern international ideas and principles, but still did not eliminate the paternalism reflected in the traditional adult guardianship regimes.

What is worse, the fragmentary laws made the adult guardianship framework quite chaotic, and there might be many loopholes and contradictions during the application of the law.[63] For example, although Article 26 of the *Elderly Protection Law* introduces voluntary adult guardianship, it is silent on its operational guidelines and its precise interaction with other general guardianship laws. Are those adults who have not reached old age also legally permitted to appoint their guardians before they lose their legal capacity for civil conduct? If so, what is the legal basis since voluntary adult guardianship is only prescribed in the *Elderly Protection Law*? If not, the disunity within the Chinese adult guardianship institutions was apparent.

There are other deficiencies such as the absences of the state supervisory institutions and express provision regarding the termination and post-termination of an adult guardianship relationship.[64] As a result, the previous framework relied entirely on the

[63] Lindy describes the Chinese adult guardianship laws in his paper that "The Chinese framework is a fragmented one, comprised of different forms of regulation, not specifically designed to regulate the making of health decisions…Many uncertainties still exist about who has authority to make health decisions, for whom such decisions can be made, and the principles which should inform the decision-making process." See the Chinese regulatory framework in Lindy Willmott, *Guardianship and Health Decisions in China and Australia: A Comparative Analysis,* Asian Journal of Comparative Law, Vol.12, Issue 2, December 2017.

[64] Only Article 18(3) of *the General Principles* stipulates that the court can disqualify a guardian based on the

good faith and ability of guardians who are expected to act in the best interests of the wards, while the wards had no effective access to quit the existing adult guardianship relationship by themselves when they were suffering from exploitation, abuse, and neglect.[65]

3. The Primary Establishment of the Adult Guardianship Regime in 2017 with the Enactment of *General Provisions*

1) *The General Provisions of Civil Law*

The General Provisions of Civil Law ('General Provisions'), deemed as the opening chapter of China's *Civil Cod*e, came into effect on 1st October, 2017.[66] The *General Provisions* are constituted of 210 articles in 11 chapters, which are based on the *General Principles* and enacted to better handle the new situation arising with China's socio-economic development. Legislators have revised many clauses in the *General Principles* and added new ones to better protect individuals and organizations.[67] Many scholars' opinions including the criticisms to the *General Principles*, especially their strong requests for reform and reorganization of China's adult guardianship system, were taken into account during the enactment of the *General Provisions*.

The following is the introduction of several breakthroughs of the new adult guardianship laws in the *General Provisions*, which stand for the primary establishment of a modern adult guardianship regime in China.

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application of a concerned party or unit. However, the stipulation is too general because the concept of "concerned party or unit" and the particular situation which could lead to the disqualification of a guardian are not clear.

65 Cora Chan, Rebecca Lee, *supra* note 13, at 131.

66 Online:<http://www.lawinfochina.com/display.aspx?lib=law&id=23213>.

67 China Focus: China Adopts General Provisions of the Civil Law, Xinhua Press, 16th March 2017, online:<http://english.court.gov.cn/2017-03/16/content_29655856.htm>.

2) Breakthrough 1: Mental Illness is not Required for being Eligible for Adult Guardianship

The *General Provisions* stipulate that an adult with no or limited capacity for civil conduct shall be eligible for a guardian, which means the requirement in the *General Principles* that only the mentally incapacitated persons could be the wards under adult guardianship is removed.[68] This change indicates the new adult guardianship law has achieved a full range of coverage. Seniors and physically and intellectually disabled who are unable to care for themselves would also be placed under adult guardianship. Persons with various extents of incapacity out of different reasons are all included in the protective range so that the generality in adult guardianship is ultimately achieved.

3) Breakthrough 2: Voluntary Adult Guardianship is Recognized

Article 33 of the *General Provisions* stipulates that any adults with full capacity for civil conduct can determine their guardians in writing in advance. The guardians can be selected from among close relatives or other individuals or organizations willing to undertake the responsibility. When the adult loses all or part of capacity, the previously determined guardian in the mandate contract shall perform the duty of guardianship. Therefore, unlike the voluntary adult guardianship stipulated in the *Elderly Protection Law* that can be applied only on the elderly, the voluntary adult guardianship in the *General Provisions* has formally been incorporated into the general adult guardianship regime, which reflects China's embracement of the principles such as respecting the wards' autonomy, normalization, and protection for their best interests.

However, there is still no stipulation regarding the specific procedures in voluntary adult guardianship. Article 33 only requires the written form of the ward's will, while

[68] *General Provisions*, Art. 21(1) and Art. 22(1).

whether the context shall be registered or notarized is unclear. The lack of operability in voluntary adult guardianship leads to doubts and unacceptability among the elderly and other persons with full capacity. In Chinese culture, wills and any other arrangements like the appointment of a guardian symbolize misfortune, so the Chinese are reluctant to plan for these events. Additionally, young adults are less likely to contemplate their possible future incapacity and to prepare thoroughly for it, even though they are more likely to be involved in high-risk activities which could lead to severe and lasting brain injuries.[69] Therefore, if there are no sufficient specific procedural safeguards to guarantee persons' arrangements to appoint their guardians, voluntary adult guardianship would not be popularly embraced.

Even worse, the provision leaves many other unanswered questions. For example, are there any requirements for guardians to be qualified in a mandate contract? Their age might be a requirement since most of the spouses of the elderly also belong to the high age group, they might not be suitable to be the mandatary; and are individuals allowed to appoint two or more guardians in their mandate contracts, or are they allowed to own several mandate contracts concurrently?

4) Breakthrough 3: The Acceptance of the Principles of the Best Interests and Respecting Wards' Wills

The purpose of guardianship lies in protecting wards' interests, while also maintaining social stability and improving the transaction safety.[70] The previous adult

[69] Robert M. Gordon, Ann M. Soden, *The Guardianship of Incapable Adults and Their Property in Canada,* Comparative Perspectives on Adult Guardianship, edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014), at 121.

[70] According to Article 21 and Article 22 of the *General Provisions*, the validity of mentally incapable persons' acts in a transaction activity is void or undetermined, which increases uncertainty and cost of transaction. Persons have to figure out whether the other party in transaction has full legal capacity to ensure that the transaction is valid in law. Under the guardianship regime, the appointed guardians act as representatives of wards or assist wards to make decisions, which avoids the potential uncertainty of the validity of transactions.

guardianship laws in the *General Principles* mainly focus on the latter two aspects, advancing guardians' decisions while restraining individuals' free wills. The *General Principles* have no prescriptions regarding human rights principles. In contrast, the principles of best interests and respect for wards' wills are asserted in the *General Provisions*, such as Article 30 where the qualified guardians negotiate whom shall be guardian, [71] Article 31(2) where the courts and other departments designate guardians,[72] Article 35 where guardians perform their duties,[73] and Article 36 where the court disqualifies guardians and arranges necessary provisional guardianship measures.[74]

The new provisions above follow the contemporary guardianship's development in the world. One is the principle of the best interests which requires guardians to make decisions that best promote the well-being of the ward. The guardian should make decisions based on what a reasonable person in the ward's circumstances would do in light of the advantages and disadvantages of the proposed course of action.[75] Another is the principle of respecting the wards' wills, which requires guardians to consider the wards' past and present wishes and feelings, in particular, any relevant written statements they had made before they lost legal capacity.

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[71] *General Provisions,* Art.30, "Persons legally qualified for guardianship may, by agreement, determine the guardian. The true will of the ward shall be respected in the determination of guardian by agreement."

[72] *General Provisions,* Art.31(2), "The urban residents' committee, villagers' committee, civil affairs department, or people's court shall respect the true will of the ward, and designate the guardian from among persons legally qualified for guardianship under the principle of most benefiting the ward."

[73] *General Provisions,* Art.35, "A guardian shall perform the duty of guardianship under the principle of most benefiting the ward. The guardian shall not dispose of the ward's property unless for safeguarding the ward's interests; The guardian of an adult shall, in the performance of the duty of guardianship, respect the ward's true will to the fullest extent, safeguard and assist the ward in performing juridical acts that are commensurate with the ward's intelligence and mental health. The guardian shall not interfere with any affairs that the ward is capable of handling alone."

[74] *General Provisions,* Art.36, "Where a guardian falls under any of the following circumstances, the people's court shall, upon application of the relevant individual or organization, disqualify the guardian, arrange necessary provisional guardianship measures, and designate another guardian in accordance with the law under the principle of most benefiting the ward." (Omitted here the following circumstances).

[75] Mary Lay Schuster, *Determine "Best Interests" in End-of-Life Decisions for the Developmentally Disabled: Minnesota State Guardians and Wards*, Disability Studied Quarterly, Vol. 34, No.4, 2014.

However, the significant progress of introducing the advanced principles is not that perfect. Although the Chinese adult guardianship laws have adopted some of the advanced international principles, there is still difficulty in the application due to the over-general stipulation. On one hand, the *General Provisions* have not defined the "best interests" in the context of the Chinese law; on the other hand, it has not provided any specific criteria to evaluate the best interests for the wards in practice. Are the best interests of others for whom the ward had a close or special concern also included? Moreover, the most significant problem lies in the absence of any proposal for addressing a potential conflict between the principle of the best interests and respecting the wards' true wills.[76]

5) Breakthrough 4: Different Situations of Guardianship Termination have been Specified

The termination of guardianship is effective to protect the wards from being infringed upon in a guardianship relationship. Regrettably, the *General Principles* include no stipulation on this issue,[77] while the *General Provisions* fill the gap. Article 39 stipulates several situations under which the guardianship shall be terminated.[78] Additionally, Article 36 provides several circumstances under which the court shall disqualify guardians upon the application of the relevant individuals or organizations.[79]

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[76] The conflict between the principle of the best interests and respect for the wards' true wills will be further discussed in details in Chapter III.

[77] Only the Article18(3) of the *General Principles* stipulates the court may disqualify a guardian based on the application of a concerned party or unit. However, it does not specify the situations under which the court shall consider the termination of guardianship, in this sense, the termination of guardianship in the *General Principles* is absent.

[78] *General Provisions,* Art.39, "Under any of the following circumstances, the guardianship shall terminate: 1) The ward obtains or regains full capacity for civil conduct; 2) The guardian becomes incapable of guardianship; 3) The ward or the guardian dies; 4) The guardianship otherwise terminates as determined by a people's court."

[79] *General Provisions,* Art.36, "Where a guardian falls under any of the following circumstances, the people's court shall, upon application of the relevant individual or organization, disqualify the guardian, arrange necessary provisional guardianship measures, and designate another guardian in accordance with the law under the principle of most benefiting the ward. (1) Acting seriously to the detriment of the ward's physical and mental health. (2) Being slack in performing the duty of guardianship, or being incapable of performing the duty of guardianship but

However, there is no provision governing the post-termination affairs, such as guardians' responsibilities to account for their work or return the wards' property.[80]

iii. Conclusion: The Main Deficiencies Needed to be Solved in China's New Adult Guardianship Regime

In China, both the traditional adult guardianship laws and the current adult guardianship regime always contain strong familial dimensions and readily justifiable by the Chinese traditional values. The previous framework prescribed in the *General Principles* is pursuant to the Confucian ideas so that it disregards individual's residual capacity, while the recent reforms of China's adult guardianship mainly focus on how to compromise the traditional values and modern principles. This theme is reflected in a series of new domestic legislation and international commitments that China has joint. On one hand, influenced by the Confucian theory, the tradition of the Chinese adult guardianship always perceives family as the most basic unit for taking care for incapacitated adults. On the other hand, society and the state tend to undertake more of the ultimate responsibilities by legislation and public policies to codify and particularize the traditional moral responsibilities. For instance, Article 18(2) of the *Elderly Protection Law* is the most representative stipulation that turns the traditional moral responsibility into a legal obligation, which states that family members living apart from the elderly have the legal duty to frequently visit or greet the elderly.

refusing to delegate part or all of the duty of guardianship to another person, which causes distress of the ward. (3) Otherwise seriously infringing upon the ward's lawful rights and interests."

[80] Besides the four breakthroughs illustrated in this section, there are several other new adult guardianship institutions in the *General Provisions*, such as the provisional guardianship, guardians' reinstatement of the guardianship after being disqualified; all of these progresses greatly promote the modernity of China's adult guardianship laws. See *General Provisions,* Art. 31, Art. 36 and Art. 38.

Despite many positive developments in Chinese adult guardianship's reforms, the further reforms are needed. The following aspects in the current adult guardianship regime should be revised in the near future:

(1) Abandon the "all-or-nothing" approach and provide more alternatives to adult guardianship. The current Chinese adult guardianship classifies the wards into two categories, namely the persons with no capacity for civil conduct and those with limited capacity for civil conduct. Such a classification is a categorical approach that fails to recognize the varying extents of people's disabilities when they are making decisions on different issues and circumstances. Accordingly, China's adult guardianship is still plenary because it adopts substituted decision-making model in which the wards will be entirely deprived of self-determination rights and legal status to make decisions, no matter to which extent do the wards lose their capacity. Except for voluntary adult guardianship, there are no other alternatives to the general adult guardianship. China's legislators could consider introducing the supported decision-making and partial guardianship to accurately tailor guardians' power according to every ward's incapacity degree.

(2) Reconsider the oversimplified standards for guardians' appointment. Besides the current standards which prioritize the kinship between the guardian and the ward, China's adult guardianship should also consider more specific factors when appointing a guardian, notably the guardians' characteristics, social reputation and any potential conflicts of interests with the wards.

(3) Establish a professional department of public guardianship and trusteeship. Although Article 32 of the *General Provisions* stipulates that the civil affairs department, urban residents' committee, and the villagers' committee have the duty to

act as public guardians when the qualified designated guardians are not available,[81] these three departments seldom undertake the role in reality.[82] The reasons might lie in two aspects. First, the officials are irresponsible because in the Chinese belief, adult guardianship belongs to the private realm, even if no qualified family members are available to be guardians, it is impossible for the social community or an organization to act as a caretaker in one person's daily life. Officials perceive themselves as the powerholders in China, rather than 'babysitter' for the society, so they are unwilling to make efforts to provide guardianship for the disabled. Second, the civil affairs department, neighborhood committee, and village committee are comprehensive administrative institutions which are responsible for solving citizens' problems in every respect of their daily lives. Consequently, these comprehensive departments and committees are not professional enough to be public guardians. China should establish particular institutions or agencies comprised of various specific departments which are working on different affairs such as physical health care, mental care, elderly care, property management and so on.

(4) Establish a registration and notarization system to provide procedural safeguards and improve the operability of voluntary adult guardianship. Article 33 of the *General Provisions* only prescribes the written form of a mandate contract, but there

[81] *General Provisions*, Art.32, "Where there is no person legally qualified for guardianship, the civil affairs department may or the urban residents' committee or villagers' committee of the place of the ward's domicile satisfying the conditions for performing the duty of guardianship may act as the guardian." The same stipulation can be found in the Article17(1) of the *General Principles*, "If none of the persons listed in the first paragraph of this article is available to be the guardian, the unit to which the mentally ill person belongs, the neighborhood or village committee in the place of his residence or the civil affairs department shall act as his guardian."

[82] According to the response by the Chinese government, by the end of 2011, institutions for people with psychological and intellectual disabilities under the civil affairs departments had admitted only 55,000 persons with disabilities, while professional institutions such as senior citizens institutions and comprehensive welfare institutions throughout the country accepted 2.568 million people (most of them have partially or completely lost capabilities). See the Committee on the Rights of Persons with Disabilities, *Response by the Government of the People's Republic of China to the List of Issues (No.1 to No.30)*, Issue 19, at 21.
Online:<https://www.google.com/search?sourceid=chrome&ie=utf-8&oe=utf-8&aq=t&hl=en-US&q=%20Response%20by%20the%20Government%20of%20the%20People%E2%80%99s%20Republic%20of%20China%20to%20the%20List%20of%20Issues%20(No.1%20to%20No.30)%20by%20the%20Committee%20%20on%20the%20Rights%20of%20Persons%20with%20Disabilities#>.

is no other procedural requirement to formalize this contract. Voluntary adult guardianship has not been included into China's registration system yet,[83] on one hand, it could not reflect the ward's true will, on the other hand, it is uncertain whether the ward is mentally competent when making the mandate contract. As will be illustrated in Chapter III, registration will also provide the mandate contract with publicity to secure the transaction safety.[84]

(5) Establish a public supervisory mechanism. The supervision is quite vital in the adult guardianship, especially for voluntary adult guardianship.[85] However, the *General Provisions* in China contain little explicit language concerning the regulation and supervision over guardians in practice. To prevent any potential neglect and abuse of wards, the state should encourage persons to appoint a private supervisor by signing an agreement in advance before they lose legal capacity. If no such prior arrangement is made, public departments should undertake the ultimate responsibility of supervision.

The problems above are briefly introduced and will be further discussed in Chapter III. After reviewing the Canadian adult guardianship in Chapter II, the paper will compare these two countries' regimes in Chapter III and try to provide some references from Canada for the Chinese adult guardianship reforms, notably in the preceding aspects identified in this section.

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[83] For now, only the civil act of marriage and adoption need to be registered in China. See *Marriage Law of the PRC (Revised)*, Art. 9; *Adoption Law of the PRC (Revised)*, Art. 15, Art. 20 and Art. 27

[84] From the comparative perspective, the Japanese adult guardianship laws and Korean adult guardianship laws both require the mandate contracts of appointing guardians to be notarized. See Je Cheol Ung, *Korean Guardianship*, Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014), at 199; See Wang Zhuqing, Yang Ke, *Jianhu Zhidu Bijiao Yanjiu [The Comparative Legal Study on the Guardianship]*, (Beijing: Intellectual Property Publishing House).

[85] "The supervisory guardian is indispensable to establish a contractual guardianship, in contrast with a judicial guardianship." See Je Cheol Ung, *ibid*, at 191.

II. THE CANADIAN GUARDIANSHIP SYSTEM: FROM A PLENARY AND PATERNALISTIC ONE TO A TAILORED ONE WITH DIVERSE ALTERNATIVES

Canada's adult guardianship is an example of success to provide suitable and helpful experience for China because both states have similar routes and patterns of guardianship development. More specifically, both adult guardianship in Canada and China developed from an inadequate one to a more improved one, from a plenary and paternalistic guardianship which emphasizes restriction of wards' autonomy to tailored guardianship with diverse alternatives to accommodate the wards' various needs to different degrees.

The evolution of Canada's adult guardianship could be divided into three stages, namely the early establishment influenced by the English lunacy laws in the common law tradition and *the Napoleonic Code*, the reforms since the mid-1970s and the modern systematic model. Accordingly, this chapter first traces the origins of Canada's adult guardianship in the common law tradition and the continental civil law tradition respectively, then explores the long-term reforms and last introduces the contemporary reconstruction of Canada's adult guardianship regime and the characteristics in every developing stage. Moreover, this chapter also highlights the outstanding reforms in Alberta's legislation, notably *the Dependent Adult Act* and *the Adult Guardianship and Trusteeship Act* for China's reference.[86]

[86] This paper will outline examples primarily related to Alberta but also some of other legislation across Canada. This section will demonstrate later that some of the Canadian provinces' reforms in adult guardianship were primarily inspired by the model provided by Alberta's *Dependent Adults Act*, which was the first modern adult guardianship law in Canada. Alberta's *Dependent Adults Act* contained many innovative and progressive features that later appeared in the early 1990's amendments to Quebec's *Civil Code* and the *Civil Procedure Act*, Ontario's *Substitute Decision Act* and Manitoba's *Vulnerable Persons Living with a Disability Act.* See *Court and Statutory Guardianship: Patients Property Act and the Adult Guardianship Act (Part 2) A Discussion Paper On Modernizing the Legal Framework*, February 2004, Public Guardian and Trustee of British Columbia. Moreover, Alberta established the first office of a public guardian in Canada in 1978.

i. Tradition: The Paternalism in the Plenary Adult Guardianship

1.The Origins of Canada's Adult Guardianship

Canada was colonized by Britain and France, and it was forced to accept the institutions and legislative approaches from the common law tradition and the continental law tradition simultaneously.[87] Accordingly, Canadian jurisprudence in the field of adult guardianship is constituted of mixed legal traditions that mainly originated from the *Law of Parens Patriae* in the UK and the *Napoleonic Code* in France. Specifically, the English lunacy laws and the interdiction laws in these two traditions formed the foundation of Canada's early plenary adult guardianship regime.

1) The Source of Plenary Adult Guardianship in the Common Law Tradition: Traced to the English Lunacy Laws and the *Parens Patriae Law*

Since Canada's legislative power is divided between the federal parliament and the provincial legislative assemblies, different provinces have their own adult guardianship laws, as the delivery of health is a matter of provincial jurisdiction.[88] Most provincial or territorial statutes can be traced to the English lunacy laws (notably, the *Imperial Lunacy Act*, 1890) of the 19th century.[89] The English lunacy laws derived from the *Law of Parens Patriae*, which prescribed that the King has responsibility and authority for

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[87] This is a general description of Canada's jurisprudence. Accurately speaking, different provisions in Canada accept different jurisdictions. To be more specific, Quebec (the Lower Canada) accepts civil law tradition and the rest of the country accepts common law tradition. This paper will separately discuss the adult guardianship regime of these two legal traditions in Canada.

[88] According to the *Constitution Act*, 1867, matters under provincial jurisdiction include hospitals, municipalities, education, and property and civil rights. See the constitutional distribution of legislative powers explained by the Canada government, online:<https://www.canada.ca/en/intergovernmental-affairs/services/federation/distribution-legislative-powers.html>; *The First Report of Canada on the Convention on the Right of Persons with Disabilities* also states in the Term 10 that matters concerning persons with disabilities fall under both levels (federal level and provincial level) of government, who work together and in collaboration with the non-profit and private sectors, and assume complementary roles in promoting and supporting the full participation of persons with disabilities in all dimensions of Canadian society, online:<http://www.ccdonline.ca/en/international/un/canada/crpd-first-report>.

