
성년후견제도 시행에 따른 과제와 전망

박종렬*

Challenges and outlooks Following to the Interoduction of adult Guardianship System

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요 약 현행 우리 민법에서는 제한능력자로 한정치산자와 금치산제도를 두고 있는데, 민법이 개정되면서 새로운 성년후견인제도가 2011년 2월 18일 국회를 통과하여 2013년 7월1일부터 전면 시행하게 된다. 이에 한정치산과 금치산제도가 7월1일부로 폐지됨으로 많은 현행법에서 한정치산자와 금치산자를 규정하고 있는 각종의 결격사유를 보완해야 할 필요성도 적지 않다. 따라서 성년후견제도가 성공적으로 시행되기 위해서는 여러 가지 법률적 기반을 마련하고 개정민법과 연관된 각종 법령을 새로운 후견제도의 정신에 맞도록 빠른 시일 내에 정비해야 됨으로, 본 논문에서는 한정후견과 성년후견제도 도입에 따른 결격사유를 개정하는 여러 가지 방안을 검토하고 합리적인 입법모형을 마련하고자 한다.

주제어 : 성년후견제도, 성년후견, 한정후견, 특정후견, 한정치산, 금치산

Abstract Current in Korean Civil law, it regulates the Limited Guardianship and Specific Guardianship as an incompetent person. And as amending the Civil Law, the New Adult Guardianship System passed by the National Assembly on February 18 and it will be fully implemented from 1 July 2013. Therefore, in current law, the supplementation for various disqualifications about quasi-incompetence and incompetence is need. Because, the system of quasi-incompetence and incompetence will abolished from July 1. Thus, for the successful implementation of the Adult Guardianship System, laying the various legal groundwork and should be maintenance as soon as possible the each legislation associated with the revision of the Civil Code to fit the purpose of the New Guardianship System. So, in this paper, it will examine the several ways to amend the disqualification due to the introduction of the limited guardianship, adult guardianship system and prepare the reasonable legal model.

Key Words : Adult Guardianship System, Adult Guardianship, Limited Guardianship, Specific Guardianship, Quasi-Incompetence, Incompetence

1. Introduction

On 18 February 2011, the revised bill of the Civil Code for introduction of adult guardianship system (hereinafter referred to the amended the Civil Code) was passed by the National Assembly. And the amended the Civil Code (Law No. 10429, enforcement July 1st, 2013, hereafter amended the Civil Code) which

promulgated on March 7, 2011 is the first result of phased revision of Civil code which beings promoted in 50years from 1958, also, it has the great significance as it can be the clues to dramatically improve the quality of life of the disabled and the elderly. Current the adult guardianship system in Korea, as the Civil law the quasi-incompetence, incompetence system is operating. But it has a lot of problems like the complexity of the

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procedure, excessive right infringement, wealth management problem etc. So, they abolished the quasi-incompetence and incompetence system and introduced these as legal guardianship like the adult guardianship, limited guardianship, specific guardianship, voluntary guardianship. Through this, the institutional scaffolding was built to be able to run the guardianship work more efficiently.

Meanwhile, since July 1, 2013 when the new revision of the Civil Code is being enforced, they were unable to see the old system, quasi-incompetent and incompetent. And instead of this, the limited guardianship, adult guardianship system will enforce. So, the limited ward that sentenced the limited guardianship, adult guardianship sentence was appeared. Among the many current laws, quasi-incompetent and incompetent were prescribed. Because disqualification of licensing such as permission, authorization, registration, etc. Especially, the quasi-incompetent and incompetent were regulated as disqualification in the Lawyer law (Article 5, Paragraph 5) and Medical law (Article 8, paragraph 3).

From July 1, as abolition of current quasi-incompetence and incompetence system, the necessity that complements the disqualification which regulates the quasi-incompetent and incompetent has been needed. In addition, for the successful implementation of the adult guardianship system, much legal groundwork are need and must make sure organize the each statutes which related revision of the Civil Code to spirit of a new guardianship.

