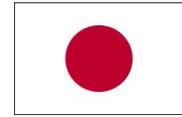




**Reply to questionnaire for the country reports – Japan**

Hisashi Ohgaki, LL.D. Professor, Ritsumeikan University



1. What legislation is relevant for the protection of adults? (If applicable, differentiation between federal law or the law of individual federal states)

**(1) Overview**

*A) Support for Legal Capacity*

- There are basically two different sets of protective measures : (1) *ex ante* measures which adults may voluntarily take in anticipation of the future incapacitation and (2) *ex post* formal measures where a certain type of statutory supporter is appointed by family court after incapacitation. (3) as an in-between, you may enter into voluntary guardianship contract which is filed and becomes in effect upon the appointment of the supervisor by the family court.

*B) Support for Medical Decision/Observation of Preference for Certain Treatment*

- There is no specific legal form or system for a living will, i.e. *ex ante* statement of wishes concerning the possible medical treatment. It is a doctor as a professional to decide what treatment be taken with the approval of someone who may act on behalf of the person with mental disability. There is no clear legal line, however, who is such an advocate. Although not legal obligation, if any explicit statement of wishes by the patient about possible medical treatment exists, doctors and hospital usually take them into primary account in obtaining such approval.
- So-called health-care proxy, i.e. *ex ante* appointment of the person who makes a medical decision for an incapacitated person in accordance with his/her wishes, is not institutionalized, either. If any, however, it is likely that family members and related persons observe such proxy and let the advocate nominated in the proxy give an approval/disapproval, though not legally binding.

*C) No Dual Legal System*

- There is no differentiation in terms of legal system between national and regional governments.
- As a matter of administrative application, statutory supporters (guardian / curator / assistant) are appointed and supervised by district family court, where each judge is guaranteed independence under constitution and each court also has certain level of autonomy, which creates subtle difference in the application of the system by district.
- Education and support program for supporters are provided by local government, which also substantially differs by area both in terms of contents and budget.
- New law to promote guardianship mentioned below obligates both national and local government to take necessary steps to facilitate the use of the statutory system.

**(2) Ex Ante Measures**

*A) Agency*

- Under Civil Code (“CC”), you may enter into an agency contract with anyone you may deem appropriate (CC§643). Such contractual agency may start right away or be conditioned upon the disability event of the principal. The agent represents you in accordance with the authority you give

under the agreement. Agent's authority may be specific, by type or even broad enough to cover virtually all the essential legal transactions. Incapacitation does not automatically terminate the agreement (CC§653) and the agency power stays while you live, unless you specifically provide otherwise in the initial agreement or the statutory guardian later appointed cancel the contract when he/she deems appropriate.

#### B) Trust Arrangement

- Japan has Anglo-American type of Trust Law ("TL"). Trust may be created either by agreement, will, or self-declaration in writing (TL§3, collectively referred to as "trust instrument"). In order for trust arrangement to be valid, the settlor does not have to transfer the asset, in which case trust operation starts upon transfer of the asset to the trustee(TL§4),. Trustee, then, becomes the nominal owner of such asset. Real property registration system and other pertinent filing system for other types of property have been amended accordingly so that the trustee may be registered as the title holder for purpose of trust. Trustee undertakes for benefit of a nominated person (beneficiary) to (1) administer or dispose of such asset in accordance with a certain purpose (excluding the purpose of exclusively promoting the person's own interests) and (2) conduct any other acts that are necessary to achieve said purpose (TL§2).
- Trust stays in force not only after settlor's incapacitation but also his/her death. Trust may not be revoked by the settlor without the consent of the beneficiary unless otherwise provided in the trust instrument (TL§164). Trust instrument may deprive the settlor of the power of revocation to prevent the statutory guardian from exercising it after the settlor becomes incapacitated (*id.*).
- Prototype arrangement in our context is as follows: someone (settlor) who anticipates future incapacitation transfers his/her primary assets such as substantial sum of monetary assets (bank deposit, securities) and real property to someone (trustee) on whom the settlor relies and has such trustee undertake to administer or dispose such assets and undertakes any other necessary actions for purpose of [PHASE 1] taking care of the settlor-beneficiary in case he/she becomes mentally disabled; [PHASE 2] distributing the trust assets to the heir-beneficiaries in accordance with the manner set forth in the trust instrument. We call PHASE 1 arrangement "a guardianship trust" as contrasted with the PHASE 2 arrangement for heritage management.
- **Commercial Trust** Though we have had trust law since 1922, until 2006 when the law was entirely revised, trust had been used only as the conduit for financial products and arrangements (such as, quasi deposit saving trust, investment fund trust, pension trust, security trust, asset securitization trust, etc.). To undertake trusteeship as a course of business, you should be a bank or other eligible financial institution with the ancillary trust license from the Financial Service Authority ("FSA") or a stock company with the trust license from the same under Trust Business Law ("TBL").
- Though the revised Trust Law now enables typical estate trust arrangement as mentioned above, licensed commercial trust banks and companies tend to focus upon the wealth management trust and business succession/heritage management trust for relatively high net worth clients. Guardianship trust is generally considered to be less profitable with higher risk as it involves social welfare considerations and physical support/care services which is foreign to the traditional trust business players. To fill in this vacuum, we may consider the involvement of attorneys/solicitors or NPOs as trustees. But in order for them to undertake trusteeship in the course of business, they need to obtain trust business license, which is not currently allowed as they have to be a stock company (TBL§5.2.1).
- **Private Trust** As an alternative, private trust arrangement where a layman individual such as a family member or a non-profit association solely designed to become a onetime trustee (a special purpose trustee) undertake trusteeship increases in number and variety.