[89] There are three exceptions, namely Alberta, Saskatchewan, and Quebec. The Alberta legislation was significantly reconstructed during the mid-1970s; the Saskatchewan's new *Dependent Adults Act* (*Dependent Adult Act*, SS 1989-90, c D-25. 1.) reflects a more radical reconstruction of the law; prior to 1989, Quebec's adult guardianship provisions were based upon the French legal system, and reflected a combination of Roman Law, old French ordinances and 16th century Custom of Paris, and 19th century *Napoleonic Code*. See R.M. Gordon, Simon N. Verdun-Jones, *Adult Guardianship Law in Canada*, (Ontario: Carswell,1992), at 1-16.

the custody of the lands of "idiots", "natural fools" or "lunatics".[90] *Parens Patriae* is Latin for the meaning of "parent of the nation". In the context of adult guardianship laws, *Parens Patriae* referred to the caretaker, who acted as parents of the persons who lost the intellects and decision-making abilities to take care of themselves. The "*Parens Patriae*" tradition was the source of paternalism in lunacy laws.

Canada's former adult guardianship regime maintained the controversial characteristics in the English lunacy laws. First, the law was featured with paternalism, under which guardians acted as parents caring for the lunatics who had legal status as minors.[91] Second, the law only focused on the management of estates rather than personal protection; the law did not prescribe guardians' duties on the wards' personal care; worse still, few acts separated the orders for personal guardians and those for property guardians; hence, the ward's property guardian would also become the adult's personal guardian even if the ward did not need personal care.[92] Third, the lunacy laws adopted an "all-or-nothing" approach; once a guardian was appointed, he would gain absolute and plenary authority over the ward's person and property, regardless of the ward's real needs; the ward had either to accept such absolute guardianship or receive no assistance at all. Such plenary guardianship was based upon the assumption that an adult was either completely incompetent or not, which failed to recognize the fact that in many cases, incompetency emerged gradually. As a result, when a person was not radically incompetent but needed some assistance, he had to exaggerate the extent of "mental incompetency" to be eligible for guardianship. Fourth, the protective spectrum was too narrow; as Gordon and Verdun-Jones have pointed out, Canada's former adult

[90] See Chantal Stebbings, *Protecting the Property of the Mentally Ill: The Judicial Solution in Nineteenth Century Lunacy Law*, The Cambridge Law Journal, Vol. 71(2), 2013, at 390.
[91] Stebbings clarified the paternalism in lunacy laws. He stated that the lunacy law was a supremely paternalistic branch of law because the lunatic persons' decisions were determined by others in the perceived best interests of those subjected to it, with no articulation of their needs by the users themselves. Furthermore, he points out that the paternalistic ethos of lunacy laws underlay the place of mentally ill within English law. *Ibid*, at 409.
[92] *Ibid*, at 5.

guardianship regime rested on the concept of mental incompetency or incapacity, which means that only when there was evidence that the adult was utterly unable to make decisions due to mental disorder, would he be subject to guardianship. Nevertheless, those who were mentally competent but physically disabled were excluded, but had to feign mental illness or insanity, which distorted truth and stigmatized these persons.[93]

2) The Source of Plenary Adult Guardianship in the Continental Civil Tradition: Traced to the Interdiction laws in the *Napoleonic Code*

The adult guardianship in Quebec's civil law tradition was in the name of "Interdiction", [94] which was derived from the *Napoleonic Code*. Although the *Napoleonic Code* was highly praised for its rationality and justice based on the principles of equality, freedom, and solidarity, its interdiction provisions were quite conservative and even retrogressive. The *Napoleonic Code* constituted 2281 provisions, and the interdiction provisions (from Article 489 to Article 515) were in Title XI., Book I. of Persons.

Interdiction refers to a legal restraint upon a person incapable of managing his property because of mental incapacity, from signing any deed or doing any act to his own prejudice without the consent of the curator or indicator.[95] While the definition above is polished and it looks neutral and or non-discriminatory toward those lacking mental capacity, the interdiction resulted in plenary guardianship. To be more specific, Article 489 indicated who would be entirely subject to the interdiction: "An adult, who is in a habitual state of idiocy, insanity, or madness, must be interdicted." Article 509

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[93] R.M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 1-20.

[94] In French law, every person who, on account of insanity, has become incapable of controlling his interests, can be put under the control of a guardian, who shall administer his affairs with the same effect as he might himself, such a person is said to be "interdict", and his status is described as "interdiction". See Henry Campbell Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (2nd Edition)*, (St.Paul, Minn, West Publishing Co.,1910), at 646.

[95] The Free Dictionary by Farlex, Online:<https://legal-dictionary.thefreedictionary.com/interdiction>.

provided that insane persons would lose their legal status completely, "An interdicted person bears a likeness to a minor, as regards his person and his property; the laws on the guardianship of minors shall be applicable to the guardianship of persons under interdiction". Article 502 stipulated that all acts of the interdicted person without the assistance of the advisor shall be void in law.[96] Both Article 502 and Article 509 radically deprived mentally ill persons of freedom, ignored their dignity and even went against the spirit of the French Revolution. Persons deemed "insane" or "idiots" would lose all of their legal rights and self-determination rights in the personal and property affairs. Therefore, to some degree, the interdiction laws in France were the same as the English lunacy laws, both of which were plenary adult guardianship in essence.[97]

As Quebec retained the civil law tradition following the French settlement, the *Napoleonic Code* significantly influenced Quebec's legal system. The interdiction regime had been implemented until 1991 when it was abolished due to the enactment of the *Quebec Civil Code.*

2. The Establishment of Plenary Adult Guardianship in Canada

1) Adult Guardianship in Upper Canada, Taking *Ontario Lunacy Act* as an Example

The developments in Canada's lunacy laws primarily focused on the connotation of "lunatics". This section will analyze the early establishment and development of adult guardianship in Ontario to examine how perceptions and attitudes toward wards developed from being lunatic-focused to being mental-incompetency-focused.[98]

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[96] See the English version of the *Napoleonic Code*, online:<http://www.napoleon-series.org/research/government/c_code.html>.

[97] Honoré de Balzac's work "*The Commission in Lunacy*" could reflect the deficiency of the interdiction system in the French society. The story is about a wife of a slightly unconventional nobleman, and she wants her husband to be declared senile so as to have the full control of the family's wealth.

[98] As this section would illustrate later, the concept of "lunacy" was redefined by the *Ontario Lunacy Act,* which enlarged the scope of wards to include the elderly, alcoholics, drug abusers and other mentally incapable persons. Therefore, one of the most significant developments in adult guardianship laws in Upper Canada was that the legislation was no longer just applied on the lunatics only, and the scope of application was broader to include any persons who were mentally incompetent.

As illustrated in the first section of this chapter, provinces with the common law tradition in Canada constructed their adult guardianship laws by relying on the model in English lunacy laws. For example, the *Ontario Lunacy Act* of 1909 which formed the basis for most early Canadian lunacy legislation was basically the same as the *Lunacy Act of England.*[99] Explicitly, they both defined "lunatic persons" as "idiots", "persons with unsound minds" or even "persons who were insane and dangerous to be at large", which strongly reflected the stigma and injustice on the wards. The *Ontario Lunacy Act* adopted these stigmatizing definitions and terminologies because legislators in Ontario followed the traditional English perspective, which allowed for affirming adults' mental condition of insanity without a diagnosis in medicine and a scientific evidence.[100]

Meanwhile, medical standards were gradually introduced into Canada's plenary adult guardianship. In the later years, the criteria to judge whether adults should be placed under lunacy acts adopted more scientific medical standards rather than depending only on other persons' statements.[101]

In 1911, the *Ontario Lunacy Act* was revised, which symbolized Canada's first step toward a modern adult guardianship system.[102] The most significant progress in the reform was the redefinition of "lunacy", that is, the "lunatics" referred to persons who were unable to manage personal affairs due to mental incapacity induced by reasons

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[99] Marlett N.J. *Issues of Competence and the Dependent Adults Act.* In: Carmi A., Chigier E., Schneider S. (eds) Disability Medicolegal Library, Vol.3, (Springer, Berlin, Heidelberg,1984), at 17.

[100] Gordon criticized these vague and stigmatizing concepts that defy effective, objective measurement. The law assumes they can be identified accurately by medical practitioners but the legislation does not require that a particular assessment technique be used. Some medical practitioners may assess an adult by using a formal and standardized mental status test, while others may prefer different and even less reliable techniques such as personal impressions and hearsay. Practitioners may simply assume that a diagnosis of mental disorder is sufficient "evidence" of incompetency. See R.M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 1-21.

[101] For example, in Ontario, a competency clinic for the elderly has been stablished at the Baycrest Centre for Geriatric Care in Toronto. A multi-disciplinary team is constructing a system for assessing task-specific incompetency amongst impaired elderly people in order to produce new, reliable assessment techniques and instruments. *Ibid*, at 1-23.

[102] "The first signs of a shift in legal and social thought in Ontario in the field of guardianship was made only in 1911, when an amendment to the Lunacy Act was enacted." See Israel Doron, *From Lunacy to Incapacity and Beyond*, Health Law in Canada, Vol. 19, No. 4, 1998, at 102.

including disease, senility, alcohol abuse and drug abuse.[103] Therefore, the scope who could be a ward was enlarged to include the elderly, alcoholics, drug abusers and other mentally incapacitated persons. It was worth noting that this was the first time that the elderly became wards under Canada's guardianship regime.[104]

Subsequently, the *Mental Incompetency Act* in 1937 replaced the *Ontario Lunacy Act.*[105] It adopted the modern concept of "mentally incompetent person", which was more decent and scientific because the provision described the wards as "mentally ill" or "mental defectives" from a medical perspective, while the *Ontario Lunacy Act* used the word of "lunatics" that described the wards as "idiots" living in a state of "insanity".[106]

Although the terminology of adult guardianship laws in common law tradition went through slight changes from being lunatic-focused to being mental-incompetency-focused, the adult guardianship laws before WWII were still paternalistic. The Canadian plenary adult guardianship in the 1930s provided a forced love under the name of protection, for the mentally incompetent persons who were just annexed to their property, while their personal benefits were never under sufficient protection. At that time, wards under plenary adult guardianship still had no rights of self-

[103] The powers and provisions of the Lunacy Act, relating to management and administration, shall apply to every person not declared to be a lunatic with regard to whom it is proved, to the satisfaction of the court, that he is, through mental infirmity, arising from disease age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs." *Lunacy Law Amendment Act,* 1 George V (1911), c 20. *Ibid.*

[104] The elderly people became wards under adult guardianship laws was because of the bias of medical experts. With the development of medical technology and industrialization in Canada, medical experts perceived senility as a disease, rather than a normal life stage. Moreover, since young people were occupying the primary labor force market and the elderly became burdens on society, Canadian law was no longer holding an age-neutral position. The elderly persons were sometimes considered as abnormal, annoying, and undesirable so that they were forced to be the lunatic wards under Canada's adult guardianship at the beginning of the 20th Century. See Xuelin Zhu, *A Study on the Adult Guardianship System in Canada- And its Inspiration for Chinese Adult Guardianship System*, the doctoral dissertation of Jilin University, June 2012, at 18.

[105] *Mental Incompetency Act,* SO 1937, c 39.

[106] In the *Mentally Incompetency Act*, the "Mentally incompetent person" refers to a person, (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or (b) who is suffering from such a disorder of the mind, that he requires care supervision and control for his protection and the protection of his property. See Marlett N.J., *Supra* note 99.

determination either on personal care or on property affairs, and their legal status remained the same as the lunatics' legal status in the *Law of Parens Patriae*.

2) Adult Guardianship in Lower Canada

The *Civil Code of Lower Canada("CCLC")* in 1886 followed the *Napoleonic Code("NC"),* including the interdiction laws prescribing interdicted objects, the appointment of guardians, the interdiction application and declaration, which were stipulated in the 2nd Chapter of the 10th Title.[107]

The *CCLC* shared many similarities with the *NC* on the interdiction provisions. First, Article 325 of the *CCLC* was the same as Article 489 of the *NC* stipulating, "idiots, adults with imbecility, insanity or madness or persons who commit acts of prodigality were the interdicted objects."[108] Second, Article 327 of the *CCLC* was quite similar to Article 490 of the *NC*, both of which stipulated who could trigger the interdiction application that only relatives were qualified to make.[109] Third, Article 328 of the *CCLC*, Article 492 and Article 493 of the *NC* provided that an application for an interdiction must occur through court order, and all the demands for interdiction must be made before the courts with evidence, witnesses or other proving materials.[110] Fourth, Article 329 of the *CCLC*, Article 494 and Article 495 of the *NC* stipulated the family council as a particular institution.[111] Fifth, both Article 330 of the *CCLC* and

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[107] The content of "Interdiction Section" in the *CCLC* will be elaborated in this section and the next footnotes. See the context of the *Civil Code of Lower Canada*, Thomas McCord, *The Civil Code of Lower Canada*, 2nd ed. (Montreal: Dawson Brothers, 1870), at 48-50.
Online:<http://eco.canadiana.ca/view/oocihm.9_01864/115?r=0&s=4>.

[108] According to Article 325 and Article 326 of the *CCLC*, "A person of full age, or an emancipated minor, who is in a habitual state of imbecility, insanity or madness, must be interdicted, even though he has lucid intervals"; "Persons who commit acts of prodigality, which give reason to fear that they will dissipate the whole of their property, are also to be interdicted."

[109] According to Article 327 of the *CCLC*, "Every person has the right to demand the interdiction of anyone related or allied to him, who is prodigal, mad, imbecile, or insane. Husband or wife, likewise, may demand the interdiction the one of the other".

[110] According to Article 328 of the *CCLC*, "The demand for interdiction must be made before the proper court, or before one of the judges or the prothonotary of such court; it must contain a specification of the acts of imbecility, insanity, madness or prodigality. The applicant is obliged to prove these acts."

[111] According to Article 329 of the *CCLC*, "The court, judge or prothonotary before whom the demand is made,

Article 496 of the *NC* required the court to interrogate the defendant.[112] Sixth, both Article 334 of the *CCLC* and Article 502 of the *NC* maintained the characteristics of paternalism because they stipulated the nullity of the acts made by interdicted persons without the assistance of advisors and perceived them as minors.[113] Seventh, Article 336 of the *CCLC* and Article 512 of the *NC* were almost the same at the cease of the interdiction.[114]

The foregoing articles identify the *CCLC* was almost the same with the *NC* in prescribing the interdiction system. Still, there were some differences between these two Codes. To some degree, the *CCLC* was more progressive than the *NC*. For example, Article 331 of the *CCLC* prescribed that once the demand for interdiction was rejected, the court could appoint a judicial advisor for the person, which provided a buffer for the situation where it was not necessary to directly interdict the adults; the judicial advisor assisted the adult only when it came to judicial issues so that the adult still maintained his self-determination rights in daily life.

Overall, both interdiction laws in the *CCLC* and the *NC* were plenary and paternalistic; they shared more common characteristics than discrepancies. First, both of them only prescribed the interdiction on property affairs but ignored the personal protection. Second, the interdicted persons had to deal with their financial affairs with the assistance and consent of judicial advisors; otherwise, all of their acts would be void

orders a family council to be called, as in the case of tutorship, and takes its advice as to the state of the person whose interdiction is sought; but he who makes the demand cannot form part of the family council."

[112] According to Article 330 of *CCLC*, "When the demand is made on account of imbecility, insanity or madness, the defendant must be interrogated by the judge attended by a clerk or assistant, or by the prothonotary; the examination is taken down in writing, and communicated to the family council. These interrogatories are not required if the interdiction is sought on account of prodigality; but in this case, the defendant must be heard or have been summoned to appear."

[113] According to Article 334(2) of *CCLC*, "All acts done subsequently by the person interdicted for imbecility, madness or insanity are null; the acts done by anyone to whom an adviser has been given, without the assistance of such adviser are null, if injurious to him, in the same manner as those of minors and of persons interdicted for prodigality, according to Article 987."

[114] According to Article 336 of the *CCLC*, "Interdiction ceases with the causes which necessitated it. Nevertheless, it cannot be removed without observing the formalities prescribed for obtaining it, and the interdicted person cannot resume the exercise of his rights until after the judgment removing the interdiction."

in law. Therefore, the heteronomy completely replaced autonomy in the interdiction laws.[115]

3. The Paternalism in Canada's Old Plenary Adult Guardianship

As depicted above, influenced by British and the French jurisprudence, Canada adopted plenary guardianship with heteronomy instead of autonomy, only focusing on financial management rather than physical protection, which strongly reflected the paternalism in Canada's early jurisprudence.

1) The Benign Paternalism?

Gordon explicates the principle of benign paternalism, the legacy of the nineteenth-century lunacy laws, which were derived from the doctrine of *Parens Patriae* and were reinforced by a belief that extensive, benevolent state intervention served the best interest of incapacitated adults.[116] Indeed, benign paternalism is a double-edged sword. On one hand, under benign paternalism, mentally incompetent persons completely lost personal dignity, fundamental human rights, and freedom since they were deemed to be mentally incapable like minors who were watched by their parents. On the other hand, the state's parental role in guardianship provided benevolent protection, full care, and assistance as a part of the state's welfare services for mentally disordered persons.

The dual character of paternalism is the reason why Gordon described it as "an unlimited benign paternalism".[117] However, as Robertson pointed out, any form of

[115] Heteronomy refers to action that is influenced by a force outside the individual, in other words the state or condition of being ruled, governed, or under the sway of another. Here the author held the view that the interdiction laws in the *CCLC* and the *NC* reflected heteronomy while denying interdicted persons' autonomy rights, because the interdiction laws stipulated that interdicted persons' acts without judicial advisors' assistance or approval were absolutely void, which means interdicted persons were deprived of legal status and legal rights to make decisions on their own.
[116] R.M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 1-28.
[117] *Ibid.*

guardianship, however benign and "limited" it may appear to be, is extremely intrusive and results in severe restraints on the liberty of affected adults.[118] This paper agrees with Robertson's argument. Benign paternalism is a false concept which is just under the name of benevolence, and the old guardianship laws were still labeled with stigmatization in nature. The real benevolence should be presented as care, assistance, and support; in other words, wards' residual legal capacity should be maintained as much as possible and the state should help them to maximize their capacity, instead of replacing wards' willing or forbidding them to make decisions on their own. Therefore, paternalism, which was presented as an "all-or-nothing" approach in adult guardianship regime and caused the regime plenary, is not benevolent. Under paternalism, the mentally incapable persons were perceived as minor by law, and the state acted as parents of the mentally incapable persons, which deprived wards of legal status and autonomy rights. Worse still, the concept is self-contradictory. Since the paternal power is unlimited, excessive and absolute, there would always be a negative impact upon the ward, how could it be benign paternalism? An overdose of benevolence would be as harmful as the lack of protection and assistance.[119]

The "benign paternalism" tradition in Canada's lunacy laws and interdiction laws and the Confucian tradition in China's adult guardianship were quite alike in many aspects. Both states directly intervened in and took control of the lives of adults who were unable to care for themselves and radically deprived them of self-determination rights; both states failed to recognize the incapacitated adults might still be able to make parts of decisions independently and provided help for them only in a necessary situation. To remove the paternalism in the early adult guardianship laws, both China

[118] Gerald B. Robertson, *Mental Disability and the Law in Canada*, (Ontario: Carswell,1992), at 116-117.
[119] Working Group on Legal Issues, Committee on Guidelines for Comprehensive Services to Elderly Persons with Psychiatric Disorders, *Legal Issues in the Care of Mentally Impaired Elderly Persons: Competence, Surrogate Management, and Protection of Rights*, Canada's Mental Health, Vol.6 1987.

and Canada need to redefine and adjust the state's role in this regime that only when the persons' actions were likely to harm others, would the state forcefully intervene in their lives.

2) Paternalism in Canada's Early Undeveloped Mental Health Treatment and Mental Health Legislation

Canadian adult guardianship was not complete in the 1990s because it only focused on mental health care issues until the 1930s when it just began to pay attention to the needs of the physically disabled adults, hence the *"Parens Patriae*" tradition and paternalism were initially reflected in the early mental health treatment and mental health acts. The early mental health treatment provided a form of guardianship when an adult was admitted to a mental health facility.[120] Therefore, the foundation of the early adult guardianship framework was gradually built up through the practices of mental health treatment and mental health acts.

Like in England, mentally incapable persons in Canada were either guarded in families or put into prison at the beginning of the 19th Century. In 1839, Ontario passed legislation to authorize the erection of an asylum for the reception of insane and lunatic persons.[121] However, until 1841, the first provisional mental hospital in Upper Canada was established, which was rebuilt based on a prison that was unsuitable to confine criminals. If three medical practitioners determined the patient was mentally incompetent, the patient would be directly and forcefully admitted by the mental hospital.[122] Therefore, with a growing immigrating population, there were more and

[120] See R.M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 1-26.
[121] The law authorized the government to establish the first provincial asylum, thereby giving Ontario a degree of responsibility for the care of people with a disability, including those with a developmental disability. See *The Consolidated Status of Upper Canada*, RSUC 1839, c XI.
[122] Fances Frankenburg, *The 1978 Ontario Mental Health Act in Historical Context,* HSTC Bulletin, Vol.6, No.3, 1982, at 172.

more patients held in Canada's mental hospitals and asylums, which became so crowded that the quality of care became poorer and poorer.[123]

In 1884, Canada established the first formal asylum, the Chapel of Hope, in London, Ontario. Until the end of the 19th Century, this asylum had already held 1000 patients and became the largest asylum in North America. Meanwhile, there was significant progress in medicine and psychiatry at the beginning of the 20th Century. Accordingly, nearly every province in Canada revised the mental health acts and adult guardianship laws one after another, mainly focusing on introducing the medical standards into legal judgment. For example, in 1911 and 1937, Ontario adopted a medical standard to classify different levels of mental capacity and stipulated that medical certificates be necessary for any guardianship declaration.[124] However, once medical standards became the only one criteria, it was hazardous, because some medical practitioners had impure motives; under these medical experts' misguidance, even some persons who did not behave normally but had full capacity were also forcefully placed under guardianship. As a result, there were more and more cases of involuntary psychiatric hospitalization. For instance, there were only seven voluntary patients among the total number of 2133 patients in the Ontario Hospital in 1922.[125] Such a chaotic mental health treatment made the Ontario council realize the necessity to change this over-restrictive method. For example, the *Mental Health Act* was enacted in 1935, which emphasized that hospitalization was aiming to cure the psychiatric patients, instead of controlling their behavior.[126]

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123 *Ibid*, at 173.
124 *Lunacy Law Amendment Act,* 1 George V (1911), c 20; *Mental Incompetence Act,* RSO 1937, c 110.
125 Dana H, Porter G F, Curtis, et al. *Survey of Canadian Legislation*, The University of Toronto Law of Journal 1938, Vol.2, No.2, at 376.
126 Gray K G. *The Mental Hospitals Act*, 1935. The University of Toronto Law of Journal, 1937, Vol.2, No.1, at 105.

