出國報告（出國類別：其他-會議）

參加世界成年監護大會暨東亞成年監護法會議

報告書

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摘要

世界成年監護大會於 2009 年於日本橫濱召開第一屆會議,由日本、美國、澳洲、德國等學者專家所發起，而每隔兩年舉辦一次。於世界監護大會舉辦之際，同時舉辦東亞成年監護大會，就文化背景相近之國家，日本、韓國、台灣與中國，邀請學者共同發表與成年監護制度相關之文章。此次會議於美國華盛頓召開，本人乃代表台灣學者應邀前往參加。

此行參與之主要活動為東亞成年監護大會暨世界成年監護大會。在東亞成年監護大會中，發表「演進中的成年監護制度－台灣成年監護制度之現狀與展望」一文，會後並與其他國家的學者進行交流與討論。其後的世界成年監護大會中，則在各國專家學者與實務界之法官律師針對不同主題的發表中，獲得許多資訊，而更能了解各國在因應高齡化社會，於成年監護制度上所作的設計，以及所面臨的困難與問題。

一、 目的

高齡化社會是全球所面臨的現象，其所衍生的法律問題，紛紛開始為各國所正視，而欲尋求適切之解決方法。世界成年監護大會的召開乃因應此一重要議題，希望集結各國研究成年監護制度的學者、專家以及從事實務的法官、律師等，就該國相關的法制度以及在實務運作上所產生的困難提出說明、並加以檢討。其後，透過研討會後的交流與討論，能對各國的作法有清楚的認識，並能反思本國法制度尚應改善的地方。

二、 活動過程

世界成年監護大會第一屆於日本橫濱舉行，之後確立每兩年舉辦一次，此次為第三屆世界成年監護大會。由於日本成年監護學會為發起此一世界成年監護大會的成員之一，會在世界成年監護大會中同時舉辦東亞成年監護法會議，由東亞國家中各派兩名成員針對成年監護制度發表論文。這場東亞成年監護法會議由日本成年監護學會主辦，東亞總共有四個國家代表發表論文，分別是日本、韓國、中國香港與台灣。台灣由我先擔任專題報告人(Keynote Speaker)，台大黃詩淳教授則擔任主題討論人(Panelist)。在四國代表分別一一說明本國成年監護制度之現況與課題之後，再由主持人針對特定主題進一步加以討論，包括意定監護制度採用之必要性，以及成年監護制度中國家應扮演的角色，與家庭成員在此一制度中之定位等。最後則由其他世界各國之專家學者發表評論，包括有德國成年輔助

協會的專業成年監護人 Jochen Exler-König 與哥廷根大學的 Volker Lipp 教授，該教授為近年來研究德國成年輔助法的專家，更基於其在醫療法的專業領域之研究，對於一心智退化者之意思能力如何判斷亦有提出論文。美國則有成年監護法律與政策中心的負責人 Kim Dayton 與密蘇里大學教授的 David English，還包括加拿大 Simon Fraser 大學犯罪學教授 Robert Gordon、澳洲成年監護協會主席 Anita Smith、英國法官 Denzil Lush，以及新加坡公共成年監護事務處的代表 Daniel Koh。其一一對於亞洲各國的成年監護制度提出其觀察與建議。最後，結束正式會議之後，主辦單位舉辦小型餐會，在該餐會中更有機會與各國專業人士交流，針對特定問題提出各種不同觀點的討論，特別帶有不同文化背景的考量，更豐富了此次會議的內容。

在其後登場的世界成年監護大會中，一共分三天，除有共同參與的場次，針對一般性的議題，由各國代表說明該國的情形外，亦分各種專題，包括制度面與施行面，例如意定監護制度如何運行、如何協助受監護人作成自己決定，或是法院在監護宣告程序中如何選任監護人、調解制度在監護宣告扮演的角色等不同議題，供參加會議者依自己的興趣選擇參加，使此一會議兼顧廣度與深度。而在會後的餐敘中，更可有機會與報告人針對其所報告的議題作進一步的討論與分享。