Organisationskomitee  
[organizing committee](#)

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · [vice-president](#)

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · [president](#)

Karl-Heinz Zander  
Geschäftsführer · [secretary](#)

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · [Germany](#)

Bankverbindung  
[bank account](#)

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01

### (3) *Ex post* measures

- see 2 below.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity? (Especially private mandates or legal representatives appointed by a court/authority)

#### (1) Statutory Supporters: Adult Guardianship, Curatorship, and Assistance

- Civil Code offers three types of court appointed adult supporters according to the level of disability: Statutory Guardianship, Curatorship, and Assistance.
- **Adult Guardian(Seinen Koken)** represents the ward for any juristic act except for the acts relating to daily life, such as the purchase of daily household items(CC§7). Any act performed by such ward may be rescinded by the guardian(CC§9). As this is considered as the final stage, people tend not to request the court for appointment unless they face such situations as they really need it (1) to legally represent the ward (such as selling his/her residence, etc.) or (2) to incapacitate the ward as the last resort to avoid any wrongdoing.
- **Curator(Hosa)** gives consent to each of the following enumerated acts. An act which requires the consent of the curator may be rescinded if it was performed without such consent or any permission by family court in lieu thereof(CC§13).
  - i. receive or use any principal;
  - ii. borrow any money or guarantee any obligation;
  - iii. perform any act with the purpose of obtaining or relinquishing any right regarding real estate or other valuable property;
  - iv. take any procedural action;
  - v. make a gift, make any settlement, or agree to arbitrate;
  - vi. accept or renounce any inheritance, or partition any estate;
  - vii. refuse an offer of a gift, renounce any bequest, accept the offer of gift with burden, or accept any bequest with burden;
  - viii. effect any new construction, renovation, expansion, or major repairs;
  - ix. make any lease agreement with a term which exceeds the period set forth below:
    - (i) Leases of forest for the purpose of planting or felling trees: 10 years;
    - (ii) Leases of land other than the leases listed in the preceding item: 5 years;
    - (iii) Lease of a building: 3 years; and
    - (iv) Lease of a movable : 6 months.
  - x. any other acts ruled by the court at the request by the applicant.
- **Assistant(Hojo)** gives consent to one or more of the nine actions except for x enumerated as those requiring curator's consent above. An act which requires the consent of the assistant may be rescinded if it was performed without such consent or any permission in lieu thereof(CC§17). Assistance facilitates the progressive structure so as to minimize the extent of incapacitation, which is in line with the idea of the Hague Convention.

#### (2) Supervisor of the Supporters

- The family court may appoint a supervisor of a statutory supporters, when it finds it necessary, at the request of a ward or his/her relative, or a supporter, or *ex officio*.(CC§848, 876-3, 876-8)

#### (3) Voluntary Guardianship Contract

- Also you may enter into an agency agreement under the Law on Voluntary Guardianship Contract (Law1999-150, "LVGC"). The agreement is called voluntary guardianship contract.

Organisationskomitee  
organizing committee

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · vice-president

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · president

Karl-Heinz Zander  
Geschäftsführer · secretary

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · Germany

Bankverbindung  
bank account

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01

- The voluntary guardianship contract becomes in effect upon the appointment of the supervisor of the guardian by family court. The contract should be in compliance with the form prescribed in the relevant ordinance and be notarized by a notary public. The notary public shall file the contract in the registration office upon notarization.
- In the contract, the principal (1) nominates the candidate for an voluntary adult guardian in case he/she becomes mentally disabled and (2) specifies the authorities he/she wishes to grant. The form enumerates the typical items to be authorized so that the principal may check the box unless he/she has additional items.
- When the principal becomes to have insufficient capacity to appreciate right or wrong due to any mental disability, the family court appoints the supervisor of the voluntary guardian at the request of a principal or his/her relative, or a voluntary guardian, whereby the guardianship becomes in effect. The applicant other than a ward him/herself has to obtain prior consent of the principal unless he/she may not express his/her will.
- Though it is called guardianship, the authority of the voluntary guardian is limited to the ones specified in the contract. Though it resembles Assistance in this sense, the authorities the principal may grant are not limited to the ones enumerated in the Civil Code. In this sense this is in line with the idea of self-determination under the Hague Convention.

#### (4) Use of Statutory Supporters

- Number of appointed statutory supporters is 191,334 as at the end of 2015, which is just 5.5% of 4.7 million - the number of people with cognitive difficulties level II<sup>1</sup>. And this utility ratio has not changed substantially since 5 years ago. Use of less restrictive measures (assistant, voluntary guardian) is extremely low.

		Adult Guardian	Curator	Assistant	Voluntary Guardian	Total
Number	2015	152,681	27,655	8,754	2,245	191,335
	2011	126,765	17,917	6,930	1,702	153,314
Estimated Number of Entire Level II	2015	3.45million				5.55%
	2010*	2.8million				5.47%

source: Ministry of Health, Labor, and Welfare and Labor, Ministry of Justice

\* The number for 2011 is not available.

3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?
4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

<sup>1</sup> Level II is defined as "symptom, behavior, difficulties in communication showing cognitive impairment which causes some problem in daily life are observed, but independent life may be held as long as someone closely watches and support him".

- Family Court decides whether to appoint a supporter.