2. Introduction and the Main Content about Adult Guardianship System

2.1 Concept of Adult Guardianship System

Today, the development of medical technology and food, clothing and shelter is improving gradually than before. So, the life of humanity is getting extend. As a result, the proportion of the elderly population became

higher proportion than in the past. because this situation, they protect the elderly and respect the personality, remaining capacity and do something to not ostracized by society, also, in order to build social stability and promotion the dementia, intellectual, mental, physical protection and welfare, the interest for guardianship is growing[1].

The Adult Guardianship System is the legal supporting device which helps people who is lack of the mental ability to handle the decision making cause of sickness, disability, old age, etc[2].

The main idea of our civil law is the "private autonomy". That is, the equal parties are establishing legal relations below the legal relationship and make it a rule to assume the responsibility to its result. However, in order to be realized the principle of self-responsibility, first, the parties must be in a comparable position. The most basic indicators to assess the equality of the parties are the ability to judge. Where the adult guardians of the Civil Code are generally protect, supervision the incompetent and management of the property also, such as the role of the legal representative. Guardianship can be divided into minor guardianship and adult guardianship. Among them, the adult guardianship is the guardianship except the minors who under the custody of a protective effect.

2.2 The Introduction of the Limited, Adult Guardianship System

As the 21st Century dawns, it was the institution which can handle the office work such as property management, social welfare, benefit, some act for personal gain to promote social life. And the adult who cannot handle the office works themselves due to mental disorders and physical disabilities and other circumstances caused by welfare state, an aging society, industrial accidents, and traffic accidents have help from adult guardians. But, the quasi-incompetence, incompetence system in current civil law, is difficult to flexible operating institution as

personal individual's specific powers of judgment, and the need to protect the institution. Also, if there is a negative use of language or a family court's sentencing, personal family registration is released. So, the parties, as well as families also tend to avoid. Therefore users are getting poor. Meanwhile, complement these existing problems of guardianship system, also in order to extend the scope of its protection, abolished the quasi-incompetency, incompetency institution and was introduced the limited, adult guardianship[3].

In Article 12 of the before the revised Civil law state, if who has the mental lack such as old age, disability, illness, etc. in contrast with condition of insanity, it allowed the commencement of adult guardianship and in contrast with an incompetent who can be the target of cancel in each legislation, the adult ward cannot be the target of cancel in the extent of specified law, which designated by Family Court.

Abolished the quasi guardianship in Article 9 of the before the revised Civil law state, and with the introduction of limited guardianship, unlike "the worry of distress to self or family life by weak of mental, and waste of property" which is reason of quasi guardianship adjudge, it is the requirement for limited guardian "if who do not usual social activities or economic activities personally, due to mental lack such as disease, disability, old age and other reasons".

Unlike a quasi-incompetent who has to get the guardian's agree in each legal act, the limited ward need guardian's agree in just little scope which provided in Family court, also, it can be canceled to legal act which needs to usual living and not excessive cost.

2.3 Establishment of Specific Guardianship System

Specific guardianship system is the establishment system which recognized the temporary psychological restriction and limits its ability uniformly. Like this way, it solves the problems and promotes the flexible

using. And some part of office work of specific guardianship can use until final judgment. Specific guardian system will be used widely, because it has the temporary and comprehensive features to solve the specific problem. If who needs the support to treat the office work due to incomplete temporarily judgment ability such as illness, disability and advanced age, judge the specific guardian as claim of one's self, relatives, spouses, minor guardianship, minors' guardian supervision, the head of the local government and prosecutor (Revised Civil Law Article 14-2 Paragraph 1). Specific guardianship system is same as mental capacity law which was old system in England[4].

The Specific guardianship system cannot be initiated against the own intention, because it is the specific protection which is being run according to his own intention(Revised Civil Law Article 14-2 Paragraph 2). When give the sentence of specific guardianship, the Family Court must determine the period and range of office work about specific guardianship(Revised Civil Law Article 14-2 Paragraph 2). The Family court can order the protection measures in accordance with the specific guardianship to support the specific ward(Revised Civil Law Article 959-8), also, allows the appointment of specific guardian to deputy and act as guardian for a specific ward(Revised Civil Law Article 959-9).