三、 研究與參訪心得

很感謝科技部的補助，得有參加此次國際會議的機會。藉由此

次之國際會議，充分體認到國際交流的重要性，特別是在成年監護這個領域。畢竟高齡化社會的形成，不只我國，而是全球化的現象，針對此一共通的需求，各國皆紛紛制定相關法規範予以因應，但卻因各國對於家庭的定義與功能囿於各國的民情文化而有所出入，例如監護人的選任，是否仍由家庭成員當然擔任，或是得由國家選任適當之人等問題。我國成年監護制度法規範的改革正在起步當中，面臨家庭結構的日漸鬆散之下，本原由家庭成員所擔負的照顧責任，已漸漸無法繼續維持，而必須由國家轉而協助。此外，對於日益注重個人人格權的保障趨勢下，亦使本由家庭成員之替代決定，而要求尊重該個人之殘存意志，此皆促使成年監護制度應有結構性的修正。是以，在這次世界成年監護大會中，首先在東亞的議程上，透過各國代表的報告與討論，了解即使在文化背景相似的國家中，對於成年監護制度中仍然有不同的發展，以及在法制施行上，各自面臨不同的難題需要解決，例如日本，就公示性的登記，因不願讓他人得知，而促使使用此一制度的人不多。而香港的制度，則仍帶有英國法的色彩，而與中國之制度又有所不同，中國則在東亞各國中，雖意識到此一問題之重要性，但仍尚未有對法制的改革，仍沿襲在家庭中處理此一問題的舊制。韓國最近一次修正在於 2013 年，已納入意定監護制度，並對人身管理有所規範，此對於我國正考慮納入意定監護，以及是否應加強人身管理之規範，或可提供一參考方向。

其次針對世界成年監護大會所舉辦的各個場次，分為共同參與的場次與個別主題的場次，本次成年監護大會所強調的重點為自我決定權的保障，在共同參與的場次中，其中有一場由六個國家代表

分別說明該國成年監護制度對於自我決定權如何保障之機制，並在每場結束之後,由主講人提出三個問題,讓在場聽眾以感應器回答，並立即統計結果並在投影幕上呈現大家的答案。此一方式令人印象深刻，值得學習。在個別主題的場次中，無論是荷蘭法官或是明尼蘇達州法官對於該國或該州選任以及培訓監護人的說明，特別是職業監護人的培訓等機制，正是我國目前所欠缺，而可供我國借鏡。

四、 建議事項

參與此次會議之後，更體認成年監護制度之重要性，未來應加強我國對於成年監護制度之研究,包括如何落實自我決定權之保障,以及如何妥善管理財產與人身之監護事務等，並促使我國成年監護制度之進一步改革。此外，對於兩年之後將於柏林再次舉辦之世界成年監護大會，我國亦應積極的參與，以拓展並加深國際交流之面向。

附錄

演進中的成年監護制度－台灣成年監護制度之現狀與展望

An evolving system of adult guardianship- a discussion on the present and future of adult guardianship law in Taiwan

中文摘要

我國在面臨高齡化社會所產生之需求後，於西元2008年對於成年監護制度進行全面修正。在尊重當事人之人格自由的精神下，廢除原本之禁治產宣告制度，改以監護宣告與輔助宣告二者並行之制度，並在監護人之選任上，考量成年監護之特殊性，而得由法院依職權選任適當之人擔任監護或輔助人。然而我國法之修正內容是否已完善保障受監護人之人格尊嚴？在以第一次世界成年監護大會後所發表之橫濱宣言觀之，顯然仍有不足。在橫濱宣言中，強調個人意志的尊重，法律原則上不應再以代理制度作為保護身心障礙者權益之手段，而改以協助身心障礙者，視其行為能力之狀況，於權利行使上，能儘量由其自己作成決定。此外，更重視當事人在身上照顧之事宜。針對橫濱宣言所訴諸之原則，我國法不但無意定監護制度，有關於人身管理的部份，特別針對護養治療措施的決定亦明顯過於簡陋，使得新制在實務運作上顯有不足，而無法達成其應有之功能。本文將以我國現行法之缺失出發，而以橫濱宣言之內容作為檢視之對象，提出我國成年監護制度未來之修法方向。