	Guardianship	Curatorship	Assistance
Level of Disability	a person who constantly lacks the capacity to discern right and wrong due to mental disability(CC§7)	a person who whose capacity is extremely insufficient to appreciate right or wrong due to any mental disability(CC§11)	a person who has insufficient capacity to appreciate right or wrong due to any mental disability(CC§15)
Eligible Applicant	<p>the person in question</p> <p>his/her spouse</p> <p>any relative within the fourth degree of kinship</p> <p>the guardian of a minor, the supervisor of the guardian of a minor</p> <p>the curator, the supervisor of the curator</p> <p>the assistant, the supervisor of the assistant</p> <p>a public prosecutor</p>	<p>the person in question</p> <p>his/her spouse</p> <p>any relative within the fourth degree of kinship</p> <p>the guardian, the supervisor of the guardian</p> <p>the assistant, the supervisor of the assistant</p> <p>a public prosecutor</p>	<p>he person in question</p> <p>his/her spouse</p> <p>any relative within the fourth degree of kinship</p> <p>the guardian, the supervisor of the guardian</p> <p>the curator, the supervisor of the curator</p> <p>a public prosecutor</p>

5. How significant is the legal capacity of the adult concerned and is there a constitutive ascertainment of (lack of/limited) legal capacity?

- As shown above, the person under statutory guardianship except for voluntary guardianship is subject to certain constitutive ascertainment of (lack of/limited) legal capacity. There is no rescission power for voluntary guardian.

### (1) Ward subject to Adult Guardianship

- Any juristic act done by the ward except for the acts relating to daily life, such as the purchase of daily household items becomes rescindable by the guardian.

### (2) Person subject to Curatorship

- Any one of the enumerated acts which require the consent of the curator may be rescinded if it was performed without such consent or any permission by family court in lieu thereof.

### (3) Person subject to Assistance

- Any pre-specified act which requires the consent of the assistant may be rescinded if it was performed without such consent or any permission by family court in lieu thereof.

6. What are the responsibilities of a supporter /representative and what are the obligations and principles he/she must comply with?

### (1) Responsibilities

#### A) Adult Guardian

- **Investigation of the ward's property** A guardian shall, without delay, undertake and finalize the investigation and prepare an inventory of property within one month; provided that this period may be extended with the approval of the family court (CC§853).
- **Budgeting** Upon assumption of office, a guardian shall estimate the amount of money that will be required in annual expenditure for the living, education, medical treatment and nursing, and administration of property of the ward(CC§861).
- **Administration/Representation** A guardian shall administer the property of a ward and represent a ward in juristic acts concerning his/her property; provided, however, that if an obligation requiring an act of the ward is to be created, the consent of the ward shall be obtained (CC§859). If the supervisor has been appointed, the guardian must obtain the consent of such supervisor in representing any of the enumerated items for curator above except for i (receipt or use of any principal). (CC§864)
- **Joint Guardianship** If there are multiple guardians of an adult, the family court may determine *ex officio* that the guardians should exercise authority jointly or according to a division of labor (CC§864).
- **Disposition of Residence** A guardian of an adult shall obtain the permission of the family court for sale, rent, cancellation of lease, or establishment of a mortgage, or any other disposition equivalent to these, on the ward's behalf with regard to a building or site used for the adult ward's residence (CC§859-3).
- **Opening The Private Mail** Under the new amendment to the Civil Code, the adult guardian is allowed to open private mails addressed to the ward (CC§§860-2, 860-3).
- **Limited Authority after The Death of Ward** Theoretically the guardianship automatically ceases to be effective when the ward dies. Consequently there has been a dispute as to whether the guardian may render the residual services such as cremation and burial of the deceased. New amendment above also made clear about the limited authority of the guardian after the death of the ward (CC§873-2).

### (2) Obligation

#### A) Duty of Care

- All types of supporter including private agency and trustee are subject to duty of care - a duty to administer the mandated business with the care of a good manager compliance with the main purport of the mandate (CC§644, TL§29).
- A statutory supporters must respect the intention of the person under the support, and consider his/her mental and physical condition and living circumstances (CC§§858, 876-5.1, 876-10.1).

#### B) Conflict of Interest

- If there is any conflict of interest between ward and adult guardian or among two or more wards supported by the same guardian, the guardian needs to ask the family court to appoint a special representative; provided, however, that if the supervisor has been appointed, the guardian must seek the consent of the supervisor. (CC§860)

Organisationskomitee  
[organizing committee](#)

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · [vice-president](#)

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · [president](#)

Karl-Heinz Zander  
Geschäftsführer · [secretary](#)

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · [Germany](#)

Bankverbindung  
[bank account](#)

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01

- Same rule applies if curator or assistant is granted any authority by the family court to represent the principal.(CC§§876-2.3, 876-7.3)