2.4 Other Related Regulation

2.4.1 Enforcement Date

It was submitted to the National Assembly in December 2009, regulated in supplementary provision of Civil Law Amendment. And its enforcement date was January 1, 2012. Because, after consideration of the bill of National Assembly and pass the legislation, its ready to enforce such as maintenance of related laws, disclosure system would required approximately two years expected. But after the submission of bill to the National Assembly, full-fledged consideration of bill was needed for nearly a year in the 1st group of the

Legislation and Judiciary Committee, and the method of public notice for guardianship was changed from Register of Family Relations to Registration. So, its enforcement date had to be delayed. As a result, assumed to be proclamation in early 2011, the revision of the Civil Law, it takes approximately 1 year to consolidate the ordinances, such as enactment of the Guardian Registration Act. And it calculated that the guardian registration system construction of the Administrative Office of the Court takes almost 1 year and 6 month. So, its effective date was modified as July 2013 (Bylaws Article 1).

2.4.2 The Interim Measures

In the revision of the Civil Code enforcement, the people who was already declared incompetent or quasi-incompetent the provisions of the former Act were applied (Bylaws Article II, Paragraph 1). Because, if who receive the application of the new law, it should be considered some regulation such as the incompetent to care of the wards, the quasi incompetent to limit of the wards. Especially, in case of limited guardian, decide the content of guardian personally. So it was hard to regulate the ability of care of the wards technically. Therefore, existing incompetent or quasi-incompetent seeks the legal stability as apply the provisions of the former Act. However, if the old law to be applied permanently, the purpose of New Act that respect the existing capability and whose own intention may be diluted, so to guard, demand the adult guardianship, limited guardianship, specific guardianship as new guardianship system within three years from the effective date. And it has been reviewed the plan to impose the fines if they violating the rules.

But, in the process of deliberation in the National Assembly, the Administrative Office of the Court request the deletion of these obligations and said "3 years after, if the guardian charged the new guardian. Then, it can be ambiguous how to treat" The Ministry of Justice was accommodating this regulation as respect the court's position to operate the adult

guardianship system. Instead of this, in order to prevent the continued effect of the sentence about incompetent, quasi-incompetent, it will be lost to its effect toward the future when the expiration of five years from the effective date(Bylaws Article 2, Paragraph 2).

2.4.3 Relationships with other Statutes

In the Civil Law the law which cited the "incompetence" or "quasi-incompetence" is more than 200. If the revision of the Civil Law regulates the regulations that considered as "adult guardianship" or "limited guardianship", very difficult problems will occur related to restriction with other laws. Especially, in case of limited guardianship, especially, in case of limited guardianship, its range of the ability to judge will too wide. So, if limit its qualifications like quasi-incompetence, it has the possibility of unconstitutionality. On the other hand, if do not no regulations in Bylaws Article and other law did not revised until the enforcement of Civil Law, it may have gaps in that regulation[5].

So, in the revision of the Civil Law, if other statutes cited the "Incompetence" or "quasi-Incompetence", it regard as citation of "adult guardianship" or "limited guardianship", but like interim measures, its deadline was limited to 5 years(Bylaws Article 3). Therefore, the ministry and office concerned of the relevant laws and regulations must organize its laws within 5years in accordance with the adult guardianship system. If the maintenance not be carried out within that period, its effect of regulations will be negative. In this case, the problems that the gap of regulation can be occurred, but add 2years' grace period from promulgate the Civil Law to the effective date, and 5years that can keep its period of effect. Then, total 7 years are left fully for preparation. So it is expected as the decree maintenance will goes well, unless they neglected its obligations.

3. Legislation Case of all Nationalities for Adult Guardianship System

3.1 The United States

The history of guardianship system of the United States has very long history because its origin is in the Common Law of Roman and English. The right of continuous representation law was established in the State of Virginia in 1954. And add property, superintendence of ID, the right of continuous representation law was recognized in 27 states in 1990.