However, the condition of mental health care was not improved but grew even worse during World War II. Mental health hospitals and asylums were occupied by the army, while the psychiatric patients were kept in jails once again. In 1948, the poor and cruel conditions were described in this way:

"Patients were…retained in locked wards. Because of the understaffing and overcrowding, the emphasis was on custody rather than therapy. Patients and their relatives used the hospital only as a last resort. Mental illness evoked feelings of shame and hopelessness in the families of the mentally ill; many were encouraged to forget the patients following his admission."[127]

Therefore, after WWII, nationwide reforms in adult guardianship across Canada was a matter of extreme urgency.

ii. Modernity: Developments and Reforms in Adult Guardianship

1.The Overview of the Nationwide Reforms

Canada's old plenary adult guardianship laws had not been changed until the first half of the twentieth century. Reforms in this field were mainly stimulated by several factors, such as the aging population, the trend of de-institutionalization, the growing concern about the elder abuse and neglect and the advent of the *Canadian Charter of Rights and Freedoms.*[128] These new emerging situations had caused heated discussions and strong criticisms in most Canadian provincial jurisdictions since the mid-1970s. Critics of reforms argued that, rather than finding "new" ways of denying incapable adults a full measure of adulthood, the thrust of reform should be towards their empowerment.[129] Since then, Canada's adult guardianship laws has transformed to remove the archaic characteristics of plenary guardianship and paternalism. The following is an overview of the nationwide reforms.

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[127] Alec Richman, *Psychiatric Care and Prepaid Medical Insurance Plans*, *Chapter 16-19, in Psychiatric Care in Canada: Extent and Result,* (Ottawa: Queens Printer,1966), at 33.
[128] R.M. Gordon, Simon N. Verdun-Jones*, supra* note 89, at 1-12.
[129] *Ibid*, at 6-31.

In 1989, a new *Dependent Adult Act* was passed in Saskatchewan.[130] Meanwhile, the *Public Curatorship Act*, the *Civil Code*, the *Code of Civil Procedure* and the *Mental Patients Protection Act* were substantially revised, and the new provisions of adult guardianship were enacted in Quebec. [131] In Ontario, after a decade of deliberation, new guardianship laws and related legislation, including three critical bills, were introduced in the Spring of 1991.[132] Also, adult protection legislation was introduced in New Brunswick, Nova Scotia, and Prince Edward Island.[133] British Columbia,[134] Manitoba,[135] the Yukon,[136] and the Northwest Territories[137] took steady progressing reforms subsequently. Consequently, various options were being examined by governments and councils, some of which were primarily inspired by the model provided by Alberta's *Dependent Adults Act*, an innovative statue adopted in the mid-1970s.[138]

Gordon concludes in his paper that there were three waves of these reforms in adult guardianship in total since the mid-1970s. The first wave appeared in Alberta in the form of the *Dependent Adult Act*. The second wave affected only the Atlantic provinces and consisted of new adult protection legislation which aimed at elder abuse or neglect. The third wave focused on the enactment of omnibus adult guardianship statutes including adult protection provisions. Through the three waves of nationwide reforms, Canada gradually established its modern adult guardianship regime.[139]

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130 *Dependent Adult Act*, SS 1989-90, c D-25. 1.
131 On June 22, 1989, an act respecting the public curator and amending the Civil Code and other legislative provisions (SQ 1989, c 54) was sanctioned.
132 Three bills are *The Advocacy Act,* SO 1992, c 26, (Bill 74); *The Consent to Treatment Act,* SO 1992, c 31, (Bill 109); and *The Substitute Decisions Act,* SO 1992, c 30*,* (Bill 108), respectively.
133 *Family Services Act*, SNB 1980, c F-2.2; *Adult Protection Act*, RSNS 1989, c 2; *Adult Protection Act*, RSPEI 1988, c A-5.
134 *The Adult Guardianship Act*, RSBC 1996, c 6.
135 *The Vulnerable Persons Living with a Mental Disability Act*, SM 1993, c 29; CCSM, c V-90.
136 *The Adult Protection and Decision Making Act*, SY 2003, c 21.
137 *The Guardianship and Trusteeship Act*, SNWT 1994, c 29.
138 *Dependent Adults Act*, RSA 1980, c D-32 (as amended).
139 Robert M. Gordon, *Adult Guardianship and Adult Protection Legislation in Canada: Recent Reforms and Future Problems*, Canadian Journal on Aging, Vol. 14 sup.2, 1995, at 89.

Next, this paper will analyze Alberta's adult guardianship legislation as a major example, for the reason that Alberta has the most outstanding experience among the thirteen jurisprudence across Canada.[140] It represents the general contemporary trends of the development in guardianship legislation and could provide a more profound and comprehensive understanding of Canada's adult guardianship reforms.

2. Alberta's *Dependent Adults Act* and *Adult Guardianship and Trusteeship Act*

1) The Partial Adult Guardianship

Alberta's *Dependent Adult Act* ("DAA") was enacted in 1976 and was recognized as a pioneering and influential statute and symbolized a new chapter of Canada's adult guardianship that represented "one of the most significant attempts to rethink guardianship of the person."[141]

As depicted above, Canada's lunacy laws and interdiction laws ignored the necessity to separate the property management and health care issues; hence the guardian who should only deal with the financial affairs for the ward would also be empowered to make a decision for the ward's personal care. Worse still, once the adult was judged as incapable, he would radically lose his legal status to make decisions, no matter the extent to which he was impaired.

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[140] As mentioned before, some of the Canadian provinces' reforms in adult guardianship were primarily inspired by the model provided by Alberta's *Dependent Adults Act*, which was the first modern adult guardianship law in Canada. The *Dependent Adults Act* contained many innovative and progressive features that later appeared in the early 1990's amendments to Quebec's *Civil Code* and the *Civil Procedure Act*, Ontario's *Substitute Decision Act* and Manitoba's *Vulnerable Persons Living with a Disability Act, supra* note 86. Moreover, Alberta established the first office of a public guardian in Canada in 1978. The Executive Director, Barb Martini also states that Alberta's legislation in adult guardianship, such as the new *Adult Guardianship and Trusteeship Act* and *Personal Directives Act*, is regarded as among the best in the world. See *2016-17 Annual Report of Office of the Public Guardian and Trustee*, at 6. Online:<https://open.alberta.ca/dataset/e236819b-b72b-4212-b569-b7e121906f11/resource/a08a903b-b03d-44a8-a609-4d8202888830/download/2016-17-annual-report-final-sept-18-2018.pdf>.

[141] Paul McLaughlin, *Guardianship of the Person*, (Downsview, Ontario: National Institute on Mental Retardation,1979), at 49.

The *DAA* turned the page on traditional guardianship that was plenary and paternalistic by adopting a brand new and less intrusive approach, i.e., the partial adult guardianship, and jurists had a greater discretion to list the specific powers over which guardians had authority. The partial adult guardianship meant that guardians' authority would be tailored to the wards' degree of mental incapacity. The partial guardianship should always be prior to the plenary guardianship in consideration, unless the partial guardianship was insufficient to meet the need of wards. This new act was the first attempt to deny the old plenary and paternalistic guardianship, which gradually diverted the restrictions on wards' freedom to those on the guardians' authority.

2) Other Progress in the *Dependent Adult Act*

Apart from the partial adult guardianship, the *DAA* still made more progress worth mentioning. Before the enactment of the *DAA*, the lunacy laws in Canada adopted the diagnostic classifications with strongly stigmatizing labels such as mentally retarded, senile and idiot. The *DAA* replaced such derogatory terms with more general and functional statements, e.g., "unable to care for himself," "unable to make reasonable judgments in respect to all or any matters relating to his person," and "in need of a guardian", which were subjective and open to interpretation and reflected a broader spectrum of the guardianship application.[142] Moreover, the *DAA* established the Public Guardianship and Trusteeship, which would be applied when no one else was willing or able to act as guardians.

[142] Marlett N.J., *supra* note 99, at 16.

Afterward, most common law provinces followed Alberta's precedent, including Manitoba,[143] Ontario,[144] Saskatchewan,[145] British Columbia,[146] Prince Edward Island,[147] the Yukon,[148] and the Northwest Territories,[149] as they all provided different types of partial adult guardianship.

3) *The Adult Guardianship and Trusteeship Act*: The Upgraded Version of the *DAA*

Since the *DAA* was enacted in 1979, it had continuously been amended, but its fundamental framework and basic terms had not been changed yet, while the needs of Albertans had changed and the related legislation in this area needed to adapt to the contemporary emerging situations. Therefore, a new act, *Adult Guardianship and Trusteeship Act* ("*AGTA*") was enacted in 2009 to replace the *DAA.*[150]

The *AGTA* provides more decision-making options for incapable persons, such as the supported decision-making authorizations,[151] co-decision-making orders for personal matters,[152] specific decision-making provisions,[153] urgent/temporary

[143] *Supra* note 135, s 57(1).
[144] *Substitute Decisions Act*, SO 1992, c 30, s 60(1).
[145] *The Adult Guardianship and Co-decision-making Act*, SS 2000, s 14(1)(b).
[146] *Supra* note 134, s 19.
[147] *The Adult Protection Act*, RSPEI 1988, c A-5, s 16(2).
[148] *Supra* note136, s 38.
[149] *Supra* note 137*,* s 11(2).
[150] *The Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2.
[151] **Supported decision-making authorizations (Personal directive):** These authorizations are a regulated form and allow an adult with capacity to designate a "supporter" to help them make decisions in personal matters. The authorization allows the supporter to access personal and health information to assist the adult in making the decision. The adult can terminate the authorization at any time. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 2, division 1.
[152] **Co-decision-making orders for personal matters (Court-ordered):** Co-decision making orders can be used if an adult is assessed as having a significant impairment, but can still make decisions with assistance. A co-decision making order is a court order, and the adult must agree to it. Before granting the order, the Court must consider whether less intrusive options could meet the adult's needs. This provision is useful for families where there is a trusting relationship; for example, a wife assisting her husband who is in the early stages of dementia. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 2, division 2.
[153] **Specific decision-making provisions (Applied only for temporary health care):** This provision is for when an adult has no personal directive or guardian. It covers situations where an adult suddenly loses capacity, and a health professional believes the adult cannot provide informed consent on a health care or temporary placement/discharge decision. In these sensitive circumstances, a health professional can select a relative of the adult to make the decision or, as a last resort, the Public Guardian can make the decision. The specific decision maker's authority is limited to the health care or temporary placement/discharge decision at hand. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 3, division 1.

guardianship and trusteeship orders,[154] guardianship and trusteeship orders,[155] and temporary protection orders,[156] and these approaches are listed from the least intrusive to the most intrusive. In this sense, the *AGTA* is the upgraded version of the *DAA*. The *AGTA* is more progressive because it adopts a leveled range of supportive and substituted decision-making options in different situations, and some urgent situations are extremely explicitly stipulated. The more types provided in guardianship, the more accurate and less intrusive protection would be placed on the wards.

3. Alternatives to the Guardianship in Canada

1) An Enduring Powers of Attorney: Two Models in Canada

The highlight of the reforms from the 1980s to the 1990s is the amendment of powers of attorney. It became possible for a competent person to create an enduring power of attorney, a legal authorization for the nominated person to act on the person's behalf in legal and financial matters which can continue in force without the need to apply to the court of protection after the person granting it loses mental capacity.

[154] **Urgent/temporary guardianship and trusteeship orders (Ordered by the court, with limited period and applied only for the urgent situations):** These provisions apply to situations when an adult is believed to lack capacity and is in imminent danger of death, serious harm or financial loss if someone does not make a decision to prevent the death, harm or financial loss. In these rare and urgent situations, the Court may waive or modify some application requirements (e.g., notification) and grant a temporary order of no more than 90 days. A temporary order must be reviewed before the Court on or before the 90-day time limit. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 2, division 3, s 27.

[155] **Guardianship and trusteeship orders (Court-ordered as a last resort):** These options are for adults assessed as incapable, but the application process allows for improved screening and information provision for prospective guardians and trustees. The new process also ensures the adult's views are included in a report to the Court, if possible. The *AGTA* also provides the Court with additional guidance when granting an order. For example, the Court must consider whether less intrusive options could meet the person's needs. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 2, division 3.

[156] **Temporary Protection Orders (Court-ordered, with limited period and applied only when the adults are in danger):** The Public Guardian may apply for a temporary protection order where there is a reason to believe a represented adult is at risk of serious harm. In these rare and urgent situations, the Court may waive typical application processes (e.g., notification) if the Court is satisfied the adult is at risk of serious harm (e.g., death or substantial health risks). The Court may grant the Public Guardian temporary decision-making authority and authorize the police to assist the Public Guardian in removing the adult to a place of safety. Unless otherwise ordered by the Court, temporary protection orders expire after 30 days. See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, part 2, division 3, s 27(1)(b).

There are two models of power of attorney in Canada. One is with the single purpose of managing incapable persons' property and financial affairs, while personal matters will be additionally arranged in personal directives; this legal framework separating the property management and personal protection is adopted by British Columbia, [157] Alberta, [158] Saskatchewan, [159] Manitoba, [160] Ontario, [161] New Brunswick,[162] Prince Edward Island, [163]and Newfoundland.[164] The other model is adopted by Quebec [165] and Nova Scotia, [166] which enlarges the protective range including not only the financial affairs but also the issues of person. Both models have advantages and shortcomings, and Chapter III will elaborate on which approach is more suitable to China's social context.

2) Supported Decision-making Authorization or Mandated Consultation System?

The supported decision-making authorization is also known as the co-decision-making orders.[167] As literally indicated, co-decision maker assists the ward by making

[157] *The Powers of Attorney Act*, RSBC 1996, c 370.
[158] *The Powers of Attorney Act*, RSA 2000, c P20.
[159] *The Powers of Attorney Act*, SS 2002 c P20.3.
[160] *The Powers of Attorney Act,* SM 1996 c P97.
[161] *The Powers of Attorney Act,* RSO 1990, c P20.
[162] *The Infirm Persons Act,* RSNB 1973, c I-8*; The Property Act,* RSNB 1973, c P19. Strictly speaking, New Brunswick is the only province in Canada that does not have the stand-alone power of attorney act in place, and the authority to create a power of attorney is found in both the *Infirm Persons Act* and the *Property Act*. However, the Power of Attorney Action Group criticized a lack of legislation with clear, precise guidelines so that people in New Brunswick are calling for a more specific power of attorney legislation. See Sarah Betts, *Province's Power of Attorney Regulation Laws Lag Behind Rest of Canada, Group Says*, CBC News, 23rd June 2017. Online:<https://www.cbc.ca/news/canada/new-brunswick/nb-power-of-attorney-legislation-1.4174868>.
[163] *The Powers of Attorney Act,* RSPEI 1998, c P16.
[164] *The Powers of Attorney Act*, RSNL 1990 c E11.
[165] In Quebec, the power of attorney document is called a mandate in anticipation of incapacity, which will take effect when the mandatory becomes incapacitated. The Quebec mandate solution is substantially similar in effect to the enduring power of attorney solutions in other jurisdictions. See Kim Nayyer, *A Harmonized Approach to Elder Financial Abuse in Power of Attorney Legislation*, Report delivered at the AGM of the Uniform Law Conference of Canada, Toronto, 2014. In Quebec, the mandate could be comprehensive and include both issues regarding the person and the estate. See Robert M. Gordon, *Material Abuse and Powers of Attorney in Canada,* Journal of Elder Abuse& Neglect, Vol.4, 1993, at 178. See *Civil Code of Québec*, LRQ, c C-1991, s 2166 and onward.
[166] In Nova Scotia, provision has been made for a form of limited enduring power of attorney of the estate. A power of attorney of the person is, however, limited to health care decision-making and does not cover other personal care decisions. *Ibid.*
[167] The only difference between these two models lies in their different sources and legal bases. The co-decision-making orders are made by the court, while the supported decision-making authority is made by a personal directive. However, in essence, both models provide assistance for the incapacitated persons. *Supra* note 151 and

decisions together, rather than entirely substitute their desires. This approach respects the ward's residual capacity and preserves the ward's legal status as normal persons in daily life. Moreover, this model removes the clear distinction between "capable persons" and "incapable persons", and also recognizes that an adult's capacity may change over time since the mental condition and competency are a matter of degree, rather than a case of absolutes.

Currently, only a few provinces have both assisted decision-making authorization laws or co-decision-making orders. For example, Saskatchewan's Act only allows the court to issue a co-decision-making order in both the property and personal matters.[168] In Yukon's legislation, there is no court-ordered co-decision-making, but it provides assisted decision-making authority that adults are allowed to arrange their supporters in advance if they understand the nature and the legal effects of such authority.[169] Manitoba's legislation has an even more narrative spectrum for the application that the supported service is only applied to the vulnerable persons whose intellectual functioning and adaptive behavior are impaired so that they suffer mental disabilities.[170] Manitoba's legislation emphasizes if the vulnerable persons need supported service, the extent of their mental incapacity should be that of persons younger than 18 years of age.[171] Manitoba's requirement for vulnerable persons to be qualified to receive support service is unnecessary and arbitrary. What if the mentally incapable adult's mentality is manifested over 18-year-old persons, such as some elderly people with slight mental impairment? Why will they be excluded from the supported service? In brief, Saskatchewan's, Yukon's and Manitoba's approaches to providing the assisted

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[168] *The Adult Guardianship and Co-decision-making Act*, SS 2000, c A-5.3, s 14.

[169] *The Adult Protection and Decision Making Act*, SY 2003, c 21, s 38.

[170] *The Vulnerable Persons Living with a Mental Disability Act*, SM 1993, c 29, s 9.

[171] *Ibid*, s 1(1).

decision-making authorization for incapable persons all have different limitations on the application.

In contrast, Alberta's *AGTA* was more flexible than these three provinces' acts. It combines the advantages in Saskatchewan's and Yukon's law, and therefore forms the broadest protective spectrum and ensures the flexibility in the legal application. As the foregoing has illustrated, the *AGTA* adopted both the supported decision-making authorizations and co-decision-making orders for personal matters.[172] Such a legal framework can be useful for other provinces' future legislation in adult guardianship, which concurrently allows adults to enter supported decision-making agreement or courts to make co-decision-making orders. [173]

Some provinces do not provide the alternative of assisted decision-making authorization, while their laws with similar function are provided in another way. For example, Ontario's law stipulates that guardians shall encourage incapable persons to participate, to the best of his or her abilities, in the guardian's decisions on his or her behalf.[174] However, this paper argues that this stipulation is not as progressive as the assisted decision-making authorization. Although it sets up a mandated consultation between guardians and the incapacitated persons, it still perceives the wards as mentally incapable persons without legal capacity and full legal status. Despite consultation and encouragement, it is possible that even after guardians inquire about the wards' wishes they are still entitled to make the final decision alone. In this sense, the "mandated consultation system" is not equivalent to the assisted adult guardianship.[175] It seems

[172] *Supra* note 151 and 152.
[173] Sarah Burningham, *Developments in Canadian Adult Guardianship and Co-Decision-Making Law*, Dalhousie Journal of Legal Studies, Vol. 18, 2009, at 125.
[174] *Substitute Decision Act*, SO 1992, c 30, s66(5). This is basically identical to the Northwest Territories' act, *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 12(8).
[175] Burningham also held the view that the statutorily mandated consultation or encouragement was not equivalent to co-decision-making. She thought the depth and scope of consultation was not defined, because the guardian is not required to share authority with the ward, consultation may be only cursory. Burningham, *supra* note 173, at 125.

that the wards' wishes would be considered, in fact, the statutorily mandated consultation is easily evaded by guardians, and in this sense, it does not change the nature of the plenary adult guardianship because it cannot restrict guardians' authority in a real sense. Compared with the assisted decision-making authority which stipulates the guardians shall share the authority with the wards, mandated consultation is not definite concerning the exact meaning of consultation, its realizing method, and the supervision. Therefore, mandated consultation lacks operability and could probably become an institution just on paper without practical implementation.

4. Procedural Safeguards in Adult Guardianship

To protect the best interests of the wards as much as possible, it not only requires diverse models of guardianship and alternatives to accommodate the wards' various needs, it also needs fair procedures to guarantee the justice and efficiency in guardianship application. To be specific, the primary procedures of guardianship involves three aspects, including the application and the capacity assessment, the appointment of guardians, and their supervision. This paper still takes the *AGTA* as an example to analyze how the process of guardianship application in Alberta could guarantee a full and fair judgment.

1) The Application for Adult Guardianship

The application for guardianship relates to the following issues. First is pertaining to the subject of the application, who is qualified to apply for capacity assessments and guardianship for others.[176] Second, the application typically requires a hearing; otherwise, all of the documents and materials should be submitted to the *Office of the*

[176] An interested person and the Public Guardian are entitled to apply to the court. See *Dependent Adults Act,* RSA1980, c D-32, s 26(1) and s 26(2).