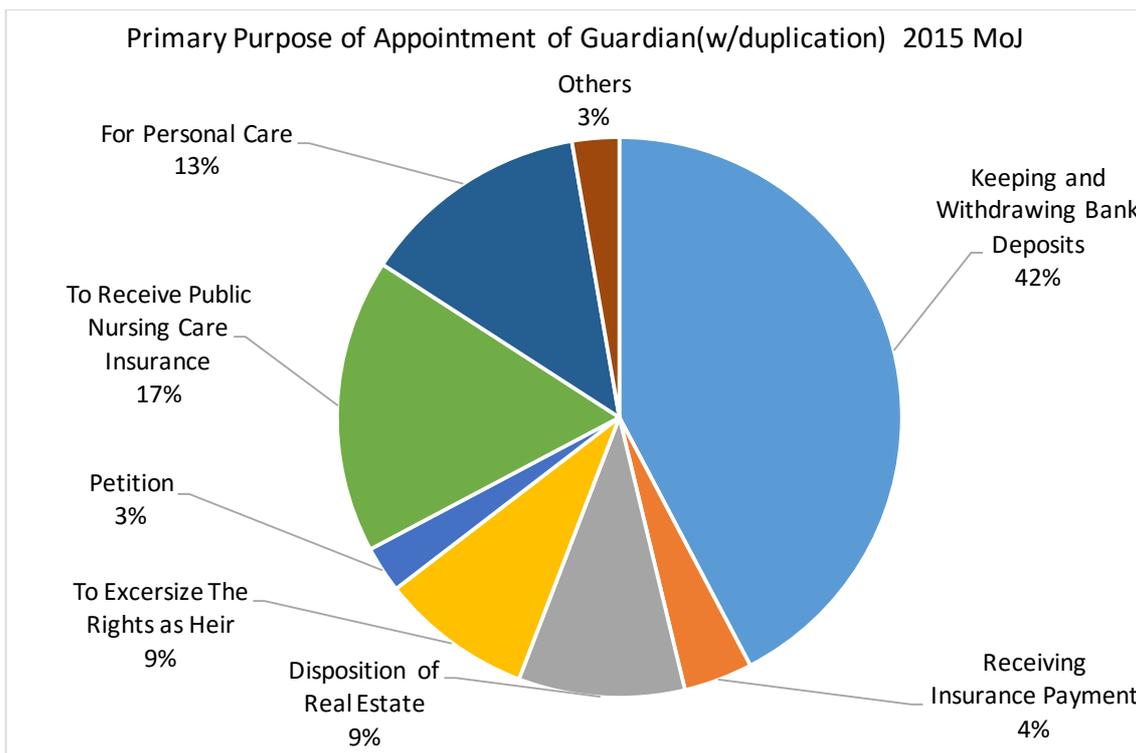
C) Duty of Loyalty

- In the trust arrangement, the trustee is subject to the general duty of loyalty (TL§30 *et al.*) in addition to the set of specific obligations including the restriction on conflict of interest.

7. What role do family members play and what are the requirements imposed on them?

(1) **Duty to Mutual Support**

- Legally speaking, the lineal relative by blood and siblings have a duty to support each other (CC§877).
- This duty naturally includes the duty to support the adult family member with mental disability.
- In addition, pre-modern era’s Confucius moral mandating the children to support their parents still somehow persists and it remains common for one of the children (in many cases the eldest sibling) take care of his/her parents especially in the case of a surviving parent.
- Consequently, family members function as a *de facto* supporter for major proportion of the elders with mental impairment. They in many cases virtually make use of the parents’ money to support him/her. When it comes to the stage where they need legal authority, they come to court for guardianship appointment as the last resort.



- Considering the number of professional supporters is rather limited comparing to the number of possible “users” of the system, the family support might have to be elevated from the pre-modern moral based virtual support to the publicly recognized function as a part of national welfare system.
- i. As one of the early stage efforts, the government amended the Child Care and Family Care Leave Law in 2016 to allow more flexible leave for the family care support and prevent the undesired retirement, which has become the wide spread issue in these days.

- ii. Also the amendment to the family section of the Civil Code is currently discussed in the Ministry of Justice to reflect the contribution of the specific family member who has supported the decedent in determining the intestate share in the estate.

## (2) As Statutory Supporters

- About one third of the statutory supporters are family members of the ward/principal.

Type of Guardians	No.		Family/Non.Family		
spouse	851	2.4%	family	10,426	30%
parents	814	2.3%			
child	5,515	15.8%			
siblings	1,481	4.2%			
other relatives	1,765	5.1%			
attorneys	8,000	22.9%	non family	24,494	70%
legal advocates	9,442	27.0%			
social workers	3,725	10.7%			
council of social welfare	821	2.4%			
tax accountants	85	0.2%			
administrative advocates	822	2.4%			
psychiatric social workers	21	0.1%			
volunteers and NPOs	224	0.6%			
other legal entities	1,185	3.4%			
other individuals	169	0.5%			
Total			34,920		
Duplicate Appointment			2,737		
Net Number of Appointment			32,183		

- There is no specific requirements the family member has to satisfy in order to be the statutory supporter. Family court has the discretion to appoint anybody whom it deems appropriate. In light of the recent abuse cases by family member, it is said that the court tends to appoint the third party supporters or make a duplicate appointment. *see* Guardianship Support Trust below.
  - Though the proportion of non-family supporters are relatively high, this is not necessarily because the professional/third-party supporters are common but because the court tends to appoint the latter being afraid of the possible abuse. As the appointment of statutory supporter becomes popular from just 5% to far more, it is likely that the proportion of the family member increases again considering the poor availability of the professional supporters.
- i. The Labor/Welfare Ministry estimates the number of potential users *i.e.* people with Level II cognitive difficulties increases from 3.45 in 2015 million to 4.7 million in 2025, up by 34%. The number of attorneys and legal advocates in 2015, on the other hand, is 36,415 and 22,013 respectively, totaling just 58,428 that is 1.7% of the existing potential users. Assuming the number of supporters needed increases proportionately to that of the entire number, about 11,000 (34% of the 32,183) additional users are coming up, which would probably be difficult to cover by the existing force of the professionals. The shortage expands further if the usage ratio of 5% goes up.

