



Reply to questionnaire for the country reports –South Korea

Professor Dr. Cheolung Je, South Korea



1. What legislation is relevant for the protection of adults?

Vulnerable adults are to be protected especially in relation to both decision makings and abuse and neglect. Regarding decision makings, various types of guardians either support and assist persons under guardianship or make substituted decisions on their behalf, which is regulated by the Korean Civil Code: relevant provisions are Arts. 9-17, 929 – 959-20. Regarding protection of vulnerable adults against abuse and neglect, three major social welfare Acts are relevant: The Welfare of Elderly Act, the Welfare of Disabled Persons Act, and the Protection and Assistance of Persons with Developmental Disabilities Act.

2. What are the types of formal measures that exist to support people with disabilities in exercising their legal capacity?

Guardians are supposed to support adults with disabilities to exercise their legal capacity. Except full guardianship, which makes persons under guardianship be deprived of nearly almost legal capacity to make decisions, the purpose and aim of other types of guardianship is to support people with disabilities to make their own decisions, among which there are limited guardianship, specific guardianship and contractual guardianship.

3. Who decides on the appointment of a supporter/legal representative and what are the requirements for the respective measures?

Full guardians, limited guardians and specific guardians are appointed by a family court (judicial guardians), whereas a principal can appoint his/her guardian by a contract before he/she loses the capacity to make a guardianship contract (contractual guardian). Any type of guardian can have power and authority to represent a person under guardianship and consent to medical treatments and other personal welfare matters in accordance with either a family court decision or a guardianship contract.

On the other hand, there is a supervisory guardian, whose function is to supervise the guardian. A supervisory guardian shall be appointed by a family court. There is no positive requirements in order for anyone to be appointed as any kind of judicial guardian, whereas there is a disqualification provision which blocks anyone being appointed as a judicial guardian: minor, being under any kind of guardianship, bankrupt, disqualification penalty, revoked legal representative, revoked guardian (any kind), a person suing against a person under guardianship or being sued by him/her, and his/her spouse and direct lineal relatives. The other disqualification provision about a supervisory guardian is that the latter cannot be appointed from among family members of a guardian, over whom he/she shall supervise.

4. Who is involved in the procedure of determining the need for support in legal affairs and in what capacity?

Only eligible legal entities including natural person can participate in the procedure for appointing guardians. The person in the case, his/her spouse, his/her relatives within 4th degree of kinship, guardian of the person in the case, local authorities, and public prosecutors.

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

Legal capacity is a prerequisite for any person to make contracts and consent to medical treatments and so on. If any person is deprived of legal capacity by a family court decision, he/she shall be excluded from legal transactions to the extent of that decision's effect. Such a decision of depriving any person of legal capacity has never been challenged so far by filing a constitutional claim to the Korean Constitutional Court.

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

A guardian has power and authority to represent a person under guardianship to the extent that such a power and authority is given either by a family court (judicial guardian) or a principal (contractual guardian). Guardianship per se does not incur any responsibilities to the guardian. However, the guardian should serve in good faith and skill, which is his/her obligation. Otherwise, he/she shall be liable to damage caused as if he/she is a party to a mandate contract. On the other hand, the principle he/she should follow when he/she serve as a guardian is to respect the welfare and preference or wishes of the person under guardianship. If the preference or wishes of the person under guardianship is contradictory to the welfare of that person, the guardian should respect the latter.

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

Nearly 75% of guardians have come from among family members so far. However, family members do not have any power and authority to represent adults with disabilities except that a spouse is a legal representative to represent his/her spouse in relation to daily life transactions and relatives within 3rd degree of kinship can apply for being a manager of his/her relative's bank account for public benefit. In those two cases, family members are obliged to discharge his/her duty in good faith and skill. On the other hand, family members who are obliged to maintain his/her relatives by Korean Civil Code (Arts. 974 -978) have power and authority to admit the relative with mental illness to psychiatric hospitals and institution with two consents by psychiatrists.

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

Volunteer citizens have been appointed as specific guardians. Guardianship services they have provided is based on the Protection and Assistance of Persons with Developmental Disabilities Act, meaning that adults with developmental disabilities, who come from low income family, are provided with specific guardianship. Volunteers who want to serve as guardian should finish more than 30 hour lessons, which are provided for by disability organizations selected by the Ministry of Health and Welfare.

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

Professional guardians have been serving since 1st July 2013. They are mostly paralegals (*Beopmusa*), lawyers, and social workers. They do not need to satisfy any requirements to be appointed as guardians. But family court judges have preferred appointing professionals as guardians who have a continuous professional development program focused on adult guardianship, provided for by professional organizations such as bar association, associations of paralegals and social workers.

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

Persons under guardianship are responsible for the costs for procedures and guardians with their own money. However, the Ministry of Health and Welfare has subsidized those costs for persons with developmental disabilities, who have low income. In those case, guardians come from volunteer citizens, and more or less 100 US\$ a month are paid for reimbursement of the guardianship service costs.

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 CRPD)

According to legal frame of Korean Civil Code, a guardian is supposed to be supervised by a supervisory guardian, and family court has a final voice for supervision over a guardian and a supervisory guardian. However, the practice of family courts tends to be reluctant to appoint a supervisory guardian in the cases where guardians are family members or professionals. Where a volunteer citizen is appointed as guardian, a local authority has been appointed as a supervisory guardian. For the guardianship services for persons with developmental disabilities, the Ministry of Health and Welfare plans to delegate guardianship corporations the role of a guardian or a supervisory guardian. Korean guardianship system has still been developing and changing, and it will take some more time for the guardianship system to be settled down.

Regarding respecting the will and the preference of persons under guardianship, the Korean Civil Code provides that guardians should respect those will and preference unless they conflict the welfare of persons under guardianship (Art. 947 Korean Civil Code).

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?

There are two systems for deprivation of liberty and involuntary medical measures. For the persons under guardianship, it is indispensable for guardians to apply for the permission of such measures by a family court (Art. 947-2 Korean Civil Code). On the other hand, for persons with mental illness, involuntary admission to psychiatric hospitals and institutions has been decided by two persons among family members who are responsible for maintenance of patients and guardians, with diagnosis by two psychiatrists for the necessity of involuntary admission and medical treatments (Korean Mental Health Act Art. 24). However, Art. 24 Korean Mental Health Act was recently revised to the direction that involuntary admission shall be supervised by a special committee and a mental health review tribunal, which will come into force as from 30th May 2017.

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Regarding a distinction between self-endangerment and endangerment of others, there is no distinction in Korean law, meaning that both are equally treated for involuntary admission to psychiatric hospitals and institutions.

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

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