Public Guardian and Trustee ("OPGT").[177] A review officer would review the qualification of the applicants, including their personal reference, criminal records and credit records.[178] The officer also needs to notify the adults' immediate family members, meet the adult to inform them of the application and inquire their opinions and any proposed guardians.[179]

2) The Capacity Assessment

An adult is presumed to be capable of making a decision independently unless there is evidence to the contrary. The evidence could be events or sound reasons, such as a severe stroke or brain injury in an accident, which could probably lead to a significant impairment in the person's ability to make a decision.[180] The evidence could not directly place the adults under the guardianship, but could only trigger the capacity assessment.

The capacity assessment is required within six months of the guardianship application. The *AGTA* prescribes a comprehensive process for the capacity assessment. First, there are professional capacity assessors designated by the Minister, who have satisfactorily completed necessary training.[181] Second, before the assessment, the

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[177] *Dependent Adults Act,* RSA1980, c D-32, s 111.

[178] The Adult Guardianship and Trusteeship Act stipulates the "review officer" who is a person designated to provide a written report to the court regarding the adult's wishes and views, the suitability of each proposed co-decision-maker, guardian and trustee. See *The Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 81.

[179] See Alberta's official illustration regarding adult guardianship, online:<https://www.alberta.ca/adult-guardianship.aspx>.

[180] One of the guiding principles of *AGTA* is "an adult is presumed to have the capacity to make decisions until the contrary is determined". Capacity is presumed, regardless of age, disability, etc. Even if you are 105 years old, the law presumes that you have the ability to make your own decisions, unless the Courts demonstrate otherwise. See *Guide for Capacity Assessors (AGTA)*, at 7, online:< https://open.alberta.ca/dataset/a86649cc-b0d4-44bb-ab0a-eef8609f29f4/resource/9ff4213f-84b6-4f08-bbcf-05497b5a6017/download/opg-guardianship-publication-opg5630.pdf>.

[181] Under the *Dependent Adults Act*, capacity assessments have been performed by a physician or a psychologist. Under the *AGTA*, that list has been expanded to include other health care professionals, (social workers, occupational therapists, registered nurses and registered psychiatric nurses as well as physicians and psychologists) once they have met certain eligibility requirements which are set out by the Regulations. The Minister of Alberta Seniors and Community Supports has the authority to designate capacity assessors, to establish training requirements and other qualifications for capacity assessors, and to establish standards for the conduct of persons designated as capacity assessors. *Ibid*, at 9.

assessor should consult a physician to evaluate the adult to exclude any temporary or reversible factors such as the infections or depression that could probably affect the adult's decision-making capacity.[182] Third, the assessor shall meet the adult and explain the nature, the process and the importance of the assessment to him, and the adult should be informed that he has the right to refuse to be assessed as well.[183] In case the adult refuses the assessment, the court would make the judgment as to whether the adult's capacity should be assessed.[184] Fourth, the assessment could be divided into two aspects, the cognitive (ability to think and solve problems) and the functional aspects (practical skills such as paying bills) respectively.[185] In addition, the assessment only focuses on the specific areas where there is evidence supporting that the adults may have lost the capacity to make decisions.[186] Fifth, the assessor should comprehensively evaluate whether the adult can understand what his decision means, including the consequence, the advantages, and disadvantages.[187]

3) Restrictions on Guardians: Appointment and Supervision

The *AGTA* stipulates that only interested persons are qualified to be guardians or trustees.[188] To be specific, they are either the adults' family members or friends. If they are not able or suitable or willing to undertake this role, the *OPGT* has the authority to take over the task.[189] After inquiring about the adults' opinions and their preferences

[182] See Guide for Capacity Assessors (*AGTA*), "11.4 Prior medical evaluation". *Ibid,* at 13.
[183] See Guide for Capacity Assessors (*AGTA*), "11.3 Explanation of purpose, significance and rights". *Ibid.*
[184] If the adult refuses to undergo or continue with the assessment, the capacity assessor must stop the assessment and note this on the capacity assessment report. *Ibid.*
[185] The assessment is carried out in a formal interview, in which the capacity assessor asks questions to see if the adult can understand information from a reasoning or executive perspective and can also apply it to real life situation. See Guide for Capacity Assessors (*AGTA*), "10. What is the process for conducting a capacity assessment?". *Ibid*, at 11.
[186] The Guide for Capacity Assessors mentions two common pitfalls in capacity assessment, one of which is that the capacity assessor fails to understand that capacity is not "all-or-nothing", but is specific to a decision or to an Area of Concern. *Ibid*, at 9.
[187] See Guide for Capacity Assessors (*AGTA*), "11.8 Components of a Capable Decision". *Ibid*, at 16.
[188] *The Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 28.
[189] *Ibid,* s 29 (1).

and checking the potential qualified guardians' or trustees' suitability, the *OPGT* shall submit a comprehensive report to the court. Before granting guardianship or trusteeship, the court shall make sure that the adults have been assessed and confirmed that they had lost the capacity to make decisions independently and other less intrusive or restrictive alternatives have been sought and not working.[190]

To prevent the abuse and neglect of the incapacitated persons, the *AGTA* establishes many safeguards either before or after the guardianship determination.[191] For example, before the determination, all the guardians' and trustees' profiles would be reviewed by the *OPGT* and the court, in order to select the most suitable guardian candidate under the guidance of the best interests principle.[192] Besides, the assisted persons' or represented persons' preferences and opinions shall be considered.[193] Once the proposed guardian is appointed, he is required to submit the plan for the court's approval. After being legally appointed, guardians or trustees should perform their roles complying with the *AGTA'*s stipulations regarding their duties and responsibilities, including periodical reports or accounts to the court. When it comes to significant decisions, such as selling estates, trustees are not allowed to decide by themselves but need to be approved by the court.[194] The *AGTA* allows the Minister of Seniors and Community Supports to designate individuals to receive complaints and investigate guardians' performance and the current living condition of the incapacitated persons to evaluate whether their best interests have been well-protected.[195]

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[190] *Ibid,* s 26 (1) and s 26(6)(b).
[191] Chapter III will elaborate on the procedural safeguards. This paper will classify these procedural safeguards into two categories, one is the proactive method used before the guardianship determination and the other is the retroactive method applied after the guardianship determination. See details in Chapter III, at 109 (note 279).
[192] The court needs to consider the report of the review officer and the proposed guardians plan in determining whether it is in adult's best interests to appoint a guardian. *The Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 26 (7).
[193] The court also needs to consider any personal directive and supported decision-making authorities made by the adult when determining guardians' appointment. *Ibid.*
[194] The Trustee is not authorized to sell, dispose of or encumber the property. *Ibid*, s 48(5)(c).
[195] *Ibid,* s 75 and s 76.

Apart from the three aspects discussed above, there are other effective mechanisms throughout the guardianship application to guarantee that adults' opinions, complaints, preferences, and personal choices are fully considered. For example, there is a formal complaint process to follow if there are concerns regarding how the guardians and co-decision-makers perform their responsibilities;[196] the adults could withdraw their consents to the co-decision-making orders at any time.[197]

4) The Public Guardianship and Trusteeship

As mentioned above, public guardianship and trusteeship play an essential role throughout the adult guardianship application, especially when Canada was influenced by the de-institutionalization and non-institutionalization since the mid-1950s and the principle of normalization.[198] Alberta set up the *Office of the Public Guardian and Trustee*, a branch of *Alberta Justice and Solicitor General*, to provide services, tools, and supports for personal and financial matters to vulnerable Albertans and their families.[199]

Indeed, when the *OPGT* was first set up under the *DDA*, it received many published criticisms and concerns. For example, there was a concern that a system of public guardianship could be seen as a potentially dangerous form of state intrusion and interference in the private lives of citizens and their families.[200] Worse still, it was expensive, and at that time the Canadian government was adopting a restrictive economic policy, in this regard, the public guardianship is easy to cause a fiscal

196 *Ibid.*
197 *Ibid,* s 17(8).
198 See R.M. Gordon, Simon N. Verdun-Jones, *supra* 89, at 1-14 and 5-35. In Gordon's illustration, the principle of normalization means the mentally incapable persons would be cared for, supported and assisted in the community (a "normal" environment) rather than institutions, in this sense, the principle of normalization was translated into policies of de-institutionalization and non-institutionalization.
199 The *Office of the Public Guardian* in Alberta was first established by the *Dependent Adult Act* and began operations on the proclamation of the statute in 1978. See *Dependent Adult Act*, SA 1976, c 63.
200 See R.M. Gordon, Simon N. Verdun-Jones, *supra* 89, at 5-44.

crisis.[201] Therefore, at first, the public guardianship would be the last resort and applied under the guidance of partial intervention. When the *AGTA* was enacted in 2009, the *OPGT*'s role accordingly changed from being a public tool which was intrusive in persons' lives to a conceivable safeguard aimed at protecting adults' fundamental rights.

In the 2015-2016 *Annual Report of OPGT* which is its first published annual report, the vision of the *OPGT* is stated as being to create a province where all Albertans can achieve personal autonomy, live with dignity and maximize their potential.[202] Under this guidance, the responsibility of the *OPGT* mainly lies in four aspects, the advance planning, undertaking the role of public guardian or trustee, placing the supervision over private guardians and maintaining the programme of public education and assistance. First, the *OPGT* believes in the power of advance planning, and it encourages people to write a personal directive, an enduring power of attorney and a will. Second, the *OPGT* acts as the court-appointed public guardian, and they also provide advice and guidance to the private guardians. Third, the *OPGT* will undertake the supervision task in the both processes of appointment and post-appointment, such as conducting reference checks on a prospective guardian or trustee. Additionally, the *OPGT* also has the duty to review the application including meeting the adult to inform them of their rights and gathering their views on the application, notifying relevant parties of the application. The *OPGT* states it reviewed 2500 applications in 2015.[203] Fourth, the *OPGT* has the duty to educate adults to learn more about the alternatives to guardianship, such as a power of attorney, personal directives, supported decision-making and co-decision-making. However, the *OPGT* is not allowed to be involved in

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[201] *Ibid.*
[202] See *Office of the Public Guardian and Trustee 2015-2016 annual report,* (Edmonton: Human Services, 2016), at 7. Online:<https://open.alberta.ca/dataset/e236819b-b72b-4212-b569-b7e121906f11/resource/cd502fba-6755-42c7-bb35-fc11e4c02ea3/download/opgt-2015-16-annual-report.pdf>.
[203] *Ibid.*

physical care activities. Therefore, we can see the *OPGT* is a bridge connecting not only the wards and the court, but the wards and the guardians as well.

iii. Conclusion

From the 19th century to the 20th century, adult guardianship in Canada's common law tradition derived from the *Law of Parens Patriae* and *the English Lunacy Laws*. In 1911, with the revised *Ontario Lunacy Act,* Canada started to abandon the archaic terminology of "idiots", "natural fools" and "lunatics". *The Civil Code of Lower Canada* derived from the *Napoleonic Code* introduced the interdiction laws to Quebec's civil law tradition. The interdiction provisions in *the CCLC* and those in the *NC* are markedly similar. Both the lunacy laws in the common law tradition and the interdiction laws in the civil law tradition suffered from paternalism and plenary approaches to deprive incapacitated persons of their freedom and autonomy.

With the growing aging population, the economic boom in postwar Canada and the deinstitutionalization movement in the US, there was a strong appeal for further reforms such that Canada gradually changed the legislative ideas behind adult guardianship laws and started to initiate a series of legislative amendments. Since the mid-1970s, significant reconstructions of adult guardianship legislation have been proposed in Alberta, Quebec, Ontario, British Columbia, Manitoba, Prince Edward Island, and the Northwest Territories. The typical example was the *Dependent Adult Act* in Alberta in 1978, which established the partial adult guardianship for the first time.

Entering a new demographic era in the twenty-first century, more and more baby-boomers born in postwar North America became senior citizens, which placed a heavy burden on society and exposed more deficiencies in the existing adult guardianship laws. Accordingly, a new act, the *Adult Guardianship and Trusteeship Act* was enacted

in 2009 to replace the *DAA* in Alberta. The *AGTA* provides the omnibus adult guardianship laws which are constituted of various alternatives to guardianship, such as supported decision-making authority, the co-decision-making order and the enduring power of attorney, and the *AGTA* completes the procedural safeguards in guardianship regime as well.[204]

As a result, Canada's adult guardianship laws have become more and more mature after several reforms. The following breakthrough progress is worth mentioning. First, archaic concepts such as lunacy, insanity, mental incompetency and mental infirmity, which mirror the limitation of the 19th century knowledge, were gradually replaced by more measurable and general concepts like impairment and functional disability, which permit limited intervention and tailored assistance according to the adults' needs. Accordingly, guardianship is imposed on not only mentally impaired persons but physically disabled persons and elderly persons as well. Second, partial guardianship was adopted, which abandoned the over-simplification and ossification of the previous plenary guardianship that lasted for a century. Third, new omnibus adult guardianship laws provide more options and alternatives to the traditional plenary guardianship; these alternatives are less intrusive and hence are prior to the court-ordered guardianship which would be sought only as an absolute last resort.[205] Fourth, the new comprehensive adult guardianship system began to pay attention to wards' personal protection, rather than just to their financial affairs. Currently, guardianship of the person and trusteeship of an estate are separated in most provinces, and equal emphases are placed upon them. Fifth, in order to solve problems such as guardians' absence and

[204] See the section of "Procedural Safeguards in Adult Guardianship" that illustrates the procedural safeguards in the *AGTA*, including the process of application, the capacity assessment, appointment of guardians and supervision on guardians. Moreover, the *AGTA* completed the transformation of *OPTG*'s role from being a public tool to a conceivable safeguard.

[205] Robert M. Gordon, Ann M. Soden, *supra* note 69, at 111-113.

abuse of power, public guardianship and trusteeship and supervision over the guardians were established, which were the most indispensable procedural safeguards established in guardianship practices.

In conclusion, after several reforms between the 1970s to 2000s, Canada has gradually completed the demolition and reconstruction of adult guardianship regimes by providing various guardianship models and diverse alternatives, and setting up procedural safeguards under the guidance of the contemporary advanced legislative ideas. The next chapter will focus on what kind China can draw from Canada's experiences and how Canada's successful reforms may inspire China's adult guardianship development.

III. THE ROAD TO MODERNIZATION INSPIRED BY CANADA: FOUR STEPS FOR CHINA'S REFORM IN ADULT GUARDIANSHIP

After reviewing the history, long-term reforms and current regimes of China's and Canada's adult guardianship laws in Chapter I and in Chapter II respectively, this chapter aims to refer some of Canada's excellent experience to China's modernization of adult guardianship laws and transplant Canada's advanced legal arrangements to China with some adjustments based on China's unique traditional culture and the current national demands.

The modernization means a transformation of adult guardianship from a traditional plenary model with paternalism to a tailored model with various alternatives to accommodate people's needs. This chapter will focus on how China's adult guardianship could achieve its modernization in three aspects, namely: its guiding principles, substantial equity, and procedural laws. The paper proposes four steps for China to transform its plenary adult guardianship stipulated by fragmentary pieces of laws to a comprehensive and internally unified regime under the guidance of advanced principles.[206]

i. The First Step to Modernization: Keeping the Orientation towards Human Rights Protection and Establishing the Guiding Principles

[206] As Chalke concludes that despite significant distinctions between the laws passed in the various jurisdictions within Canada, there are some common themes that have developed in the modernization of guardianship law, including a new emphasis on procedural fairness, rights protection, and self-determination; Modernization of incapacity planning documents; New and refined assessment procedures; Statutory articulation of duties for guardians; Statutory schemes for responding to allegations of abuse, neglect and self-neglect of vulnerable or incapable adults; Codification of the common law rules with respect to health care consent; A broadening of persons who can give a legally authorized health care consent to include non-court appointed substitutes; Limited requirements for providing rights advice, in certain circumstances; and Modernization of the legal structure for the Public Guardian and Trustee. In Chalke's argument, these themes are commonly required in modern adult guardianship laws, which inspires this paper to decide which aspects should be focused on when discussing the modernization of China's adult guardianship regime. See Jay Chalke, *Canadian Trend: Guardianship in British Columbia and Other Provinces,* The Law Reform Commission, Annual Conference (Ireland: Dublin, 2nd December 2015), at 9.

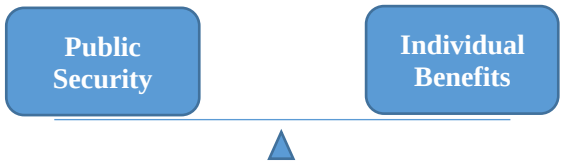
1. Why are Guiding Principles Necessary in Adult Guardianship?

1) Adult Guardianship Requires Guiding Principles to Respond Value Conflicts

Establishing the guiding principles is the first step to a complete adult guardianship regime, because they capture the essence of what guardianship is, and what we want it to be. This paper will explore the essence of adult guardianship in the context of the internal value conflicts within this regime.

a. Whose Interests are being Served by Guardianship: The Persons' or the State's?

The first conflict arising in adult guardianship regime is that between the state's interests and personal interests.[207] Some states have always treated adult guardianship as a state- and territory-based policy arena.[208] Whether the state would restrict adults' freedoms and even put them into hospitals or psychiatric institutions mainly depends on the consideration whether the adult's act is dangerous enough to threaten social safety and stability. [209] Therefore, the "state's interests" act as a standard to evaluate whether the "least restrictive" principle has been met because the court must constrain guardianship to the least restrictive means, so as not to restrict the ward's liberty beyond the state's interest in the balance of protecting its citizens.[210]

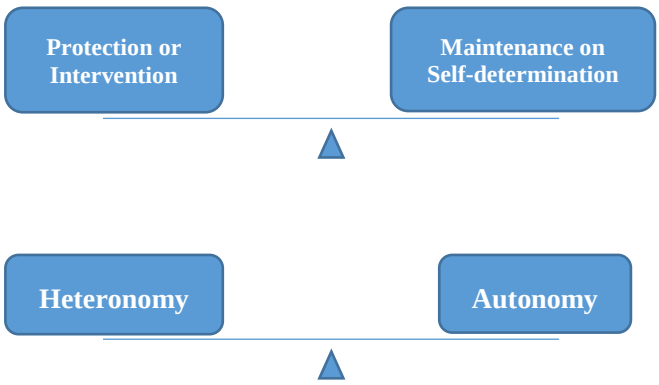


(Equilibrium point) (Figure 3.1)

[207] "At every stage in the guardianship process, the state's interest in protecting its citizens must be balanced with the powerful constitutional liberty interest of the individual." See Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75(1997), at 112.
[208] For example, Chesterman argues in his article that while the states and territories should continue to regulate the provision of guardianship, certain national policy developments are warranted. See John Chesterman, *The Future of Adult Guardianship in Federal Australia*, Australian Social Work, Vol. 66, No. 1, 2013, at 26.
[209] Mark D. Andrews holds a similar idea that "The state's power to deprive one of his liberty rights is based on the state's interest in protecting the ward and others from harm". See Mark D. Andrews, *supra* note 207, at 113.
[210] *Ibid*, at 114.

b. The Purpose of Adult Guardianship: Plenary Protection or Maximized Autonomy?

The second conflict in adult guardianship involves the purpose of adult guardianship. Frolik expresses his idea in elucidating the purpose of guardianship, "Guardianship may have conflicting interests, but it has one primary goal: the protection and advancement of the life and property of the incapacitated person."[211] This paper does not agree with Frolik. The ultimate purpose of an adult guardianship regime is to balance adequate protection for mentally or physically incapable persons with maximum maintenance of their self-determination and to balance the heteronomy with autonomy. Such value conflicts are unavoidable in the field of adult guardianship. If laws place more emphasis on providing full protection and assistance, adults are easily vulnerable to an over-restriction. Conversely, the necessary legal protection could be probably insufficient or even absent. Therefore, how to find an equilibrium point between the two values is the trickiest dilemma in adult guardianship legislation (See Figure 3.2 below).



(Equilibrium point) (Figure 3.2)

c. The Essence in Adult Guardianship: Value Orientation and Value Judgments

[211] Lawrence Frolik, *supra* note 47, at 745.

As sections a and b indicate above, both legislation and judiciary practice in adult guardianship must respond to many value conflicts. In this sense, adult guardianship is a matter of value orientations and value judgments in nature. Judges would be the sole arbiter and own great discretionary powers to determine whether the adult meets the legal standard of mental incapacity and whether the adult would benefit from guardianship.[212] In this regard, the application of adult guardianship is a process of value judgment and value selection, during which a good start would be the development of clear principles to guide and motivate judges to make decisions.

2) Universalism Justifies the Necessity of Guiding Principles in Adult Guardianship

As asserted by Surtees, "Universalism as a model to understand elder law carries with it the hope that all of us can be united in designing programs and policy which include us all, wherever we currently find ourselves on time's and space's continuum."[213] Surtees's argument simply mentions the characteristic of universalism which makes elder care programs and policy universally applied, including adult guardianship laws, regardless of age or jurisdiction. However, Surtees did not explicitly explain where the characteristic of universalism came from and how it made adult guardianship a universal matter across the world. Glenn's theory regarding "a tradition of universalism" helps the author to understand the characteristic of universalism in adult guardianship.[214] Glenn proposes the notion of "a tradition of universalism", which he asserts is characterized by particular teachings and consists of universal

[212] See Mark D. Andrews, *supra* note 207; Lawrence A. Frolik, *Standards for Decision Making,* Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014).
[213]D. Surtees, *What can Elder Law Learn from Disability Law?*, Theories on Law and Ageing: The Jurisprudence of Elder Law (Editor: Israel Doron), (Springer-Verlag Berlin Heidelberg, 2009), at 105.
[214] Glenn proposes the notion of "a tradition of universalism" which belongs to lateral traditions running across many larger traditions. Glenn asserts that "In all cases, a tradition of universalism is characterized by an ineluctable pressure to spread and solidify particular teachings, which themselves are formulated, or capable of being formulated, in universal terms." See H. Patrick Glenn, *supra* note 11, at 365.

principles. In this sense, adult guardianship regime fits Glenn's theory, because they are composed of many value orientations and value judgments. This paper believes that universalism in adult guardianship comes from its underlying values, and that it is not only a domestic legal matter but also a lateral legal issue across states. Based on Glenn's theory, it could be understood that adult guardianship laws are formulated by particular teachings, and this is the reason why legislative activity and judiciary practice in adult guardianship laws need to be guided by universal principles. This theory could be proved by the fact that since World War II, adult guardianship laws have been undergoing reforms around the world as values change over time or as worldwide events take place. These continuous reforms adopt more modern guiding principles which reflect the current adult guardianship's developing trend, such as the best interest principle, the least restrictive principle, the self-determination principle, and the normalization principle.