### (3) Torts Liability

- A person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due to mental disability shall not be liable to compensate for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentionally or negligently (CC§713).
- In cases where a person without capacity to assume liability is not liable, to protect the injured, CC provides: “the person with the legal obligation to supervise the person without capacity to assume liability shall be liable to compensate for damages that the person without capacity to assume liability has inflicted on a third party; provided, however, that the foregoing shall not apply if the person who has the obligation to supervise did not fail to perform his/her obligation or if the damages could not have been avoided even if he/she had not failed to perform his/her obligation.” “A person who supervises a person without capacity to assume liability, on behalf of a person who has the obligation to supervise, shall also assume the liability.” (CC§714)
- This clause raises a question if the family member of the person with high level of cognitive impairment is liable for the damage caused by such person’s wrongdoing and if so to what extent.
- Recently the Supreme Court made a landmark decision on this issue<sup>2</sup>. An old man suffered from dementia with the habit of wandering around broke out of his house while his wife, one of the defendants, took a nap and then took a train from nearby station to the next one, where he broke into the rail ground from the platform and was hit by the coming-in train to death. Train company sued his wife and children based upon the above clause for the damage caused by this accident, primarily the cost of alternative transportation (about 7 million yen).
- Supreme Court held as follows:
  - i. Merely being a family member or a statutory guardian does not automatically bring about the “legal obligation to supervise the person without capacity”.
  - ii. The Civil Code provision saying “A husband and wife shall live together and provide mutual cooperation and assistance” (§752) does not automatically bring about the “legal obligation to supervise the person without capacity”, either.
  - iii. Even though the person who does not have such legal obligation, however, may become liable if there is a special circumstance where such person is deemed to undertake such liability from the equity point of view. In judging this, the court shall consider, *inter alia*, (1) if the person in question has a family relationship with the ward and its level of kinship; (2) if the person in question lives together with the ward and how frequently he/she communicates with the ward; (3) if the ward had a problematic habit such as wandering around; (4) the manner and level of surveillance and care to avoid possible harm to the third party caused by such problematic habit.
  - iv. The court concluded that the defendants were not viewed as such in this particular case.

---

<sup>2</sup> Supreme Court, Judgment, Mar. 1, 2016; Saibansho Jiho 1647-4(2016), available on the court web site ([http://www.courts.go.jp/app/hanrei\\_jp/detail2?id=85714](http://www.courts.go.jp/app/hanrei_jp/detail2?id=85714))

8. What role do volunteers play and what are the requirements imposed on them?

- In 2015, 225 “Citizen Guardians” were appointed.
- There is no legal requirements to be a citizen guardian. It is up to the court whether to appoint a third party citizen to be a guardian.
- In anticipation of the up-coming proliferation of the needs for guardians, increasing number of municipals are starting the program to offer education and support for the citizen guardians, which will be accelerated after the enactment of the Law to Promote The Use of Statutory Guardianship in 2016.

9. Are there professional supporters/legal representatives and what requirements/ qualifications do they have to satisfy?

- As shown in the table above, the attorneys, legal advocates, and social workers have been active in becoming the statutory supporters.
- There is no legal requirements to be a professional guardians. But some of the associations of such professionals have set the standard and professional responsibility code for those who wish to render such services.
- There are NPOs formed by these professionals to assist their activities and to become the supervisor to enhance the credibility. The NPO formed by legal advocates has been very active in such activities and has the indemnification fund to cover any damage caused by the malpractice of the member supporters.
- It has become increasingly common for the court to appoint a legal professional as a bridging guardian for the Guardianship Support Trust as mentioned below.

10. Who bears the costs for procedures and the supporter/legal representative?

- Civil Code provides that the family court may grant reasonable remuneration to a statutory supporters out of the property of the ward, considering the financial capacity of the supporters and the ward and other circumstances (CC§§862, 876-5.2, 876-8.2).
- According to the Guideline of Tokyo District Family Court, rule of thumb for such remuneration in the case of adult guardian is 20,000 yen per month (USD190 assuming 105yen/\$) onto which additional remuneration may be granted<sup>3</sup>. The table below is an example of the fee schedule:

	Size of The Assets under Management	Monthly Fee (yen)
Adult Guardian	10 mil. or less	20,000
	more than 10 mil.	30,000-40,000
	more than 50 mil.	50,000-60,000
Supervisor	500 mil. or less	10,000-20,000
	more than 500 mil.	25,000-30,000

<sup>3</sup> Tokyo Family Court, *Rule of Thumb for The Remuneration for Adult Guardians* (2013)

11. How are supporters/legal representatives supervised and what is done to ensure that the rights, the will, and the preferences of the adult concerned are respected? (cf. Art. 12 section 4 UN CRPD)

### (1) Family Court

- Statutory supporters are under the supervision of the family court which appoints them.
- A supervisor of a guardian or the family court may, at any time, demand that a guardian submit a report on the affairs of guardianship or an inventory of property, and may investigate the affairs of guardianship or the situation of the property of the ward. The court also may order any necessary disposition concerning the administration of the property of a ward, or other affairs of guardianship, at the request of a supervisor of a guardian, the ward or his/her relative, or other interested person, or ex officio. (CC§863)