Same as Korean old institution, the U.S guardianship system has the problem such as institutional problem and exclusion of the right of self-determination and traditionally it was the institution to support the adult, but it has many problems to use. Who elected as adult guardian who recognized whose inability by mental disorders. Also, when electing the guardian, a ward loses his many rights and legal capacity uniformly. As the United States Supreme Court recognize the fundamental law of United Kingdom, the states has the right to elect guardian. But, they did not guarantee the minimum rights listed in the Constitution and they were performed their state law. In order to solve these problems, the government and related academia were tried to protect the rights. And Associated Press of the United States investigate the infringement of the rights by a adult ward and etc. based on that, they tried to reform in several states, like this way, they put on the embers about the reformation of adult guardian system. As a result, the committee of unification U.S Law was approved its amendments on August in 1997. By this revision, it was the model for other states which want to revise their law. And for the development of adult guardianship system, it shows the content about reform the law[6].

3.2 Germany

Beginning of 1970 in Germany, as the members of society were getting old, they recognized the necessity about revision of guardianship system for existing

institution of legally incompetent person and minority. And it discussed from the Federal Parliament in the 1980s, also the research was carried out in academia actively.

Since 1990, as a springboard for the revision of the adult guardianship system, it was introduced from January 1992. And they were rearranged the dualistic system as unitary system. And the Code of Civil Procedure, Non-Contentious Case Litigation Procedure Act, other laws also have been revised which were related with the adult guardianship system. And in 1998, by reform the adult guardianship law, the adult assistant was promoted as honorary position not as job. Like this way, complements to necessary part were done[7].

And after revision, they use the new terms of "guardianship" by legal. and in order to solve the problems of the previous German Civil Law, the revised law abolish the incompetency institution, obstacle superintendence and instead of this, they new system was established for the adult who got the guard and superintendence they did not unfair discrimination and they had combined as member of society.

3.3 Japan

The adult guardianship system was introduced in Japan in 1999. Total of four laws was amended. Such as the Civil law, the law for contract of arbitrary guardianship, relevant Act for enforcement law to revise the part of Civil Law and registration for guardianship, etc. Japan's adult guardianship regulate the 3 types of legal guardianship such as guard, assistance, aid and the optional guardianship system for optional guardianship contract[8].

The Korean adult guardianship system is similar with Japan from has the 3 types of legal guardianship, but combine the assistance, aid is a broad distinction. Also, arbitrary guardianship is not ruled in a separate special law. And regulate with legal guardianship is different with Japan.

3.4 France

For property management of incompetent who has the incompetent and cannot perform the job by themselves, France had the adult guardianship system like Korea.

In France, the need of reform about the adult guardianship system was occurred first untimely. This cause, the adult guardianship system was internationally revised first. Reform of France's adult guardianship system was influence on Europe and other countries in the 1980s. Through a sweeping revision of the adult guardianship system and recognize the remaining capacity of a ward, abolish the incompetency system and regulate the system for detailed situation of a ward. Also, through partial amendment of previous civil law, the adult guardianship system was good to use and the process have been simple[9].

The content of French revision of the Civil Law about adult guardian system, which contains the abolition of term, detailed and personal application of a ward. It can help who can't do office work themselves due to the reason of mental or physical. Also, as considering the principle of necessity or subsidiary, if it seems to be right, then the court enforces and applies the guardian, as well as does something for a ward actively.

And its intent of the amendment is fully consideration and concern for elderly.

4. Regulation of Disqualification and Review the Revised Plan

4.1 The Meaning of Disqualification

The meaning of disqualification, it is regulated proposed as the disqualification. If who relevant that reason, they lose their qualification naturally, cannot be the person of each legal relationship, cannot get the qualification to each special status system and cannot do some business which needs permission.

The reason why regulate the disqualifications in each regulation is to protect the stability and wealth of the people against the incomplete service as maintain of workers' qualities. The disqualifications prevent the entering of under-qualified person to various fields of business or job.

4.2 The Maintenance of Disqualification Regulation is Needed.

From July 1, 2013, as the enforcement of revised Civil Law, some necessities were occurred such as abolition of quasi-incompetence, incompetence system and organize the each legal ground for disqualification pursuant to introduction of the adult guardianship system.

4.2.1 Add the Adult, limited ward

This proposal is not delete the incompetent, quasi-incompetent and leave as it is in the disqualification, add the adult, limited ward as newly reported. Because, the incompetent, quasi-incompetent are exist realistically until July 1, 2018.

On the other hand, regulate the incompetent, quasi-incompetent as disqualification is not matched to trends of meantime. As a result, also after 2018, the disqualification must be maintenance again. So, it revised two times, also, its progress will be complex.