2. How does Canada Establish its Guiding Principles in Adult Guardianship?

In most Canadian adult guardianship laws, there are particular provisions explicitly declaring guiding principles. For example, in British Columbia's *Adult Guardianship Act*, guiding principles are stipulated in the part of introductory provisions as a general rule to be considered in every adult guardianship cases:[215]

"This Act is to be administered and interpreted in accordance with the following principles:

(a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;

(b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

[215] *Adult Guardianship Act*, RSBC 1996, c 6.

(c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered."

Moreover, the Canadian adult guardianship also recognizes the advanced principles by making statues mirroring these changing values. For example, many provinces now statutorily mandate that a court order the least intrusive measure possible and adhere to the adult's wishes as much as possible.[216] In addition, as Frolik points out, Canadian jurisprudence recognizes that adults have a right to receive notice of proceedings, such as the pending petition and their legal rights during the process.[217] Quinn also points out that legislation in Canada from the last three decades is marked by "the desire to legally intrude as little as possible in the lives of people with diminished capacity",[218] and Richardson concludes that Canada's legislation reflects the fact that "respect for autonomy is now well established as one of the fundamental principles of bioethics."[219]

3. How does China Establish the Guiding Principles and What is the Challenge?

1) The Necessity to Clearly Declare the Guiding Principles in the *General Provisions*

Due to the universalism in adult guardianship laws, the reconstruction of China's regime should also conform to fundamental principles that are widely recognized and reflect contemporary value orientations and value judgments.

Currently, China has set up two principles, namely the principle of "respecting the ward's true will" and the principle of best interests. In the *General Provisions*, Article

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[216] See e.g. *The Adult Guardianship and Co-decision-making Act,* SS 2000, c A-5.3, s3(d), 3(f); *Dependent Adults Act*, RSA 2000, c D-11, s 19(1)(c); *Substitute Decision Act*, SO 1992, c 30, s 66(9), 66(5); *The Vulnerable Persons Living with a Mental Disability Act*, SM 1993, c 29, s 75, 76(1)(a); The *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 12(8), 12(12); The *Adult Protection and Decision Making* Act, SY 2003, c 21, s 2(b), 2(c).

[217] Lawrence Frolik, *supra* note 47, at 740.

[218] Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety,* Springer Series on Ethics, Law, and Aging, (Springer Publishing Company, 2004), at 49.

[219] Genevra Richardson, *Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions,* Modern Law Review, June 2008, at 703.

30 and Article 31 emphasize both principles in the determination of guardian either by agreement or by designation.[220] Additionally, Article 35 requires both principles when guardians perform their duty of guardianship.[221] When it comes to the provisional guardianship measures, Article 36 also considers the principle of best interests, under which the provisional guardian shall be designated.[222] Obviously, only four articles prescribe mere two guiding principles in the *General Provisions.* Compared with Canada's legal arrangement that places more principles at an introductory part, China's stipulated guiding principles are inadequate and limited to be applied within a narrow range.

Based on two deficiencies identified above, this paper suggests that the future amendment of the *General Provisions* add a particular article at the beginning of the adult guardianship section, which should stipulate additional guiding principles, such as the least-restrictive principle and the normalization principle. These principles should have a broader range of application and be considered throughout every stage of adult guardianship, rather than be restrictedly applied in a particular judicial process. Such a legal arrangement could enlarge judges' discretionary power, since they could interpret and apply these principles flexibly in various cases. Additionally, the paper also proposes that the Chinese adult guardianship laws should adopt more mechanisms to reflect guiding principles, for example, the law shall stipulate that the court or public guardians are responsible for informing adults of the proceedings at every stage and allow them to refuse to be assessed.

2) Challenge: Which Principle Comes First, Best Interests or Substituted Judgment?

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220 *General Provisions*, *supra* note 71 and note 72.
221 *General Provisions, supra* note 73.
222 *General Provisions, supra* note 74.

Indeed, it is not difficult to understand the importance of the principles. The difficulty lies in how to apply these principles in order in the legislative activities and judiciary practice and how to solve the conflicts between different principles.

Apart from the most obvious deficiency that there are insufficient stipulated guiding principles in the *General Provisions*, vague and obscure terms are also problematic because they would cause conflicts in the principles' application. As introduced above, the *General Provisions* only stipulate two major principles[223] that should both be considered when guardians perform their duties, but it does not prescribe the hierarchy or the priority between the two principles for guardians' consideration. Since the potential conflict between them is unavoidable and most likely to happen in medical care and end-of-life cases where the greatest benefit for the ward is not always the exact result the ward would expect, it is necessary to establish a rule to settle which principle should be first considered and how to make a decision for the ward when the principle of best interests contradicts the principle of respecting the ward's true wills.[224]

The principle of best interests and the principle of respecting the ward's true will (also known as the principle of substituted judgment[225]) are two fundamental standards prevailing in almost all countries. In most countries, the principle of best interests is preferred.[226] In Canada's 13 jurisdictions, precisely hierarchical rules of decision

[223] One is the principle of best interests, and the other is the principle of respecting the wards' true wills (also known as the principle of substituted judgment).

[224] Although some countries' laws give guardians considerable discretion when making decisions about the person and property of the ward and are silent regarding how the guardians should make decisions, almost all countries own statutes and case law to address this problem. See Lawrence A. Frolik, *supra* note 212, at 48. This paper prefers a less flexible stipulation which shall provide a precise hierarchy of decision-making in China so that guardians' authority would be constrained and not be endless.

[225] The *General Provisions* stipulate the principle of respecting the ward's true wills that is almost identical with the principle of substituted judgment prescribed in most countries, which could be deduced from Frolik's argument "Under the principle of substituted judgment, the guardian must make decision in the same manner as the ward would but for the imposition of the guardianship. That is, the goal of the principle of substituted judgment is for the guardian to act as if the ward were making the decision." Therefore, to some degree, there is no significant difference between the principle of respecting the ward's true wills and the principle of substituted judgment. Under the two principles, the wards' wills should be placed at the first place and be respected to the largest extent. *Ibid.*

[226] *Ibid,* at 49.

making are prescribed as follows: first, follow any previously expressed wishes of the ward; then, follow the known values and beliefs of the ward; and if all else fails, do what is in the best interests of the ward.[227]

It is a challenge for China to make hierarchical rules to apply decision-making principles. On one hand, other countries' legislation -including Canada's precisely hierarchical rules- could be referenced. China should adopt the Canadian approach that prioritizes a ward's previously expressed wishes. Once there is solid evidence (such written directions, voice or video recordings, witnessed expressions of will) that the ward has expressed wishes before, such arrangement in advance should be maintained because in this case the ward's true will could be confirmed.[228]

On the other hand, when a ward's previously expressed wishes are uncertain or unknown, which principle comes instead, the best interests or the substituted judgments? Under such circumstance, China's unique traditional culture and its particular national conditions should be more important factors when considering whether best interest or the ward's true will comes first. Adult guardianship in China is in flux and still transforming from a familial mechanism in a private realm to a comprehensive legal regime under state's scrutiny in the public sphere. Concurrently, the Confucian tradition that emphasizes strong familial interconnections and weakens citizens' consciousness of individual rights protection is still deeply rooted in the Chinese culture.[229] Based on the tradition's impact and the current development of adult guardianship, this paper suggests China adopt a more objective standard in decision making to rouse the Chinese

[227] *Ibid;* Gordon also asserts that the doctrine of "best interests" governs the application process in Canada, including the decision to make a guardianship order, the selection, replacement, and removal of guardians, and the nature and scope of the powers and authority given to guardians. See Robert M. Gordon, Ann M. Soden, *supra* note 69, at 116.

[228] This principle was also proposed in The World Congress on Adult Guardianship held in Yokohama, Japan in 2010. This Congress "passed a resolution urging that guardians act with due care and diligence and respect and follow the ward's wishes, values and beliefs so long as doing so will not result in harm to the adult." See Lawrence A. Frolik. *Ibid,* at 47.

[229] Chapter I of this thesis has introduced the traditional plenary adult guardianship in China influenced by the Confucianism which emphasizes the role of family and collective interests in adult guardianship.

consciousness that autonomy and self-determination of individuals are paramount even when people lose mental or physical capacities. Therefore, compared with the principle of substituted judgment, the principle of best interests is more suitable for current China.[230]

Generally speaking, both the principle of best interest and the principle of substituted judgment require making deductions about the ward's preferences. However, the principle of substituted judgment has more drawbacks and difficulties in the application due to the deduction required is made in a subjective sense. In most cases, guardians lack sufficient information to know what the wards would do in certain situations. It is more unpredictable to know the actual intent of a ward than ascertain what the best interests are with common sense. In other words, the certainty in the wards' best interests is much higher and easier deduced than that in their unexpressed wishes. If the principle of substituted judgment is considered first, guardians could probably make decisions from where they stood, and their decisions are likely to be interpreted as "substituted judgments" but only benefit guardians even to the extent of exploiting or neglecting the wards.

Since China's adult guardianship has been influenced by Confucianism which most values familial relationships, guardians are usually family members who always take for granted that protecting the familial interests is the wards' true wills, thus if their decisions are following familial interests, then they comply with the principle of substituted judgment. Actually, the Chinese seldom separate familial interests with

[230] The principle of best interests requires guardians to make decisions based on what a reasonable person in the ward's circumstances would do in light of the burdens and benefits of the proposed course of action, the standard of "reasonable person's action" is more objective, stable, and predictable than the ward's wishes since every ward's choice and preference may vary greatly due to their different living conditions and specific situations.

personal interests; on most occasions, the Chinese primarily act for the best interests of their families.[231]

Although the principle of best interests is more objective compared with the principle of substituted judgment, China still needs to make further efforts to explicitly define the connotation of "best interests" and clarify the standard to evaluate the best interests.[232] Otherwise, the principle of best interests would also be arbitrarily interpreted and abused without proper instructions and with little or no monitoring.[233]

Placing the principle of best interests ahead of the principle of substituted judgment does not mean the latter is less important; it should remain necessary to be taken into account when guardians are making the decisions for the wards. There is no doubt that a ward's interests would be best-protected if both principles could function together. Even if the *General Provisions* stipulate a hierarchical application of rules for decision-making principles, this stipulation is not mandatory and imperative, special exceptions are allowed when necessary, and guardians do not have to adhere to the statutory standard in all cases. Overall, decisions made by guardians are thus an artful mix of best interests and substituted judgments, and whether a guardian's choice is reasonable depends upon the nature of the decision to be made.[234]

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[231] As Xu states, in China, individualism had been and is still seen, to a great extent, as the bad influences from the west. Pursuing personal interests is viewed negatively as selfish, irresponsible and demonstrating lack of control. During the social and economic reform, Chinese families as a life-boat have become even more important than ever for family members, and familial collectivism is more valued than individualism. See Anqi Xu, *The Changes in Mainland Chinese Families During the Social Transition: A Critical Analysis*, Journal of Comparative Family Studies, Vol. XLV, No. 1, 2014, at 32.

[232] For example, whether the best interests include consideration of the interests of those for whom the ward had a particular concern or a sense of obligation? Alternatively, whether guardians should consider the future best interests for the ward in his/her remaining years of life? This paper proposes that China shall make a requirement as explicit as possible.

[233] Suggestions for the future establishment of the supervisory mechanism in China's adult guardianship will be discussed in the last section of Chapter III.

[234] Lawrence A. Frolik, *supra* note 212, at 57.

ii. The Second Step to Modernization: Establishing a Supported Decision-Making Model to Achieve the Substantive Equal Recognition before the Law

1. The Supported Decision-Making Model Meets the Requirement of Article 12 of the *CRPD*

The United Nations *Convention on the Rights of Persons with Disability* (*CRPD*) is a treaty that must be referred to when research related to adult guardianship laws is carried out. The *CRPD* is the first comprehensive international human rights instruction to consolidate legal recognition of human rights for the persons with disabilities.[235] As Oliver Lewis describes, the *CRPD* "has the potential to become a transformative international legal instrument that innovates domestic politics as much as policies" in its expressive, educational and protective roles.[236] Accordingly, it could provide an authoritative interpretive lens for ratifying states' adult guardianship legislation.

Article 12 of the *CRPD*,[237] which is titled "Equal recognition before the law", is particularly relevant to the protection of incapable adults with diminished decision-making ability, since it affirms the non-discrimination and equal recognition of the

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[235] Michael Bach, Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity,* (Toronto: Law Commission of Ontario, 2010).

[236] Oliver Lewis, *The Expressive, Educational, and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities,* Rethinking Mental Health Laws, Bernadette McSherry and Penelope Weller (eds.) (Oxford: Hart, 2010), at 98.

[237] See *United Nations Convention on the Rights of Persons with Disability*, 2006, Art. 12:

Article 12 EQUAL RECOGNITION BEFORE THE LAW
1. States' Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law;
2. States' Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
3. States' Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity;
4. States' Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are 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;
5. Subject to the provisions of this article, States' Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

disabled before the law.[238] Article 12(3) requires all the States' Parties to take appropriate measures to support persons with disabilities to exercise their legal capacity.[239] Accordingly, the States' Parties shall fully implement a regime truly oriented toward supporting rather than supplanting the decision-making rights of people with disabilities; in other words, the supported decision-making regime in a legal sense is required.[240] The supported decision-making regime requires the State Parties to abandon an all-or-nothing approach and set up specific rules to recognize legal capacity to the fullest extent. The mere status of having an intellectual or psychosocial disability could no longer provide a sufficient basis for the presumption that the individual is utterly unable to participate fully and autonomously in society.[241]

2. How does Canada Interpret the Legal Capacity Laws and Establish the Supported Decision-Making Model?

1) Canada Keeps Both Supported Decision-Making and Substitute Decision-Making Models

The *CRPD* has provided an interpretive lens for the Canadian legal capacity laws since Canada ratified the *CRPD* in 2010 with a declaration and reservation, which is of extraordinary relevance to Article 12.[242] On one hand, Canada explicitly recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with

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[238] Article 12 has been most valued in the *CRPD*, for example, Inclusion Europe has stated that one of the most important aspects of the *CRPD* for people with intellectual disabilities is its principles regarding legal capacity and Quinn has opined that Article 12 is the absolute core of the *CRPD*. See *Interview: Promoting a Paradigm Shift: ERT talks with Gabor Gombos and Gerard Quinn about the UN CRPD and its optional protocol*, The Equal Rights Review, Vol.2, (2008), at 90, online:<http://www.equalrightstrust.org/ertdocumentbank//err_issue02%20reduced.pdf>.

[239] There are many commentators argue that the word of "support" in Article 12 and the related concept of supported decision making are just a "paradigm shift" away from well-established but increasingly discredited notions of substituted decision making. See Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, Human Rights Brief, Vol 19, Issue 2, 2012, at 8.

[240] *Ibid*.

[241] *Ibid*, at 9.

[242] See Term 14 of the *First Report of Canada on the Convention on the Rights of Persons with Disabilities,* online< http://www.ccdonline.ca/en/international/un/canada/crpd-first-report>.

others in all aspects of their lives, and also declares its understanding that Article 12 permits supported decision-making arrangements in appropriate circumstances. On the other hand, although Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves its right to continue the use of them in appropriate circumstances and subject to appropriate and adequate safeguards. From Canada's declaration and reservation, there is an apparent intention to keep both the substitute and supported decision-making models in Canada's legal framework. Under such reservation, all provinces and territories have in place laws related to substitute and/or supported decision-making with safeguards to protect against abuse.[243] For example, in Alberta's *Personal Directives Ac*t, individual may choose a representative to make personal, non-financial decisions on their behalf,[244] while the *Adult Guardianship and Trusteeship Act* provides options and safeguards to protect vulnerable adults who require support in making decisions.[245] In Ontario, although there is no supported decision-making regime, another regime with a similar function is provided: the *Substitute Decision Act* stipulates that guardians shall encourage incapable adults to participate, to the best of their abilities, in the guardian's decisions on the adults' behalf.[246] This stipulation encouraging the wards to be involved in guardians' decision is not the same with the supported decision-making and in nature it still belongs to substitute decision-making, since it is guardians or attorneys that are entitled to make the ultimate decisions, while incapable adults are deprived of decision-making rights and legal status.

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[243] *Ibid*, Term 34.

[244] See *Personal Directives Act*, RSA 2000, c P-6.

[245] See *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2. Apart from Alberta's legislation, Manitoba's *Vulnerable Persons Living with a Mental Disability Act* also supports and regulates both supported and substitute decision-making for adults with a mental disability, see *Vulnerable Persons Living with a Mental Disability Act*, SM 2014, c V90; In the Yukon, the *Adult Protection and Decision-Making Act* provides supported decision-making agreements, representation agreements, court-appointed guardianship and protection for adults who may be abused or neglected and unable to seek their own help, see *Adult Protection and Decision-Making Act*, SY 2003, c 21.

[246] *Substitute Decisions Act*, SO 1992, c. 30, s 32(3).

2) Flexible Evaluation of Adults' Legal Capacity and a Broader Interpretation of Legal Capacity in Canada's Judicial Practice and Legal Theory

As indicated above, a flexible approach to assessing legal capacity is key to achieving substantive equality of recognition before the law by establishing the regime of supported decision-making. A flexible approach to assess legal capacity is also indispensable in modern adult guardianship because one of the characteristics in traditional plenary adult guardianship is the all-or-nothing approach in legal capacity assessment.[247] In this respect, Canada's judicial practice and theory are worth mentioning. Under Canada's interpretation of Article 12, a person's ability to make a decision should not be judged merely by a "yes or no" scale, but flexible and less restrictive evaluation standards.[248] The Supreme Court of Canada's decision in *Starson v. Swayze* in 2003[249] interpreted the statutory test for mental capacity in Ontario's *Health Consent Act*[250] to have a relatively low threshold of decision-making ability, which is highly acclaimed because even if persons lose their decision-making ability, this will not necessarily mean that their mental capacity is impaired in a legal sense. As a result, the autonomy of people with psycho-social disabilities has been significantly advanced.

Bach and Kerzner assert that "to achieve a substantive 'equality of recognition' in the aspect of legal capacity, assessment of individual decision-making abilities may be

[247] Dinerstein asserts that "Plenary adult guardianship falsely assumes that incapacity for individuals with disabilities is an all-or-nothing proposition and that once found to exists in the individual will not regain capacity at some later time." See Robert D. Dinerstein, *supra* note 239, at 9. On the contrary, the modern adult guardianship with alternatives such as the supported decision-making could accommodate adults' various needs depending on their different levels of incapacity.

[248] Frolik states that with the growing understanding that mental incapacity is situational and not necessarily a yes-no, or binary, status, the justification for plenary guardianship has ceased to exist. Hence, it is time to discard it in favor of a more rational, flexible system of limited guardianship. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 Arizona Law Review, 1981, at 653.

[249] *Starson v. Swayze*, 2003 SCC 32, [2003] SCJ, No. 33.

[250] *Health Care Consent Act*, SO 1996, c 2.

required in order to ensure that appropriate assistance and accommodations are provided to maximize a person's decision-making ability and thus the enjoyment and exercise of their legal capacity."[251] With the purpose of providing appropriate assistance to make up for the incomplete abilities, Bach and Kerzner broadly interpreted the nature of decision-making ability and made it no longer restricted in a genuine sense but a broader legal sense. An additive approach in the conceptualization of legal capacity proposed by Bach and Kerzner could further explain this theory, i.e., "factual decision-making ability + supports and accommodations = legal decision-making capacity (legal capacity)".[252] This equation suggests that a tailored approach to supported decision-making would be provided based on the adult's actual decision-making ability.

As far as the author understands it, the proposed equation means the decision-making ability in a legal sense, that is, the legal capacity, is not only what the person can do on himself and does not entirely depend on his own decision-making ability, but is what he can do with others' support and assistance. Also, the purpose of capacity assessment is not to restrict or deny persons' legal capacity, but to address limits to their decision-making capacity and help them use their residual legal capacity to the fullest extent so that their decisions reflect their true will and intentions. Therefore, Canada's judicial practice and legal theory adopt a broad interpretation of legal capacity in the assessment.

3. Compliance with Article 12 of the *CRPD* by Establishing the Supported Decision-Making Model in China

1) Does the Chinese Adult Guardianship Meet the Requirements of Article 12 of the

[251] Michael Bach, Lana Kerzner, *supra* note 235, at 25.
[252] *Ibid*, at 26.

CRPD?

Since China ratified the *CRPD* in 2008, its adult guardianship laws should comply with the terms of *CRPD*. However, as indicated in Chapter I, China is still dominated by plenary guardianship which adopts an "all-or-nothing" approach based on an over-simplified legal capacity assessment. People are required to have decision-making ability on their own and totally understand information and appreciate the nature and consequence of a decision, otherwise they may lose their legally independent decision-making status.[253] However, this traditional standard for assessing adults' legal capacity is contrary to the equality-based approach required in Article 12 of the *CRPD*, since it fails to consider the varying extents of people's disabilities when they are making decisions in different issues and circumstances.