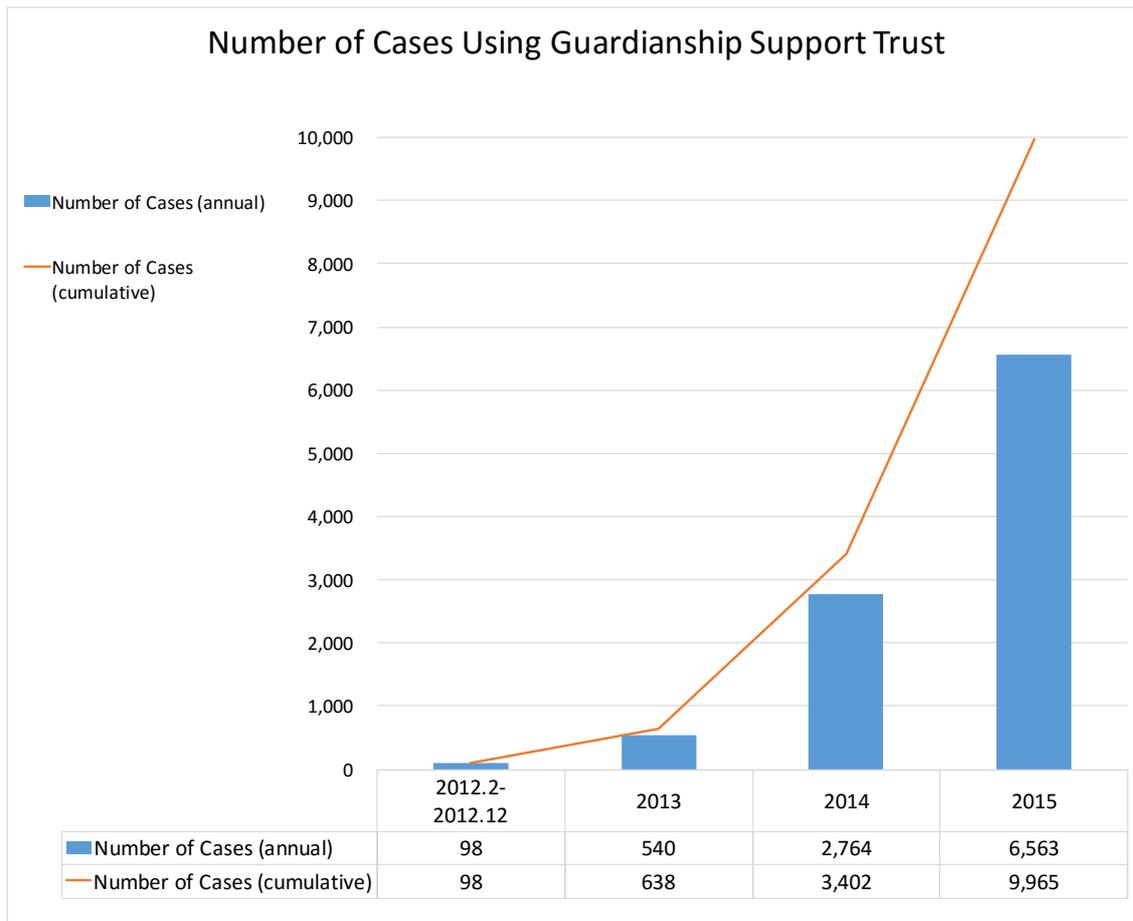
### (2) Supervisors

- The family court may appoint a supervisor of a guardian, when it finds this necessary, at the request of a ward or his/her relative, or a guardian, or *ex officio* (CC§849).
- In the case of voluntary guardian, the appointment of the supervisor is the requisite for the contract to become in effect.
- In the case of private trustee, the settler may appoint a trust supervisor who supervises the trustee (TL§131) and/or a beneficiary's agent who represent the beneficiary to exercise and protect the right of the beneficiary (TL§138).
- Currently these supervisors are viewed as the watchdog should there be any abuse or conflict of interest by the supporters. There might need further education and dissemination of the idea under the Hague Convention for the supervisors to see themselves be in a position to ensure the rights, the will, and the preferences of the adult concerned in its proactive sense.

### (3) Guardianship Support Trust

- To cope with the increasing problems of the financial abuses by the statutory guardians<sup>4</sup>, the Supreme Court and big trust banks have developed a special arrangement called Guardianship Support Trust.
- This is a monetary trust account with the trust banks - commercial banks with full line trust business license (currently Mitsui Sumitomo, Mitsubishi UFJ, Risona). Principal amount of the trust asset is guaranteed by the trustee. Though it is legally a trust, the settler stays as a beneficiary and its economic substance is virtually an ordinary bank deposit. Under the terms of the trust agreement, however, the depositor may not withdraw the trust fund without the direction issued by the family court in charge.
- To facilitate this arrangement, it has become common that the court first appoint a professional guardian such as attorneys and legal advocate. This bridging guardian creates the Guardianship Support Trust account and transfers the lion portion of the monetary asset of the ward to such account. It then hands its role over to the permanent guardian who is simultaneously appointed from the family members so that he/she may make a proper support and live nearby the ward.

<sup>4</sup> Number of abuse cases amounts to 2551 from 2010.6 to 2014.12 and the aggregated value of assets misappropriated is 19.6 billion yen (about \$170 mil.), out of which, 1.1 billion attributes to professional guardians such as attorneys and advocates.



#### Amount of Money Transferred to Guardianship Support Trust (million yen)

	2012.2-12	2013	2014	2015
Annual Entrustment	4,251	20,164	100,995	210,935
Cumulative Amount	4,251	24,415	125,410	336,345

source: Family Division of the Supreme Court

12. Who decides on deprivation of liberty and involuntary medical measures and what requirements does this decision underlie? Is there a distinction between self-endangerment and endangerment of others?