When see the point of view from the legal capacity, the adult ward does not have basically the legal capacity. So, it is same with an incompetent. Therefore, add disqualification, it seems no problem. And the limited ward has legal capacity basically, and need the agreement of limited guardian that regulated from Family Court. So, it is hard to consider the same as quasi-incompetent who needs the agreement to every legal act.

Meanwhile, unlike the quasi-incompetent, even though the limited ward has basically the legal capacity, recognize the limited ward as disqualification in unfair. The quasi-incompetent system and the limited guardianship system are basically different. So,

just changing the name is not good solution. Therefore, limit the inclusion of the limited ward to the purport of Civil law revision is advisable.

4.2.2 Establishment Measure of the Adult Ward

This measure is delete the quasi-incompetent or incompetent from disqualification and establishes the adult ward. Because, the incompetent, quasi-incompetent still exist until July 1, 2018. So if delete from the disqualification, the incompetent, quasi-incompetent can do legal act and get some fixed qualification. So, it can be the problem. So, if it deletes the quasi-incompetent or incompetent from disqualification, who apply to incompetence, quasi-incompetence, must be applicable to the disqualification as making the appropriate interim measures.

As the current quasi-incompetent system, incompetent were abolished, it gives 2years' grace period. So, most people can know that the current quasi-incompetent system was abolished. Nevertheless if quasi-incompetent and incompetent were still exist, most can think the law still not organized. So it can bring little confusion.

Therefore, regulate the relationship of quasi-incompetent, incompetent and the adult ward in supplementary provision as interim measures, it may bring less confusion. As a result, as the abolition of the quasi-incompetence, incompetence system, maintenance the laws are need and consider about that they don't need spend their effort unnecessary, this is the most reasonable proposal.

As described above, in case of delete the quasi-incompetent or incompetent from previous disqualification, and establish the adult ward. Then it can be the problem how to define the interim measures.

4.2.3 The Plan that Add only the Adult Ward

Instead of quasi-incompetent, add the limited ward to disqualifications is not matched its purpose. Thus, it is the plan that adds only the adult ward as disqualifications, leave the quasi-incompetent,

incompetent[10].

In the Bylaws of Civil law Article 3 regulate as "When execute this law, if quote the quasi-incompetence, incompetence to other law, it regard that as quote the adult or limited ward within 5years as Bylaws Article 2-2". According to this law, because the quasi-incompetent can still leave in disqualifications, it can interpret as the limited ward still conforms to disqualifications in accordance with Bylaws Article 3.

Because of the substantive gap between quasi-incompetence system and limited guardianship system, resultantly, the limited ward can include in the disqualifications.

To solve these problems, it can consider that the quasi-incompetent, incompetent who applies to disqualifications limited as the condemner who announced before July 1, 2013. But, the regulation can become complicated. Also current content which exist the law about the quasi-incompetent, incompetent can be considered as same regulation.

5. Conclusion

The adult guardianship system of Korea was born as entering the welfare state, elderly society and the change of the paradigm for a welfare society with self-reflection about existing guardianship system and process of reflection to institute the trend of internal and external law. However, since the adult guardianship system passed by the National Assembly, it has been long and its effective date not comes yet. Also, it can be seen as strange system. However if revised Civil law execute from July 1, 2013, the incompetency, quasi-incompetency system will be abolished completely. So, for the sentence of the adult and limited ward, the maintenance of law is urgently needed. And the disqualification is regulated by law. So, after review and screening a legislative bill it submitted to the National Assembly and for its deliberation and decision takes too much time. Because

of this, to meet the effective date of Civil law, they must review the proposed amendment soon as possible.

In accordance with the revision of Civil law, as the revision of disqualification was promoted, the regulation was reviewed by each agency's discretion without a regular basis. So, they are spending a lot of difficulty. For this reason, it is expected that the legislative bill which revise the regulation of disqualification will be requested. The Office of Legislation will be required to prepare the exact criterion about the limited ward and interim measures.

In addition, when organize the relevant Act, as revise the Civil law additionally, it must be prepared the enough time for convergence of opinion as consider much limitation. After then it should be executed.

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