The *General Provisions* arbitrarily and radically deprive people with intellectual, cognitive or psychosocial disabilities of legal capacity and their legally independent decision-making status. The *General Provisions* not only presume that all of these incapable people are unable to guide their own lives and need to be 'fixed', but also set limits on the scope within which adults are allowed to make decisions. This violates Article 12 of the *CRPD*, which provides that persons with disabilities also maintain legal equality. Gerard Quinn has expressed his concern regarding misinterpretations of Article 12 made by some states, including China. He criticized that in these states Article 12 was interpreted as a restrictive measure, leaning towards exclusion rather than the inclusion of the person. His argument points out the weakness in China's legal capacity assessment and its "all-or-nothing" approach: "Incapacity is not a black or white issue, it is very much an individualized process. The first thing that a political

[253] See *General Provisions*, Article 21and Article 22 state that an adult incapable of discerning or fully discerning his/her conduct shall be a person without or with only limited capacity for civil conduct and shall be represented by his/her statutory guardian or need the statutory guardian's consent and ratification when exercising legal capacity.

authority should look to do is to put in the supports to enable individuals to make decisions, rather than take away this opportunity and do the easier thing of letting another person make the decision for them."[254] Obviously, Quinn disagrees a shortcut that only uses plenary guardianship and substituted decision-making approach in all cases, but this is precisely the one China adopts right now.

2) How to Make a Broader Interpretation in Legal Capacity and Establish the Supported Decision- Making Model?

This paper agrees with Quinn, Bach, and Kerzner that a modern adult guardianship regime must be able to reasonably accommodate residual decision-making abilities to allow a person to act legally in making decisions and entering a legal relationship with others. If independent decision-making is not possible in some cases, these incapable persons should still be allowed to retain their residual legal capacity where decision-making can be managed through a supported decision-making model.

As illustrated above, many jurisdictions in Canada have recognized supported decision-making authorities to promote individual autonomy as far as possible. Inspired by Canada's developments and taking Article 12 of the *CRPD* as the benchmark, the paper suggests Article 21 and Article 22 of the *General Provisions* providing China's exclusive and over-simplified criterion of legal capacity should be broadly interpreted by the Chinese Supreme Court. Under Bach's and Kerzner's theory, supports and accommodation should be central to interpretation to allow incapable persons to exercise their residual legal capacity to the furthest possible extent. Those persons who have limited decision-making ability should still be entitled to keep the legal decision-making status, instead of being represented by their statutory guardians or need a

[254] See *Interview, supra* note 238.

statutory guardian's consent and ratification when exercising legal capacity as prescribed by the current *General Provisions*.

On the other hand, a supported decision-making model as an alternative to China's current adult guardianship regime should be introduced. Comparing two legislative frameworks provided by Canada, this paper prefers the supported decision-making authorities adopted by Alberta, Manitoba and Yukon, as opposed to the Mandated Consultation System adopted by Ontario. Supported decision-making authorities fully recognize not only the place of supports and accommodation but also adults' legal status to make decisions, while the Mandated Consultation System only prescribes guardians should consult adults, but the adults are still perceived as mentally incapable persons without legal capacity and normal legal status.[255] In this sense, the supported decision-making model is more advanced and should be introduced to China. Among several provincial and territorial acts prescribing the regime of supported decision-making, Alberta's *AGTA* is the most preferable, which not only prescribes the co-decision-making orders made by the court but allows persons to enter such legal relationship by agreement as well.[256] China should follow Alberta's legislation and also consider both the court-ordered and the contractual supported decision-making models in order to provide the broadest protective spectrum and ensure the flexibility in the legal application.

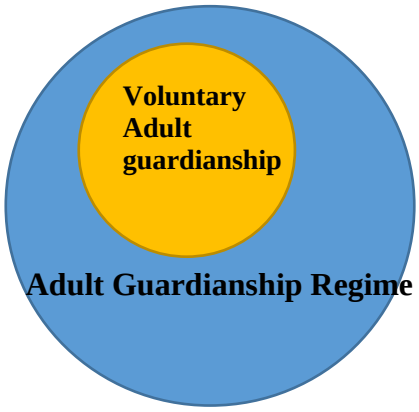
iii. The Third Step to Modernization: To Complete Voluntary Adult Guardianship

1. Different Legal Arrangements in Canada and China, which one is better?

[255] See the detailed comparison between the supported decision-making model and Mandatory Consultation System in the section of "Alternatives to the Guardianship: Supported Decision-making Authorization or the Mandated Consultation System?" in Chapter II and the section of "Canada Keeps Both Supported Decision-making and Substitute Decision-making Models" in Chapter III.

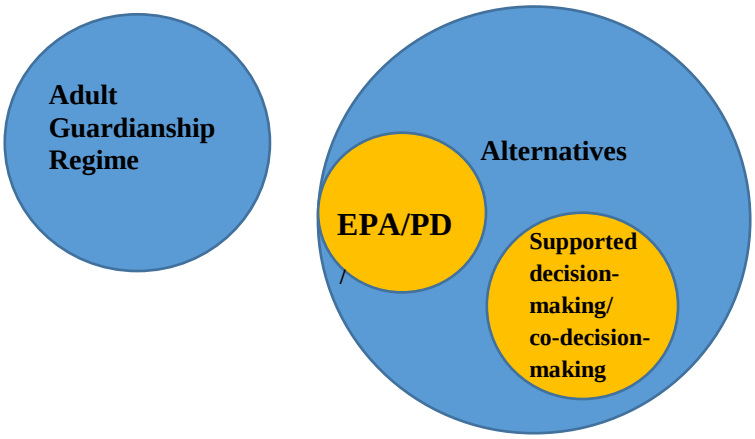
[256] See the advantages of Alberta's supported decision-making authorities in the section of "Alternatives to the Guardianship: Supported Decision-making Authorization or the Mandated Consultation System?" in Chapter II.

As depicted in Chapter I and Chapter II, both China and Canada own the legal mechanism that permits adults to determine their guardians in advance before the adults lose part or full capacity. The difference is that, China names this institution as voluntary adult guardianship, as a part or as a type, still belongs to the adult guardianship regime (See Figure 3.3); while Canada stipulates such similar institution as an enduring power of attorney (EPA) or personal directives (PD), and perceives such institution as an alternative which is independent of the adult guardianship regime (See Figure 3.4).



China's Adult Guardianship

(Figure 3.3)



Canada's Adult Guardianship and Alternatives

(Figure 3.4)

This paper prefers Canada's legal arrangement that separates the adult guardianship regime and alternatives for the following three reasons. These alternatives, such like an *EPA*, *PD* and supported decision-making, functioning as supplementary models of adult guardianship laws, should be applied ahead of guardianship laws, in other words, guardianship is considered as a tool of last resort in Canada's regime.[257] On the

[257] Taking Alberta's legislation as an example, the Adult Guardianship and Trusteeship requires that less restrictive and intrusive alternatives to court-ordered guardianship, notably supported or assisted decision-making, be explored before a guardianship order is made. *Adult Guardianship and Trusteeship*, SA 2008, c A4.2, s 26(6)(b); See Robert M. Gordon, Ann M. Soden, *supra* note 69, at 113.

contrary, China's *General Provisions* only stipulate voluntary adult guardianship in Article 33, without prescribing the priority of voluntary adult guardianship to exclude the statutory or court-ordered adult guardianship. [258] Second, different legal arrangements reflect two countries' different attitudes and understandings towards this institution. Canada's legislation does not regard *EPA/DP* and adult guardianship regime as the same; in the Canadian legal arrangement, a significant gap exists between adult guardianship regime and the alternatives because of their different natures and purposes. Adult guardianship is an institution of heteronomy, while the alternatives, of which the core is maximizing adults' autonomy and self-determination ability, are designed to be against state's intrusive interference and to change the essential nature of adult guardianship.[259] Third, the lack of independence of voluntary adult guardianship leads to its lack of operability. Some statistics indicate that the actual use of anticipatory legal documents in China, such as mandatory contract and health care directives in old age is low compared to the Canadian rates.[260] The *EPA/DP* in Canada is comprehensively stipulated in every province's *Powers of Attorney Act* and *Personal Directives Act*, rather than in the *Adult Guardianship and Trusteeship Act*; while in China's *General Provisions*, only Article 33 provides voluntary adult guardianship. Hence apparently, Canada's legal arrangement and legal front are more detailed, comprehensive and operable in judicial practices than China's.

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[258] *General Provisions*, Art 33. "An adult with full capacity for civil conduct may, by consulting in advance with his or her close relatives or other individuals or organizations willing to act as a guardian, determine his or her guardian in writing. When the adults lose all or part of the capacity for civil conduct, the guardian determined by consultation shall perform the duty of guardianship of the adult."

[259] Gordon points out some disadvantages of the guardianship, that is, the process is very time-consuming and expensive, and the probable outcome (a declaration of mental incapability and the granting of a guardianship order) is undoubtedly stigmatizing for the adult. Additionally, because the cost and complexity of applying for a change or cancellation are very high in Canada, a guardianship order may remain in force permanently, even though the adult's needs change. See Robert M. Gordon, Ann M. Soden, *supra* note 69, at 114.

[260] By the end of July in 2017, there had been only 100 voluntary adult guardianship cases registered across China, among which 50 cases happened in Shanghai, online:<http://www.sohu.com/a/209132887_119562>.

2. Safeguard Mechanism for Voluntary Adult Guardianship: The Registration and Notarization System

As indicated above, Article 33 regarding voluntary adult guardianship in the *General Provisions* are too general to be widely applied in practices; it only prescribes that mandate contract which determines the guardian in advance should be in a written form. Except for the requirement of written-form, there are no more other procedural requirements to guarantee such a mandate contract in a formal format to reflect the ward's true wills, and also, it is uncertain whether the ward is mentally competent when making the mandate contract. As a result, the possibility of disputes and the practical difficulty could increase under such an insufficient legal requirement for voluntary adult guardianship.

In Alberta, an *EPA/PD* must be in writing and must be dated and signed by the donor and witnesses, in the presence of each other. In addition, the donor shall obtain a pre-printed form from a registry office. Although the registration for an *EPA/PD* is optional, the witness's signature is still required.[261]

However, in China, the witness tradition is very weak in big ceremonies and events, even in the judicial practice.[262] In this sense, the western tradition of witnesses probably would not be widely accepted, and another safeguard of public registration and notarization should be considered instead. The advantage of public registration and notarization is that the publicity of the mandate contract and the voluntary adult

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[261] *Power of Attorney Act,* RSA 2000, c P-20, s 2(1)(b); *Personal Directives Act,* RSA 2000, c P-6, s 5(1).

[262] For example, in a ceremony of marriage, people seldom invite witnesses; and China's judicial system used to heavily rely on material evidence and documentary evidence in adjudication while paying much less attention to live, in-court testimony of a witness. See Zhuhao Wang,Why Chinese Witnesses Do Not Testify at Trial in Criminal Proceedings,Yunteng Hu, Zhengren Chuting Zuozheng Nan jiqi Jiejue Silu (证人出庭作证难及其解决思路)[*Difficulties in Witnesses Testifying at Trial and Corresponding Solutions*], Huanqiu Falv Pinglun (环球法律评论)[Global Law Review](China), No.5, 2006; Chen Weidong (陈卫东), Rang Zhengren Zouxiang Fating (让证人走向法庭) [*Let Witnesses Present in the Courtroom*], Shandong Jingcha Xxueyuan Xuebao (山东警察学院学报) [Journal of Shandong Police College](China), No.2, 2007, at 40; Chen Ruihua (陈瑞华), Lun Zhengren Zhengyan Guize (论证人证言规则) [*Discussion on Witness Testimony Rules*], Suzhou Daxue Xuebao (苏州大学学报) [Journal of Soochow University](China), No.2, 2012.

guardianship relationship could provide the access for the third party who is going to do a transaction with the ward to check with registry office to know whether there is an enduring power of attorney and who is the attorney. In this sense, the registration and notarization regime could safeguard transaction safety; and without being registered or notarized, mandate contract shall be invalid against a bona fide third party.[263]

3. To Specify the Content of Voluntary Adult Guardianship

In Canada, an *EPA* could only authorize someone to manage donor's financial affairs, while a separate document, a *PD*, gives an agent the authority to make decisions in health care including medical treatments and residential issues. Such separation is necessary because the two documents involve different aspects of people's lives and guardians' duties. However, Article 33 of the *General Provisions* does not provide such division, and there is no significant difference when voluntary adult guardianship is applied in financial affairs and personal matters.

Apart from the separation of different matters, Canada's *Powers of Attorney Acts* and *Personal Directives Acts* also make precise and detailed stipulations regarding attorneys' and agents' limited authority. Taking Alberta's act as an example, attorneys shall normally follow the general rules of financial management in the *Alberta Trustee Act*, but when it comes to big transactions, such as selling donor's real estate, attorney's authority would be limited unless the donor has explicitly authorized the attorney such power in the *EPA*.[264] Furthermore, in the *EPA* the donor could require the particular

[263] In the Chinese law, a bona fide third party means an "acquirer in good faith", and the legal effect of registration is "opposability upon publicity", which means registration is necessary for the real right to be opposable against a bona fide third party. See Yuanshi Bu, *Chinese Civil Law: A Handbook*, (Portland: Hart Publishing, 2013), at 204 and 205.

[264] The *EPA* may provide that the attorney's powers of investment will be in accordance with the "*Prudent Investor Rule"* under the *Trustee Act*, and, in that case, the attorney should familiarize himself or herself with Sections 1-8 of the *Trustee Act*, RSA 2000, c. T-8. The *EPA* may alternatively provide that the attorney's powers of investment will be restricted to certain specific types of investments. As a further alternative, the *EPA* may provide that the attorney's powers of investment are unrestricted. Three aspects in the *EPA* should be carefully considered by an attorney, namely the granted powers, the manner in which the powers are to be exercised, and the

way for attorney to perform the duty; for example, the donor might prefer to make financial decisions together with attorney or grant attorney to take over all responsibilities for donor's financial decision-making, or choose a model in-between, like a model in which attorney would be consulted on major decisions. It is obvious that the Canadian *Powers of Attorney Acts* and *Personal Directive Acts* pay great attention to the best interests of represented adults, particularly on big issues that are not adequately considered by donors in the documents. Even under the *EPA* or *PD*, donors could still maintain their autonomy and dignity by making decisions together with their attorneys or agents.[265] On the contrary, China's voluntary adult guardianship lacks such detailed content and diverse internal working models to accommodate the wards' various needs, to protect their best interests and prevent any potential infringement on their rights.

4. Several Suggestions Concluded from Canada's Legislation for the China's Voluntary Adult Guardianship

As the foregoing identifies, despite the breakthrough that voluntary adult guardianship has been adopted in the *General Provisions*, China still has a long way to go before achieving full implementation of this institution. Compared with *Powers of Attorney Acts* and *Personal Directives Acts* in many jurisdictions in Canada, there is only one clause for voluntary adult guardianship in China. This paper suggests China consider the following measurements. First, regarding the relationship between voluntary guardianship and general guardianship, China should split voluntary adult

restrictions imposed by the donors. See *The Enduring Power of Attorney: A Guide*, at 2, online:<https://www.walshlaw.ca/upload/media_element/attachments/1/Enduring-Power-of-Attorney-Guide.pdf>.

[265] This approach that an adult could enter supported decision-making relationship by agreement has been discussed in the last section "How to Make Broader Interpretation in Legal Capacity and Establish the Supported Decision-making Regime?" and in the section of "Alternatives to the Guardianship: The Supported Decision-making Authorization or the Mandated Consultation System?" in Chapter II. Alberta and Yukon adopt this approach.

guardianship from adult guardianship regime and classify *EPA* and *PD* under alternatives to the adult guardianship regime, so that they could be prioritized to be applied, and the recognition of the two alternatives would be improved. Second, regarding the procedural safeguard in the voluntary guardianship, China should establish a registration and notarization system to improve the publicity of the voluntary guardianship and avoid potential disputes afterward. Last but not least, regarding the content of voluntary guardianship regime, China should subdivide the matters into two specific categories, namely financial management and personal protection; and place more detailed restriction on guardians' or trustees' authority to make decision on significant events and provide more diverse internal working models to accommodate the wards' various needs.

iv. The Fourth Step to Modernization: To Complete Procedural Safeguards in Adult Guardianship

The lack of safeguards in guardianship procedure will lead to severe loss of rights and liberties for the wards, particularly for the elderly wards. Andrews asserts that "due to both federal and state reluctance to enact and reform legislation concerning guardianship procedures, the elderly subject to this system are being denied their constitutional rights."[266] Based on this argument, Andrews further proposes that "guardianship laws must guarantee the 'full panoply of procedural due process rights' in the following aspects: presumption and burden, standards for the finder of fact, the power to compel and cross-examine witnesses, and the right to have the issue submitted

[266] See Mark D. Andrews, *supra* note 207, at 75. The constitutionally protected liberties are probably infringed by guardianship, for example, decisions regarding where to live, the making of contracts, borrowing money, making gifts, and other basic decisions are made by the guardian, not the ward. See Hedin v. Gonzales, 528 N.W. 2d 567, 573 (Iowa 1995).

to the jury."[267] This paper will not elaborate on every procedure mentioned in Andrews's argument but will focus on the standardized safeguards it outlines that would be indispensable in the Chinese context.

1. The Procedure in Capacity Assessment

As stated in Chapter I, one of the most challenging issues today in China's guardianship law concerns legal capacity assessment. In the section of "achieving the equal recognition before the law", a broader interpretation of legal capacity is proposed, which improves the substantive equality of capacity assessment, while this section is going to dig into the procedural issues in capacity assessment.[268]

1) Two Unanswered Questions of Capacity Assessment in the *General Provisions*

Except Article 24 of the *General Provisions* that stipulates an interested party or a relevant organization of the adult may apply to the court to determine whether the adult loses legal capacity or decision-making capacity, there are no more statutes prescribing which institution is responsible for evaluating adult's legal capacity or other procedural issues in capacity assessment. From the literal meaning of Article 24, it seems that the courts have the sole authority to make the decision of capacity assessment. However, capacity assessment involves professional medical or psychological knowledge, while judges lack such expertise. In this sense, the participation of medical practitioners including psychiatrists, psychologists, and physicians is indispensable in capacity assessment. Nevertheless, it would also lack a sound legal basis if medical practitioners make decisions of capacity assessment alone without judges' opinions. For China's

[267] *Ibid*, at 93.
[268] Andrews also asserts that guardianship statutes must have procedural provisions which are relevant to determine actual incapacity. *Ibid*, at 95.

current situation, there is no sufficient training for medical practitioners to have good a command of guardianship laws, so the doctors could not understand how mental incapacity differs from legal incapacity and what the gap is between the decision-making ability in a medical sense and that in a legal sense. In addition, without a statutory uniform standard of capacity assessment, different doctors may use different diagnostic instruments and scales, which may cause chaos in judicial practices.

To conclude, the following two questions of capacity assessment in the *General Provisions* remain unanswered: first, who has the authority to carry out the assessment for adults and make the judgments; second, how to combine the medical and judicial standards in the evaluation, that is, how to incorporate both professional opinions from medical practitioners and judges.

2) The Answers Found in Alberta's Guide to Capacity Assessment: Multidimensional Procedure with Multi-participation

In Alberta, a capacity assessment is initiated only if there is a reason to believe an adult is unable to conduct his personal affairs.[269] While in China, Article 24 of the *General Provisions* does not particularly require any substantial evidence or proof to trigger a capacity assessment; consequently, it adds more heavy workload to the courts on one hand, and anyone could arbitrarily make an application to the court to assess whether an adult's capacity is impaired on the other hand. The application to the court could label an adult in advance, and others may presume the result that the adult is mentally disordered, which is discriminatory and contrary to Article 12 of the *CRPD* that requires substantive recognition before the law.

[269] *Guide to Capacity Assessment under the Personal Directives Act*, Office of the Public Guardian, at 3. Online:< http://www.cpsa.ca/wp-content/uploads/2015/09/opg-personal-directives-publication-opg1642.pdf>.

As to who has authority to assess an adult's capacity, Alberta's *Personal Directives Act* prescribes that an adult could designate one or more persons to determine the person's capacity,[270] and the designated person needs to consult with a physician or psychologist and write a declaration to announce that the person lacks capacity.[271] If there is no designated person or the designated person is unable or unwilling to make the determination, a physician or a psychologist could make a written declaration instead.[272] When the designated person makes a determination, the assessed adult is entitled to apply for the court's review for the determination. Therefore, the capacity assessment in Alberta considers the assessed adults' wills, so that they could name a trusted friend to determine capacity; in addition, since the result is based on professional medical opinions, physicians and psychologists also play key roles in Alberta's capacity assessment; at last, the court acts as a reviewer to ensure the judgment is valid based on the medical evaluation and designated assessor's observation of the adult's daily life. Overall, such multidimensional arrangement in which adults, medical practitioners and, judges all have an appropriate place in legal capacity assessment, could not only guarantee both science and judicial justice in the assessment result but also respect adults' dignity and their rights of autonomy.

Moreover, in Alberta, there are other strict procedural requirements for legal capacity assessment. For example, assessors must meet with the adults to explain the purpose and nature of the assessment and inform them of the consequence if they are found to lack capacity.[273] The adults have rights to refuse to be assessed, in that case, the court would determine whether the adults should have the assessment or not.[274]

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[270] *Personal Directives Act*, RSA 2000, c P-6, s 7(1)(b).
[271] *Ibid,* s 9(2)(a).
[272] *Ibid,* s 9(2)(b).
[273] See *Guide for Capacity Assessors*, *supra* note 180, "s 11.3, Explanation of Purpose, Significance and Rights", at 14.
[274] *Ibid.*

Also, the least intrusive method should be taken, that is, the adult would be assessed only in a particular field either in health care or in financial management, where he/she potentially loses capacity.

To conclude, the procedure in Alberta's legal capacity assessment is more comprehensive than China's, and it avoids unnecessary assessment while fully considering adults' best interests and fairness in assessment results. Therefore, Alberta's multidimensional procedure with multi-participation in capacity assessment is a worthwhile model for China.