#### (1) Who decides on deprivation of liberty and involuntary medical measures

- The Law for the Mental Health and Welfare of the Persons with Mental Disorders (Law No.123 of 1950, "LMH") applies to the situation where deprivation of liberty and involuntary medical measures are required to the wards under guardianship.
- As a principle, admission to the mental hospital must be made based upon the consent by the patient (LMH§20).
- In case the patient is at imminent risk of self-endangerment and endangerment to the others, at the notice of a citizen including his/her family, a police administration, a prosecutor, or other

Organisationskomitee  
organizing committee

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · vice-president

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · president

Karl-Heinz Zander  
Geschäftsführer · secretary

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · Germany

Bankverbindung  
bank account

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01

pertinent institutions, the municipal government may decide to make an involuntary hospitalization when unanimous opinion of more than two doctors are met (LMH§29).

- Manager of the mental hospital may make an involuntary hospitalization if the patient is not able to make a consent by him/herself and one of the relevant “family members etc.” makes a consent. For this purpose, “family members etc.” includes his/her spouse, the guardian of a minor, the lineal relative by blood and siblings with a duty to support under the Civil Code, and the guardian or the curator. (LMH§33)

## (2) Is there a distinction between self-endangerment and endangerment of others?

- There is no distinction under the applicable law.

13. Additional comments (elements of your country’s system that may be of interest and are not covered above)

### (1) Law to Promote The Use of Statutory Guardianship and ancillary revision to Civil Code to clarify certain ambiguity of guardian’s authorities (2016)

- mentioned in the relevant parts above.

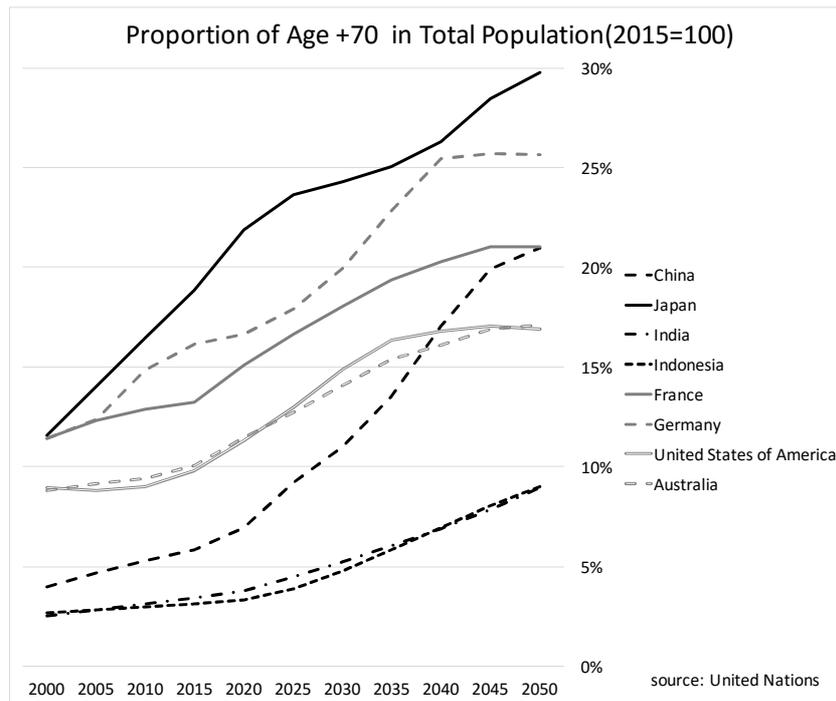
### (2) Restoration of The Voting Right of The Ward under Statutory Guardianship

- In 2013 the Tokyo District Court held that the provision of the Public Officers Election Act then negating the voting right of the ward under the statutory guardianship was the violation of the Constitution<sup>5</sup>.
- After the decision, the government voluntarily abolished the provision in question and enacted the new law to facilitate the exercise of voting right by the wards.

### (3) Japan as Ageing Laboratory for the Rest of The World

- As shown in the graph next page, Japan has been and continue to be the top in terms of the proportion of the age over 70, a good candidate for the supporter needs, for the next couple of decade.
- In terms of the absolute level of aged proportion, Japan may be in a group of Germany and France. In terms of the speed of the demographic change as shown in the page after the next, however, Japan has definitely been different from European friends. Rather we have been running ahead of Asian friends that start to face the dramatic change as we have seen for these years. Though our speed itself slows down a little from now on, we have yet a lot to settle down before getting on a level flight. In this sense, Japan will be the world’s laboratory both for the high level and high speed groups.

<sup>5</sup> Tokyo District Court, Judgment, Mar. 14, 2015; Hanrei Jiho 2178-3(2015)



- This is definitely a difficult challenge and we would probably have to be very pragmatic and realistic to cope with the situation.
  - As for the supporter question, we would have to achieve the two things at the same time: to dramatically increase the number of supporters simultaneously avoiding the possible abuse and to quickly enhance the quality of such supporters implementing the idea of self-determination under Hague Convention.
  - It is a good news that we have a high rate of professional supporters as discussed above, but it does not mean they may absorb the gigantic potential needs from now on. Rather it would probably be pragmatic and realistic to institutionalize the family support with the assistance of the professionals who have adept knowledge and experiences as suggested above, thereby the professional support may be provided more efficiently to the persons who really deserve it.
  - Also as good portion of the service rendered by guardians is conservation and management of the assets, we should emphasize the role of financial institutions, especially, regional and community banks that can render hands-on services. New participants making use of IT technology are also expected.
- i. There are a couple of community banks that have started to offer the comprehensive support to elders well before they are incapacitated. One of them makes use of private trust to make sure of the secure management of money without regard to the appointment of the statutory guardian.