2. The Public Guardianship System

As Chapter I concludes, although Article 32 of the *General Provisions* stipulates that the civil affairs department, urban residents' committee, and the villagers' committee have the duty to act as public guardians when the qualified designated guardians are not available, these three departments seldom undertake the role as public guardians in the reality, mainly because they are comprehensive social organizations to solve extensive problems in citizens' daily lives so that they are not professional and specialized enough in the field of adult guardianship.[275] This section is to discuss what kind of public guardian is needed in China and how to establish the public guardianship system.

1) Canada's Public Guardianship Services

Regarding the organizational structure of the public agency, there are several models across Canada.[276] For instance, the *Office of the Public Curator* in Quebec

[275] See The Committee on the Rights of Persons with Disabilities, *Response by the Government of the People's Republic of China to the List of Issues (No.1 to No.30)*, Issue 19, *Supra* note 82, at 21.

[276] In Canada, every province and territory has a public agency, but these public agencies have different names. For example, the *Office of the Public Trustee* in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario,

provides a combined guardianship and trusteeship services, while Alberta establishes separated public agencies in the past, namely the *Office of Public Guardian (OPG)* with the mandate to offer personal guardianship services and the *Office of Public Trustee (OPT)* offering estates management services.[277] In 2014, Alberta also merged the two operations into *OPGT*.

According to Alberta's *ATGA*, the *OPGT* has multiple tasks. Apart from the task of undertaking the role as a guardian and trustee for incapable adults, the *OPGT* also has other tasks for general procedural reviews. For example, the *OPGT* has the duty to review application documents to check whether the applicants are qualified to submit the application; only when the *OPGT* approves the application, will this application be turned to the court. By this pre-posed review, numerous applications that do not conform to the requirements would be declined; as a result, on one hand, courts' burdens are lessened; on the other hand, the possibility that any invalid applications infringing adults' rights are reduced. Besides, the *OPGT* has more duties throughout the adult guardianship, including meeting with applicants, adults and guardian candidates, checking the potential qualified guardians'/trustees' suitability and supervising private guardians' activities.[278]

As the foregoing identifies, Canada's public trusteeship and public guardianship services are well-established[279] and play a significant role in assisting a large number

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Nova Scotia, and the Northwest Territories; the *Office of the Public Curator* in Quebec; the *Public Administrator* in Yukon and the *Official Trustee* in Prince Edward Island. See Robert M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 5-1.

[277] Some of the smallest jurisdictions in Canada, by population, have adopted Alberta's model; for example, the Northwest Territories and Nunavut.

[278] See *2016-17 Annual Report of Office of the Public Guardian and Trustee, supra* note 140, at 8.

[279] Taking Alberta as an example, apart from the comprehensive duties and responsibilities the *OPGT* has, there are systematic values and missions *OPGT* has. For example, they demonstrate that their values are respect, accountability, integrity, and excellence, their missions are protecting and advocating for individuals, providing legal guardianship, administering the property of represented adults, providing information, education, and support to the public, and they also clearly demonstrate their vision, five-year goal, priorities. In this sense, Alberta's public guardianship and trusteeship services are very comprehensive and well developed. *Ibid*, at 7 and 15.

of Canadians.[280] There are also some data showing that a significant proportion of adults who are assisted and supervised by the public agencies are over 60 years of age and it is expected that both the proportion and the numbers of elderly clients would sharply increase over the next decade.[281] Therefore, it is evident that public guardianship and trusteeship is widely applied among the elderly and necessary in view of ageing demographics.

2) How to Establish China's Primary Public Guardianship and Trusteeship System and What is the Challenge?

Considering China's huge population and the complexity of adult guardianship issues, this paper does not entirely agree with the current legal arrangement to distribute the authority and duty of public guardianship and trusteeship to the civil affairs department, urban residents' committee, villagers' committee or the courts. It is an inevitable trend to establish a particular department that is professional and specialized at public guardianship and trusteeship.

Regarding the ways that the Chinese public guardian and public trustee shall be involved in the management of an adult's estate and person, considering China's limited resources and the considerable demands in reality, this paper prefers the way of "one department with two branches" which combines the advantages of Quebec's way and Alberta's way.[282] More specifically, China shall establish a comprehensive public department which is mainly constituted of public guardianship office and public trusteeship office.

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[280] According to Annual Report of Office of the Public Guardian and Trustee, as of March 31, 2017, a total of 7,056 adults in Alberta had a public guardian and/or trustee. *Ibid*, at 8.

[281] Robert M. Gordon, Simon N. Verdun-Jones, *supra* note 89, at 5-2 to 5-4.

[282] The executive director of the *OPGT* in Alberta, Barb Martini, explains the motivation that pushed Alberta to transform the *OPG* and *OPT* to the *OPGT*, "We merged two distinctly different organizations – the Office of the Public Guardian and the Office of the Public Trustee – with a goal to streamline and improve service to Albertans." See *2016-17 Annual Report of Office of the Public Guardian and Trustee*, *supra* note 140, at 6.

As mentioned in Chapter II, when the *Office of Public Guardianship and Trusteeship* was first established in Alberta, there were many sharp criticisms which perceived the *OPGT* as an institution symbolizing the state's intrusion and interference in citizens' lives. It is estimated that there would also be dissatisfaction with a public guardianship department in China, so how to avoid people's antipathy towards the public guardianship is the major challenge in the preliminary work to establish Chinese public guardianship system. In this light, this paper agrees with the terminology that Gordon used in his book, i.e., the public trustee and public guardianship services;[283] in Canada, it is generally acknowledged that public guardianship is a service rather than a governmental tool, which is offered by the state to fulfill its responsibility to protect human rights and civil rights.[284]

Gordon points out another challenge that could arise in public trusteeship. Since there is a common perception that governmental management of citizens' estates is a hidden way to "take people's money", and people are afraid that a public trustee will dispose of their assets without consultation and any compensation, and make estates' value plummet. Therefore, people would be reluctant to use public trusteeship service.[285] Such concern would likely also occur in China.

In Canada, although public trustee services are permitted to charge fees for their work or deduct the fees from clients' accounts, large profits are prohibited. The *Ontario Royal Commission Inquiry into Civil Rights* even insisted that compensation should not be permitted and criticized the practice of making and accumulating "profits".[286] This paper agrees with the Ontario Commission's view which is consistent with the

[283] Robert M. Gordon, Simon N. Verdun-Jones, s*upra* note 89*,* at 5-1.
[284] This characteristic in the Canadian public guardianship is clearly demonstrated in the *OPGT*'s annual report which states that their mission is to provide supports and services to vulnerable Albertans, and their priorities are to integrate service delivery. See *2016-17 Annual Report of Office of the Public Guardian and Trustee*, *supra* note 140, at 7.
[285] Robert M. Gordon, Simon N. Verdun-Jones, s*upra* note 89, at 5-31.
[286] *Ibid,* at 5-21.

traditional view on a trustee that a reasonable compensation was permitted, but profit-making was not accepted. Because China is a socialist state intensively centralizing the state resources, it is able to provide enough financial support for the operation of public guardianship and trusteeship services, and people are supposed to live under a comprehensive welfare system supported by the state. Considering this fact, this paper suggests that China's public guardian and trustee department shall be a non-profit organization; for public trusteeship services, earnings are allowed but should be limited within the operating costs; for public guardianship services, it should be absolutely non-profits.

On the other hand, the *Public Guardian and Trustee* of British Columbia is accountable to the legislature, the public, and directly to its clients.[287] A department of public guardianship and trusteeship in China could also be supervised either by the court or by the legislature to prevent any potential abuse and neglect of wards.

In conclusion, it is a huge project to establish a complete public guardianship and trusteeship system. In China, a major challenge would likely be establishing citizens' faith in the public authority. Apart from the three measures mentioned above that China could adopt, the department of public guardianship and trusteeship could also attempt to build a positive public image through public and professional education. At first, people may perceive such public service as the return of the state's paternalism in guardianship; hence it would be necessary to persuade them to believe that the public guardianship and trusteeship system is not the state's tool to govern incapacitated people and intrude into their personal lives. On the contrary, this institution could lessen

[287] Accountability is exercised through the government's review of Public Guardian and Trustee performance planning, annual public reporting on performance, annual audited financial statements and through judicial oversight of the *Public Guardian and Trustee* statutory and fiduciary obligations to individual clients. See Jay Chalke, *supra* note 206, at 19.

the family-orientation which is deep-rooted in traditional guardianship influenced by the Confucianism and thus could separate the guardianship from the private realm.

3. Clarifying Public Guardian and Trustee's and the Court's Supervision on Private Guardians

The supervisory mechanism plays a crucial role to ensure that the representatives are carrying out their duties and to prevent any abuse and neglect of wards throughout the process of guardianship.[288] However, China's *General Provisions* contain little explicit language concerning the regulation and supervision over guardians in practice. This legislative loophole has been causing a severe phenomenon that more and more elderly people who are living alone died without being noticed.[289] Therefore, a supervisory institution is indispensable for a comprehensive adult guardianship regime. This section will elaborate on the setup of the supervisory mechanism, that is, which institution has the supervisory authority and how the supervisory mechanism functions.

1) Canada's Two Mainstreams of Public Supervision and the Guardianship Review

In Canada, the *Office of Public Guardian and Trustee* and the court generally take the supervisory roles in adult guardianship laws. In most cases, the *OPGT* acts as the first line of supervision, while the court acts as the second line. As the foregoing demonstrates, the *OPGT* has the duty to review the application, decline any invalid

[288] Andrews explains the necessity of adequate monitoring in adult guardianship, "The guardian has nearly full power over the ward, especially in a plenary guardianship arrangement. If not monitored, the ward's situation may become oppressive, neglectful, or even abusive." See Mark D. Andrews, *supra* note 207, at 75.

[289] There is a news report that in Tianjin (a province in China), an elderly person's death went unnoticed. He was found died by his neighborhood two weeks after his death. Five neighbors said they had noticed his absence in the hallway, but did not check on him. The residents' committee which is supposed to keep an eye on residents was surprised by news of his death. In this case, the residents' committee acts as the public guardian of this elderly person. This tragedy could have been avoided if the public supervisory mechanism were established. See Emily Rauhala, *He was One of the Millions of Seniors Growing Old Alone, so He Put Himself up for Adoption,* The Washington Post, online:< https://www.washingtonpost.com/world/asia_pacific/he-was-one-of-millions-of-chinese-seniors-growing-old-alone-so-he-put-himself-up-for-adoption/2018/05/01/53749264-3d6a-11e8-912d-16c9e9b37800_story.html?utm_term=.4de35d54ea16>.

application and select the most suitable guardian by looking through every guardian candidate's profile. The *OPGT* should also supervise guardians' or trustees' performances afterward.[290] Compared with another way that the court appoints a private supervisor, the advantage of a public supervisor is that any circumstances in which a guardian could have colluded with a private supervisor to infringe the wards' interests could be avoided. After the *OPGT* completes the first-checking task, the court will take over the supervisory role; for example, the *OPGT* shall submit a comprehensive report to the court to conclude the information gathered in their investigation, and also, the appointed guardian shall submit a plan for the court's approval. In addition, guardians take responsibility to report to the court about their duty performance periodically, and they are required to get approval from the court when they are making significant decisions or when trustees are dealing with big transactions. The courts need to do guardianship review to consider whether the order of appointing a guardian is still needed or if the order needed to be amended. With these simple safeguards, Canada guarantees minimal, but effective oversight for the incapacitated citizens.

Apart from these two primary lines of supervision, the *AGTA* in Alberta allows the *Minister of Seniors and Community Support*s to designate individuals to receive complaints and investigate guardians' performance and the current living condition of the adults to evaluate whether their best interests have been well protected.[291]

2) How to Establish a Multilayer Public Supervisory Mechanism in China?

[290] See *2016-17 Annual Report of Office of the Public Guardian and Trustee*, *supra* note 140, at 7. See The Role of the Office of the Public Guardian and Trustee, online:<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/overview.php>.
[291] *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 81, s 82, s 83.

Although Canada's supervisory mechanism in adult guardianship laws is quite complete, it would be problematic to transplant it into China directly. Considering the advantages of Canada's pre-posed supervision executed by the public guardian and China's limited judicial resources, this paper proposes that China shall adopt a multilayer supervisory method which mainly relies on the public supervision supplemented by privately selected monitors.[292] As examined in the last section, China does not have a public guardianship or trusteeship system; therefore, the first step is to put such a system in place in China. Before it is established, under China's current setup of administrative agencies, the residents' committee and the villagers' committee are suitable to take responsibility to act as public supervisors with the assistance from China's grass-roots civil affairs departments.[293] After the department of public guardianship and trusteeship is established, the multilayer public supervisory system could be realized, in which the department of public guardianship and trusteeship acts as the primary supervisor with assistance from residents' committee and villagers' committee, under the state's instruction and different levels of governments' monitoring.

As to the supervising process, Canada's pre-posed "reporting and monitoring" method undertaken by the *OPGT* is worth considering, and its advantage lies in the

[292] In Canada, the use of privately selected monitors to invigilate the conduct of attorneys and representatives has not been widely accepted, but it has been implemented in British Columbia. The private monitors are mandatory for limited representation agreements made by persons with diminished capacity and are optional for general agreements. The role of a monitor is to make reasonable efforts to ensure the representative is carrying out their duties and if not, to report the matter to the Public Guardian and Trustee. There are concerns that this duty on monitors is too vague and that monitors are potentially liable for failing to superintend the conduct of the representative sufficiently. Accordingly, an alternative was included in the law to provide that a monitor could be avoided by appointing two representatives who are required to act jointly since the duties of representatives are better understood. See Jay Chalke, *supra* note 206, at 12. In this section, the discussion will only focus on public supervision, because private supervision belongs to the contractual field.

[293] The residents' committee and villagers' committee are the lowest level of the administrative hierarchy in urban and rural China, but they are also important parts of the political system. Residents' committee and villagers' committee are two grass-roots organizations having close social bonds and face-to-face interactions with citizens. See Ngeow Chow Bing, *The Residents' Committee in China's Political System: Democracy, Stability, Mobilization*, Issues& Studies 48(2), (Taipei: Institute of International Relations), at 71-126.

effective combination of a "proactive" method and a "retroactive" method.[294] For example, by the proactive method, public guardians, residents' committee and villagers' committee would give instructions to the guardian; the private guardian could then submit an initial report to the public guardian detailing how the private guardian expects to address those personal needs of the ward. Likewise, the trustee of the estate is obliged to prepare and file an initial account of the ward's assets, and submit a proposed plan for managing the estate; as noted earlier, when trustees make decisions on significant financial transactions, public trustee's or court's approval is required unless there is a protective trust. With the retroactive method, the department of public guardianship, private guardians and the residents' committee and villagers' committee have different responsibilities.[295] To be more specific, the department of public guardianship could provide for periodic review of the continuing need for guardianship. Private guardians and trustees should monthly or quarterly report to residents' committee and villagers' committee about their performance, the current living condition and mental condition of wards. The residents' committee and villagers' committee could frequently visit wards in the community to check whether they enjoy the care and whether they are safe from any potential abuse and neglect.

v. Conclusion

This chapter has highlighted four steps for China's future reforms in adult guardianship laws. Most of these steps are inspired by Canada's adult guardianship

[294] The concepts of "proactive" and "retroactive" methods are inspired by Kees Blankman. As Blankman points out that, "Supervision of the work of the guardian is by law a responsibility of the guardianship judge… Some judges are proactive and give instructions to the guardian, but most judges only act retroactively." See Kees Blankman, *Guardianship Legislation in the Netherlands*, Comparative Perspectives on Adult Guardianship, edited by A. Kimberly Dayton, (Durham: Carolina Academic Press, 2014,) at 189.

[295] In Blackman's argument, the retroactive method is primarily adopted when guardians are performing their responsibility, which means that judges would review the performance of guardians periodically and when the guardianship terminates. Blackman also describes how the retroactive method works in guardianship, "the judge can summon the guardian at any time to appear and to provide whatever information about the guardianship the court wishes to hear about him, and might do so in the event that a complaint has been filed", *ibid*.

regime, especially Alberta's model. The four steps mainly focus on three aspects, namely the guiding principles, the substantive law, and the procedural law.

First, this chapter discusses the need to absorb the international guiding principles into China's adult guardianship regime, which would be the foundation for a subsequent new guardianship regime. This paper gives preeminent importance to these guiding principles, because they could reflect the fundamental values of human rights protection behind adult guardianship laws, and also because adult guardianship is a global issue rather than merely a domestic issue, which makes adult guardianship laws comparable between different states or districts.

The chapter then explores a way to achieve the substantive "equal recognition before the law" by examining how Canada complies with Article 12 of the *CRPD*. Canada's declaration and reservation regarding Article 12 are worth noting; one is the recognition that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives, and a person's legal capacity to make decisions is not simply judged by an "all-or-nothing" approach. This could inspire China to adopt a broader interpretation and a more flexible standard to evaluate people's legal capacity; the other is Canada's preservation of both models of the substituted decision-making and supported decision-making in appropriate circumstances, making these subject to appropriate and adequate safeguards to accommodate adults' various needs. This paper proposes that China shall also introduce the alternative of supported decision-making to accommodate wards' various needs.

The third step is to complete voluntary adult guardianship. Before the enactment of *General Provisions*, only the *Elderly Protection Law* stipulated voluntary adult guardianship. Although *General Provisions* extend the application of this institution to every citizen, it is still immature and lacks feasibility in China because such a

complicated institution is stipulated only by a single article in the *General Provisions*. This paper thoroughly compares Canada's model with China's and concludes that China's voluntary adult guardianship still needs to reconsider the following questions. First, what's the relationship between voluntary adult guardianship and general adult guardianship? Second, in the sense of procedural justice, how can a system safeguard fairness and improve publicity of the legal relationship between the guardian and the adult? Third, in the sense of substantial justice, how can the regime add further stipulations to limit the guardian's or trustee's authority and provide more diverse internal working models to accommodate the wards' needs.

Last, a sentence in the book of "*Adult Guardianship Law in Canada*" inspires the author to pay more attention to procedural safeguards in adult guardianship laws, that is, "An adult has a clear right to 'procedural fairness' before a loss of liberty".[296] In the last section, this paper only focuses on three primary procedural safeguards, namely the process of capacity assessment, the public guardianship and trusteeship system and the public supervisory mechanism, which are three most significant and indispensable safeguards throughout adult guardianship application.[297]

[296] Robert M. Gordon, Simon N. Verdun-Jones. *Supra* note 89, at 6-63.

[297] Due to the length limitation, there are other effective procedures in Canada's adult guardianship laws that are not discussed in this chapter, such as a fair and impartial judicial hearing, which is also an important and common procedure to secure the fairness, but compared to the three procedural safeguards discussed in this chapter, the judicial hearing is not that indispensable and necessary.

CONCLUSION

Chapter I and Chapter II focus on the history, the development and long-term reforms of adult guardianship laws in China and Canada, and also examines their current regimes and concludes their progress, advantages, and deficiencies in adult guardianship laws. Although China enacted the *General Provisions* in 2017 which includes new adult guardianship legislation, its adult guardianship system is still incomplete compared to Canada's system. In Chapter III, this paper makes an overall comparison between China's and Canada's adult guardianship regimes in three aspects, namely the guiding principles, the diversity of models and alternatives, and the procedural safeguards in the field of adult guardianship. There is a focus on the possible solution to the deficiencies of China's adult guardianship identified in Chapter I, by referring to Canada's experience which has successfully resolved the similar problems. In brief, this thesis answers three main questions, which could be represented in a "why-what-how" abbreviation:

- **Why** the paper takes Canada as an example to compare the adult guardianship with China's, in other words, what is the basis supporting for the comparison between them?

- **What** are the advantages of Canada's adult guardianship regime compared with China's? What kind of experience of success in Canada's long-term reforms could be provided for China?

- **How** could China achieve its comprehensive adult guardianship regime? How could this Canadian regime be transplanted into China under China's Confucian tradition and its socialist regime with Chinese characteristics?

i. Why could China Learn from Canada's Adult Guardianship?

There are two reasons that the comparison and the mutual learning between Canada's and China's adult guardianship laws are reasonable and feasible. First is because of their similar adult guardianship tradition. For China, the traditional adult guardianship is primarily influenced by the Confucianism; while for Canada, the origins of adult guardianship laws derive from the *Parens Patriae Law* in common law tradition and the *Napoleonic Code* in civil law tradition, respectively. Both countries' early adult guardianship is characterized by paternalism, heteronomy, and discrimination. It can be deduced that they shared similar characteristics in the early stage; however, Canada has achieved its modernization of adult guardianship by ongoing reforms over half a century, while China is still on its way to the modernization. Therefore, Canada could provide a helpful model for China. The second reason lies in the universalism of adult guardianship regime. Canada and China share common goals and fundamental guiding principles in the field of adult guardianship. Generally speaking, different countries cannot have the exact same adult guardianship laws, but the ultimate purposes of this institution are almost identical in different states, that is, to balance adequate protection for vulnerable adults with the goal of protecting individual autonomy. Therefore, Canada's and China's adult guardianship are comparable.

ii. What Advantages does Canada's Adult Guardianship Have Compared with China?

Compared with China's underdeveloped adult guardianship laws, the advantages of Canada's adult guardianship regime lie in three aspects, the advanced guiding principles, the diversity of models and alternatives, and the fair procedures. To be more specific, it establishes the guiding principles, such as the best interests, the least

restrictive, maximizing adult's right to autonomy and self-determination, and a presumption of competence. Moreover, Canada sets up the priority between the principles of best interests and substituted judgment, which strengthens the two principles' feasibility of being applied and establishes the internal order in adult guardianship. Regarding the external order, Canada's adult guardianship laws comply with the *CRPD* and the *Charter of Rights and Freedoms*, which also further entrenches the basic values of human rights protection into its adult guardianship regime. Under such guiding principles and value orientation, the Canadian adult guardianship regime has been undergoing a long-term reform since World War II. On one hand, partial adult guardianship, enduring power of attorney, personal directives and supported decision-making have been established as alternatives, and court-ordered adult guardianship and trusteeship become the last resort applied only when the alternatives are all sought. On the other hand, comprehensive and fair procedures have been completed, such as the hearing process, the "all parties involved" capacity assessment, the public guardianship and trusteeship, and professional public supervisory department. Among 13 jurisdictions in Canada, Alberta's adult guardianship laws including the *DAA* and the *AGTA*, provide two of the most advanced adult guardianship statutes.

iii. How could China Modernize the Adult Guardianship Regime by Referring to Canada's Success?

Since Canada and China previously had similar plenary adult guardianship regimes and Canada has successfully transformed to a comprehensive modern adult guardianship regime, this paper ultimately aims to propose a feasible way to modernize China's adult guardianship system. Since the goal is a comprehensive regime rather

than just individual laws, the solution should not be fragmentary. Instead, it seeks to set out a complete reformed scheme.

One of the primary reasons that China's nearly ten-year long reform could not make significant progress in the field of adult guardianship lies in its lack of a global perspective to establish a comprehensive system. As Chapter I introduces, China has been undertaking reforms in the adult guardianship regime since the 2010s, including several amendments in the *General Principles* and the *Elderly Protection Law*, the enactment of the *Mental Health Law* in the 2012 and the *General Provisions* in the last year. It is evident that China's adult guardianship regime is presented in fragmentary statutes; hence, systematic reforms in adult guardianship are required.

Another problem is that some institutions were introduced in China, but the ideas and values behind such institutions were seldom reflected. For example, China established its voluntary adult guardianship by learning from the power of attorney acts and personal directives acts in the West, but there was only one article about this institution in the *General Provisions*. Consequently, China's voluntary adult guardianship lacks feasibility and most people even including some legal workers do not know why they need this institution and how it works in judicial practices. The first step of learning must be understanding, in this sense, China should first do more research to understand the guiding principles rather than introduce it directly, and then learn how to transplant these principles and specific institutions in the context of Chinese Confucianism.

Furthermore, China should pay more attention to the procedural safeguards in adult guardianship, primarily the public guardianship and trusteeship system, and public supervisory mechanism, in order to prevent the currently increasing exploitation, abuse, and neglect of wards. As to the substantive law in this field, China should learn from

Canada to diversify adult guardianship models and alternatives, and make the court-ordered adult guardianship the last resort to accommodate ward's various needs and maximize their self-determination capacity.

BIBLIOGRAPHY

CHINESE LAW SOURCES

1. ***The General Principles of Civil Law of the PRC*** (came into effect on Jan. 1, 1987).
2. ***Opinions on Several Issues concerning the Implementation of the General Principles of the General Principles of Civil Law of the PRC***, deliberated and adopted at the Judicial Committee of the Supreme People's Court on Jan. 26, 1988.
3. ***Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (2012 Revision)***, promulgated by the Standing Committee, National People's Congress, 28th December 2012 (effective on the 1st July 2013, amended on the 24th April 2015).
4. ***Mental Health Law of the PRC****,* promulgated by the Standing Committee, National People's Congress, 26th October 2012, effective on 1st May 2013.
5. ***Marriage Law of the PRC (Revised)****,* promulgated on September 10, 1980, and amended at the 21st Meeting of the Standing Committee of the Ninth National People's Congress on April 28, 2001.
6. ***Adoption Law of the PRC (Revised)****,* promulgated on December 29, 1991, amended at the 5th Meeting of the Standing Committee of the Ninth National People's Congress on November 4, 1998.
7. ***The General Provisions of Civil Law of the PRC****,* (came into effect on Oct. 01, 2017).

CANADIAN LAW SOURCES

1. The Consolidated Status of Upper Canada, RSUC 1839, c XI.

*2.The Civil Code of Lower Canada (*French: *Code civil du Bas-Canada),* in effect in Lower Canada on Aug.1, 1866 and remained in effect in Quebec until repealed and replaced by the Civil Code of Quebec on Jan.1, 1994.

3.Lunacy Law Amendment Act, 1 George V (1911), c 20

4. *Mental Incompetence Act*, *RSO 1937,* c 110

5. *The Infirm Persons Act,* RSNB 1973, c I-8

6. *The Property Act,* RSNB 1973, c P19

7. *Family Services Act*, SNB 1980, c F-2.2

8. *Dependent Adults Act*, RSA 1980, c D-32

9. *Adult Protection Act*, RSPEI 1988, c A-5

10. *Adult Protection Act*, RSNS 1989, c 2

11. *Dependent Adult Act,* SS 1989-90, c D-25. 1.

12. *The Powers of Attorney Act,* RSO 1990, c P20

13.*The Powers of Attorney Act,* RSNL 1990 c E11

14. *Civil Code of Québec*, LRQ, c C-1991

15. *The Advocacy Act,* SO 1992, c 26

16. The Consent to Treatment Act, SO 1992, c 31

17. *The Substitute Decisions Act,* SO 1992, c 30

18. *The Vulnerable Persons Living with a Mental Disability Act,* SM 1993

19. *The Guardianship and Trusteeship Act*, SNWT 1994, c 29

20. The Adult Guardianship Act, RSBC 1996, c 6

21.The Powers of Attorney Act, RSBC 1996, c 370

22. The Powers of Attorney Act, SM 1996 c P97

23. The Health Care Consent Act, SO 1996, c 2.

24. The Powers of Attorney Act, RSPEI 1998, c P16

25. The Adult Guardianship and Co-decision-making Act, SS 2000, c A-5.3

26. The Powers of Attorney Act, RSA 2000, c P20

27. Personal Directives Act, RSA 2000, c P-6

28. The Powers of Attorney Act, SS 2002 c P20.3

29.The Adult Protection and Decision Making Act, SY 2003, c 21

30. The Adult Guardianship and Trusteeship Act, SA 2008, c A-4.2

31. Vulnerable Persons Living with a Mental Disability Act, SM 2014, c V90

OTHER LAW SOURCES

*1. The Napoleonic Code (*entered into force on Mar. 21st, 1804*).*

2. United Nations Convention on the Rights of Persons with Disability, the text was adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. Following ratification by the 20th party, it came into force on 3 May 2008.

CASE

Starson v. Swayze, 2003 SCC 32, [2003] SCJ, No. 33.

SECONDARY MATERIAL: MONOGRAPHS

1. Keith Banting, *Welfare State and Canadian Federalism (2nd Edition),* (Kingston and Montreal: McGill-Queen's University Press).

2. Chan J. *Confucian Perfectionism: A Political Philosophy for Modern Times,* (Princeton: Princeton University Press, 2014).

3. Cora Chan, Rebecca Lee, *Adult Guardianship Law in China: Traditional Values and Modern International Developments,* Comparative Perspectives on Adult Guardianship, edited by A. Kimberly Dayton, (Durham: Carolina Academic Press, 2014).

4. H Patrick Glenn, *Legal Traditions of the World (Fifth Edition)*, (Oxford: Oxford

University Press, 2014), at 320.

5. Hsiao-hung Nancy Chen, Tsung-hsi Fu, *Older people's income security in China: the challenges of population ageing,* in *Ageing in East Asia: Challenges and Policies for the Twenty-first Century,* Fu T. H. Hughes R. (eds), (New York: Routledge, 2009).

6. Anita Smith, *Are Guardianship Laws and Practices Consistent with Human Rights Instruments?* Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014).

7. Robert M. Gordon, Ann M. Soden, *The Guardianship of Incapable Adults and Their Property in Canada*, Comparative Perspectives on Adult Guardianship, edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014).

8. Je Cheol Ung, *Korean Guardianship*, Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014).

9. Wang Zhuqing, Yang Ke, *Jianhu Zhidu Bijiao Yanjiu [The Comparative Legal Study on the Guardianship]*, (Beijing: Intellectual Property Publishing House, 2010).

10. R.M. Gordon, Simon N. Verdun-Jones, *Adult Guardianship Law in Canada*, (Ontario: Carswell,1992), at 1-16.

11. Henry Campbell Black, *A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (2nd Edition),* (St.Paul, Minn, West Publishing Co.,1910).

12. Gerald B. Robertson, *Mental Disability and the Law in Canada*, (Ontario: Carswell,1992).

13. Alec Richman, *Psychiatric Care and Prepaid Medical Insurance Plans*, *Chapter 16-19, in Psychiatric Care in Canada: Extent and Result,* (Ottawa: Queens Printer,1966).

14. Paul McLaughlin, *Guardianship of the Person*, (Downsview, Ontario: National Institute on Mental Retardation,1979).

15. Lawrence A. Frolik, *Standards for Decision Making,* Comparative Perspectives on Adult Guardianship, Edited by A. Kimberley Dayton, (Durham: Carolina Academic Press, 2014).

16. D. Surtees, *What can Elder Law Learn from Disability Law?*, Theories on Law and Ageing: The Jurisprudence of Elder Law (Editor: Israel Doron), (Springer-Verlag Berlin Heidelberg, 2009).

17. Mary Joy Quinn, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety*, Springer Series on Ethics, Law, and Aging, (Springer Publishing Company, 2004).

18. Michael Bach, Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, (Toronto: Law Commission of Ontario, 2010).

19. Yuanshi Bu, *Chinese Civil Law: A Handbook*, (Portland: Hart Publishing, 2013).

20. Kees Blankman, *Guardianship Legislation in the Netherlands*, Comparative Perspectives on Adult Guardianship, edited by A. Kimberly Dayton, (Durham: Carolina Academic Press, 2014).

SECONDARY MATERIAL: PERIODICALS

1. L Willmott, *Guardianship and health decision in China and Australia: A Comparative Analysis*, Asian Journal of Comparative Law, 12(2), 2017.

2. R. M. Gordon, *Adult Guardianship and Adult Protection Legislation in Canada: Recent Reforms and Future Problems*, Canadian Journal on Aging, Vol.14, Sup.2, 1995.

3. Quanbao Jiang, Jesus J. Sanchez-Barricarte, *The 4-2-1Family Structure in China: A Survival Analysis Based on Life Tables*, European Journal of Ageing, Vol.8, No. 2, 2011.

4. Liuyana, *Impoverishment of the Shidu People in China and Construction of their Aid System*, Chinese Social Science Journal, Vol.5, 2013, at 46.

5. Yu Song, *Losing an only Child: the one-child policy and Elderly Care in China*, Reproductive Health Matters, Vol. 22, 2014, at 113.

6. Rebecca Lee, *Guardianship of the Elderly with Diminished Capacity: The Chinese Challenge,* International Journal of Law, Policy and the Family, Vol. 29, Issue 1, April 2015.

7. Lawrence Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, Stetson Law Review, Vol. XXXI, 2002, at 746.

8. Mary Lay Schuster, *Determine "Best Interests" in End-of-Life Decisions for the Developmentally Disabled: Minnesota State Guardians and Wards*, Disability Studied Quarterly, Vol. 34, No.4, 2014.

9. Chantal Stebbings, *Protecting the Property of the Mentally Ill: The Judicial Solution in Nineteenth Century Lunacy Law,* The Cambridge Law Journal, Vol. 71(2), 2013.

10. Marlett N.J. *Issues of Competence and the Dependent Adults Act.* In: Carmi A., Chigier E., Schneider S. (eds) Disability Medicolegal Library, Vol.3, (Springer, Berlin, Heidelberg, 1984).

11. Israel Doron, *From Lunacy to Incapacity and Beyond,* Health Law in Canada, Vol. 19, No. 4, 1998.

12. Fances Frankenburg, *The 1978 Ontario Mental Health Act in Historical Context,* HSTC Bulletin, Vol.6, No.3, 1982.

13. Dana H, Porter G F, Curtis, et al. *Survey of Canadian Legislation*, The University of Toronto Law of Journal 1938, Vol.2, No.2.

14. Gray K G. *The Mental Hospitals Act*, 1935. The University of Toronto Law of Journal, 1937, Vol.2, No.1.

15. Robert M. Gordon, *Adult Guardianship and Adult Protection Legislation in Canada: Recent Reforms and Future Problems*, Canadian Journal on Aging, Vol. 14 sup.2 1995.

16. Robert M. Gordon, *Material Abuse and Powers of Attorney in Canada*, Journal of Elder Abuse& Neglect, Vol.4, 1993.

17. Sarah Burningham, *Developments in Canadian Adult Guardianship and Co-Decision-Making Law*, Dalhousie Journal of Legal Studies, Vol. 18, 2009.

18. Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75(1997).

19. John Chesterman, *The Future of Adult Guardianship in Federal Australia*, Australian Social Work, Vol. 66, No. 1, 2013, at 26.

20. Genevra Richardson, *Autonomy, Guardianship and Mental Disorder: One Problem, Two Solutions*, Modern Law Review, June 2008.

21. Anqi Xu, *The Changes in Mainland Chinese Families During the Social Transition: A Critical Analysis*, Journal of Comparative Family Studies, Vol. XLV, No. 1, 2014.

22. Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, Human Rights Brief, Vol 19, Issue 2, 2012.

23. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 Arizona Law Review, 1981.

24. Ngeow Chow Bing, *The Residents' Committee in China's Political System: Democracy, Stability, Mobilization*, Issues& Studies 48(2), (Taipei: Institute of International Relations).

25. Lindy Willmott, *Guardianship and Health Decisions in China and Australia: A Comparative Analysis,* Asian Journal of Comparative Law, Vol.12, Issue 2, December 2017.

26. LiXin Yang, *The Advantages and Disadvantages of the Chinse Adult Guardianship Reform in the General Provisions of Civil Law (“WoGuo MinFaZongZe ChengNianJianHu ZhiDu GaiGe Zhi DeShi”*), Journal of Guizhou Provincial Party School, Issue 169, No.3, 2017.

27. Hongjie Man, *The Deficiencies of Chinese Adult Guardianship in the General Provisions of Civil Law(Draft) (“MinFaZongZe(CaoAn) ChengNianJianHu ZhiDu De WenTi Yu BuZu”*), Journal of Beijing University of Aeronautics and Astronautics (Social Sciences Edition),Vol. 30, Issue 1, January 2017.

28. Hongjie Man, *Three Basic Questions Concerning the Adult Guardianship in the General Principles of Civil Law(Draft)* (“GuanYu MinFaZongZe CaoAn ChengNianJianHu ZhiDu SanGe JiBen WenTi”), Legal Forum (“FaXue LunTan”), Vol. 32, Issue 1, January 2017.

SECONDARY MATERIAL: WORKING PAPERS AND REPORTS

1. *The Blue Book of Aging: Survey Report on the Living Conditions of China’s Urban and Rural Older Persons (2018),* (Beijing: Social Sciences Academic Press (China), April 2018).

2. Working Group on Legal Issues, Committee on Guidelines for Comprehensive Services to Elderly Persons with Psychiatric Disorders, *Legal Issues in the Care of Mentally Impaired Elderly Persons: Competence, Surrogate Management, and Protection of Rights*, Canada’s Mental Health, Vol.6 1987.

3. Kim Nayyer, *A Harmonized Approach to Elder Financial Abuse in Power of Attorney Legislation*, Report delivered at the AGM of the Uniform Law Conference of Canada, Toronto, 2014.

4. *Office of the Public Guardian and Trustee 2015-2016 annual report,* (Edmonton: Human Services, 28th March 2018).

5. Jay Chalke, *Canadian Trend: Guardianship in British Columbia and Other Provinces,* The Law Reform Commission, Annual Conference (Ireland: Dublin, 2nd December 2015).

6. *2016-17 Annual Report of Office of the Public Guardian and Trustee*. Online:<https://open.alberta.ca/dataset/e236819b-b72b-4212-b569-b7e121906f11/resource/a08a903b-b03d-44a8-a609-4d8202888830/download/2016-17-annual-report-final-sept-18-2018.pdf>.

7. The First Report of Canada on the Convention on the Right of Persons with Disabilities. Online:<http://www.ccdonline.ca/en/international/un/canada/crpd-first-report>.

8. Guide for Capacity Assessors (*AGTA*). Online:<https://open.alberta.ca/dataset/a86649cc-b0d4-44bb-ab0a-eef8609f29f4/resource/9ff4213f-84b6-4f08-bbcf-05497b5a6017/download/opg-guardianship-publication-opg5630.pdf>.

9. *2015- 2016 Annual Report of Office of the Public Guardian and Trustee,* online:< https://open.alberta.ca/dataset/e236819b-b72b-4212-b569-b7e121906f11/resource/cd502fba-6755-42c7-bb35-fc11e4c02ea3/download/opgt-2015-16-annual-report.pdf>.

10. The Enduring Power of Attorney: A Guide. Online:<https://www.walshlaw.ca/upload/media_element/attachments/1/Enduring-Power-of-Attorney-Guide.pdf>.

11. Guide to Capacity Assessment under the Personal Directives Act, Office of the Public Guardian, at 3. Online:< http://www.cpsa.ca/wp-content/uploads/2015/09/opg-personal-directives-publication-opg1642.pdf>.

12. The Committee on the Rights of Persons with Disabilities, *Response by the Government of the People's Republic of China to the List of Issues (No.1 to No.30)*, Issue 19, at 21. Online:<https://www.google.com/search?sourceid=chrome&ie=utf-8&oe=utf-8&aq=t&hl=en-US&q=%20Response%20by%20the%20Government%20of%20the%20People%E2%80%99s%20Republic%20of%20China%20to%20the%20List%20of%20Issues%20(No.1%20to%20No.30)%20by%20the%20Committee%20%20on%20the%20Rights%20of%20Persons%20with%20Disabilities#>.

SECONDARY MATERIAL: DISSERATIONS

Xuelin Zhu, *A Study on the Adult Guardianship System in Canada- And its Inspiration for Chinese Adult Guardianship System*, the doctoral dissertation of Jilin University, June 2012, at 31.

SECONDARY MATERIAL: OTHERS

1. D Wong, Chinese Ethics (Stanford Encyclopedia of Philosophy). Online:<https://plato.stanford.edu/entries/ethics-chinese/>, 2008.

2. *The Blue Book of Aging: The Problem of the Chinese Aging Population Gets Worse*, 15th May 2018.

Online:<http://finance.ifeng.com/a/20180515/16277266_0.shtml>.

3. *China's Elderly Population Continues to Rise, with 241Million Now 60 or Over*, 27th February 2018. Online:<https://gbtimes.com/chinas-elderly-population-continues-to-rise>.

4. China's Senior Care Demand Continue to Increase: Survey, 23rd, May 2018. Online:<http://www.womenofchina.cn/womenofchina/html1/survey/1805/8148-1.htm>.

5. Chinese Cities Competing in Talent Grab, China Plus, 29th March 2018. Online:<http://www.china.org.cn/china/2018-03/29/content_50766216.htm>.

6. Li Qian, *Despair Turns to Joy for a Mother at 60, Shanghai Daily*, 20th December 2013. Online:<https://www.shine.cn/archive/national/Despair-turns-to-joy-for-a-mother-at-60/shdaily.shtml>.

7. Fan Liya, *China's one-child policy has a legacy of bereaved parents facing humiliation and despair*, 19th August 2017. Online:<http://www.scmp.com/magazines/post-magazine/long-reads/article/2107155/chinas-one-child-policy-has-legacy-bereaved>.

8. Kim Kyung-Hoon, *China: when an only child dies*, December 2015, Reuters. Online:<https://reut.rs/1OvIcVW>.

9. He Dan, *Guardianship Amendment Considered to Protect the Elderly*, China Daily, 27th June 2012. Online:<http://www.chinadaily.com.cn/china/2012-06/27/content_15524684.htm>.

10. China Focus: China Adopts General Provisions of the Civil Law, Xinhua Press, 16th March 2017. Online:<http://english.court.gov.cn/2017-03/16/content_29655856.htm>.

11. The constitutional distribution of legislative powers explained by the Canada government. Online:<https://www.canada.ca/en/intergovernmental-affairs/services/federation/distribution-legislative-powers.html>;

12. The Free Dictionary by Farlex. Online:<https://legal-dictionary.thefreedictionary.com/interdiction>.

13. Thomas McCord, *The Civil Code of Lower Canada*, 2nd ed. (Montreal: Dawson Brothers, 1870).

Online:<http://eco.canadiana.ca/view/oocihm.9_01864/115?r=0&s=4>.

14. Sarah Betts, *Province's Power of Attorney Regulation Laws Lag Behind Rest of Canada, Group Says*, CBC News, 23rd June 2017.

Online:<https://www.cbc.ca/news/canada/new-brunswick/nb-power-of-attorney-legislation-1.4174868>.

15. Alberta's official illustration regarding adult guardianship.

Online:<https://www.alberta.ca/adult-guardianship.aspx>.

16. *Interview: Promoting a Paradigm Shift: ERT talks with Gabor Gombos and Gerard Quinn about the UN CRPD and its optional protocol*, The Equal Rights Review, Vol.2, (2008), at 90.

Online:<http://www.equalrightstrust.org/ertdocumentbank//err_issue02%20reduced.pdf>.

17. Emily Rauhala, *He was One of the Millions of Seniors Growing Old Alone, so He Put Himself up for Adoption,* The Washington Post. Online:<https://www.washingtonpost.com/world/asia_pacific/he-was-one-of-millions-of-chinese-seniors-growing-old-alone-so-he-put-himself-up-for-adoption/2018/05/01/53749264-3d6a-11e8-912d-16c9e9b37800_story.html?utm_term=.4de35d54ea16>.

18. The Role of the Office of the Public Guardian and Trustee. Online:<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/overview.php>.

19. USLEGAL. Online:<https://definitions.uslegal.com/l/least-restrictive-alternative-guardianship/>.

20.CBC NEWS: *Canada Is Getting A New "Dementia Village" To Help Locals Suffering From Dementia And Alzheimer's*, online:< https://www.narcity.com/ca/bc/vancouver/news/canada-is-getting-new-dementia-village-to-help-locals-suffering-from-dementia-and-alzheimers>.

21.Scott Stanfield, *Vancouver Island to get its first publicly funded dementia village*, Cowichan Valley Citizen, Jan 21st 2019, online:https://www.cowichanvalleycitizen.com/news/vancouver-island-to-get-its-first-publicly-funded-dementia-village/.