Organisationskomitee  
organizing committee

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · vice-president

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · president

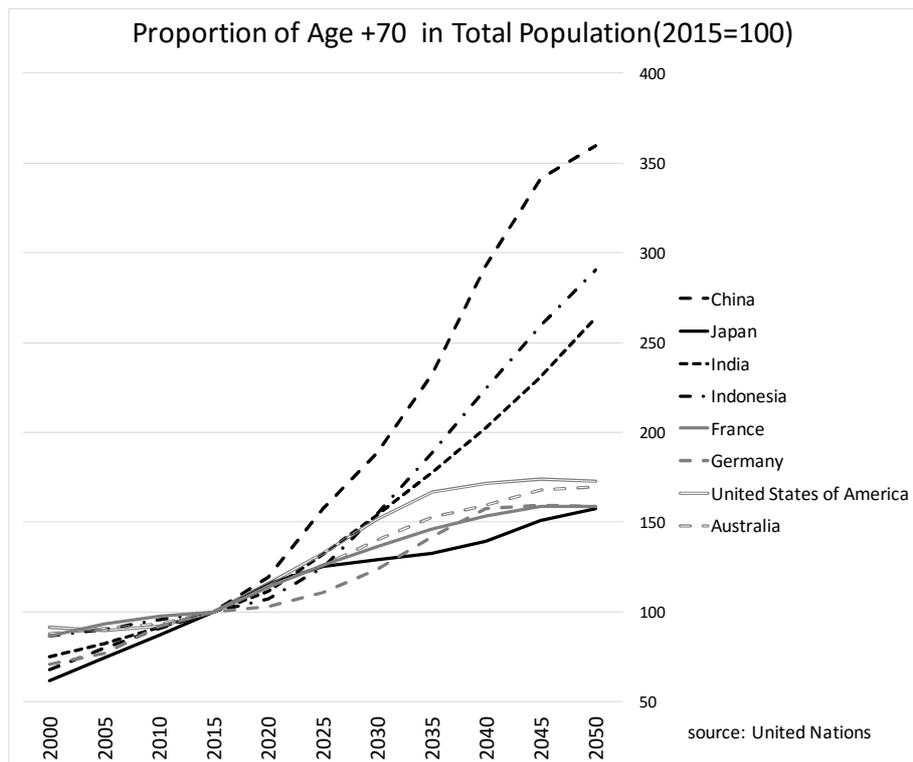
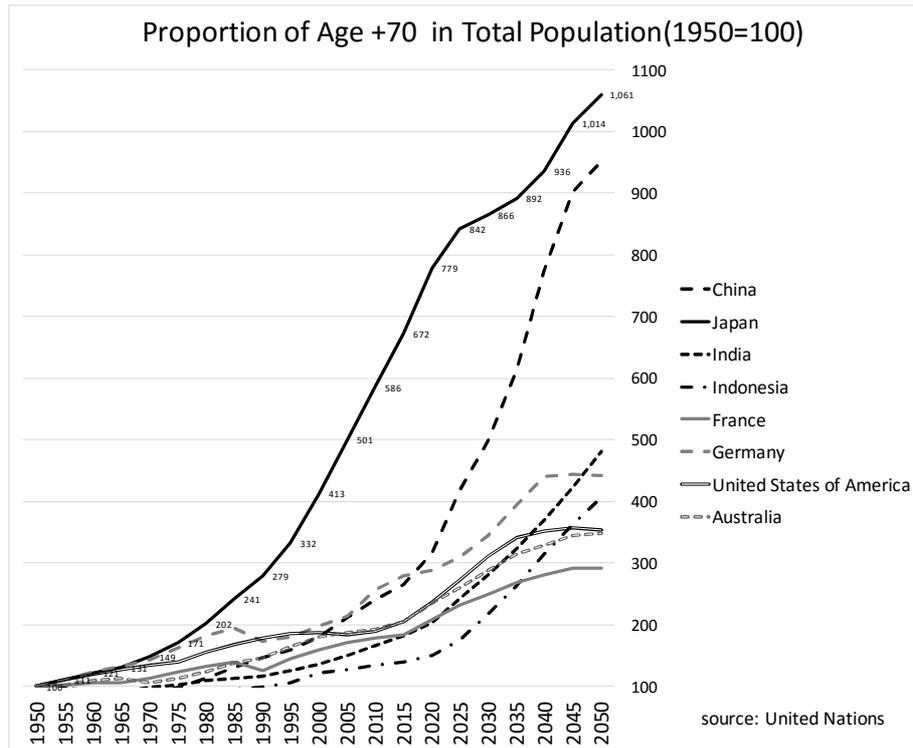
Karl-Heinz Zander  
Geschäftsführer · secretary

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · Germany

Bankverbindung  
bank account

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01



Organisationskomitee  
organizing committee

Prof. Dr. Dagmar Brosey  
Vizepräsidentin · vice-president

[www.wcag2016.de](http://www.wcag2016.de)

Prof. Dr. Volker Lipp  
Präsident · president

Karl-Heinz Zander  
Geschäftsführer · secretary

[orga@wcag2016.de](mailto:orga@wcag2016.de)

c/o  
Betreuungsgerichtstag e.V.  
Kurt-Schumacher-Platz 9  
D-44787 Bochum  
Deutschland · Germany

Bankverbindung  
bank account

Bank für Sozialwirtschaft Köln  
BIC: BFSWDE33XXX  
IBAN:  
DE73 3702 0500 0008 2767 01