Abstract

In response to the coming aging society, the Taiwanese adult guardianship law has been amended in 2008. Based on the principle of respecting personal freedom, the

law on the adjudication of interdiction has been revoked and replaced by the law on the order of commencement of guardianship and the law on the order of commencement of assistance. Furthermore, in the designation of guardians, considering the unique nature of adult guardianship, the law authorizes that the court may designate the qualified person to be the guardian or the assistor. However, it is still a question whether the above-mentioned amendment can fully protect the dignity of a ward. If we compare the above-mentioned amendment to the Yokohama Declaration issued by the World Congress on Adult Guardianship Law 2010, the answer to the question would be negative. The Yokohama Declaration emphasizes that the individual will should be respected, and also it declares that instead of employing the agency system to protect the rights of persons with disabilities, the legislation should assist the persons with disabilities, considering their various capacities, in asserting their rights and making decisions by themselves. In the light of the principles declared by the Yokohama Declaration, the Taiwanese law does not fully adopt the adult guardianship system, and in particular it does not include a more sophisticated provision on the guardian of the person (Personensorge), related to the decision-making with regard to healthcare and treatment. Due to this lacuna the amended law cannot be considered optimal. This article will start with discussing the problems of the current law on adult guardianship in Taiwan. Then based on the analysis of the content of the Yokohama Declaration, this article will propose the direction for the future improvement of adult guardianship system in Taiwan.

演進中的成年監護制度—
台灣成年監護制度之現狀與展望

壹、引言

成年監護制度的設置，原本主要處理先天或後天因意外或疾病所導致之身心障礙者所需之法律上照顧。然而高齡化社會的來臨，對於日益增多的高齡者而言，其身心狀態隨著年齡逐步衰退，而漸漸失去獨立處理事務之能力，也產生使用成年監護制度之需求。此一現象，讓各國紛紛開始重視成年監護制度，並展開對於成年監護制度的改革。

台灣成年監護制度的修法源起，可溯及至 2000 年中華民國智障者家長總會（Parents Association for persond with intellectual disability, PAPID）在立法院所召開之「心智障礙者禁治產宣告保障了誰？」公聽會。在公聽會之後，促成法務部與立法院對於成年監護制度之修法。

然而該修法，一來同時涉及民法總則對於「禁治產宣告」制度之規定，二來亦波及未成年監護制度之內容，是以，歷時多年後，台灣的成年監護制度才於 2008 年正式上路。

為彰顯成年監護制度主要目的在於保護受監護宣告之人，維護其人格尊嚴及確定其權益之意旨，修正內容除了將帶有歧視性用語之「禁治產宣告」修改為「監護宣告」，並在監護宣告之外，再增設輔助宣告，以使精神障礙或心智缺陷程度輕微者，亦有可能適用成年監護制度，使其權益受到保障。

在東亞其他國家中，最早進行成年監護制度改革的是日本。1983 年為國際身心障礙者年，以及其後聯合國對身心障礙者之建議，使得日本之成年監護朝向以「融合」取代「隔離」，並尊重受監護人之自我決定權的方向加以修正，而首先引進意定監護制度，並在法定監護制度中，由原本之二級制「禁治產宣告」與「準禁治產宣告」，改為「監護」、「保佐」，並增加「補助」類型之三級制。

在日本以及台灣完成修法之後，韓國亦於 2011 年修正成年監護制度，而於 2013 年施行。由於核心家庭化的急速發展，導致弱化家庭成員間的連繫，以及正視對身心障礙者提升其人權保障的需求，韓國的立法者認為，成年監護制度不再是家庭間之問題，而轉變成為國家應負之責，故其修正之方向，亦朝向尊重受監護人的自我決定權與其殘存能力，而儘量將成年監護之主導權，由監護人轉為受監護人本身來行使。其所採取之制度亦與日本相近，在法定監護中分為成年監護、限定監護與特定監護，同時在民法中增訂任意監護契約之規定。

觀察三國在成年監護制度之發展，不難發現，基於社會家庭型態的轉變，除了高齡化社會所帶來成年監護之需求之外，因為少子化趨勢，必定無法將照顧身心障礙或高齡者之責任，全部委由家庭成員負擔，國家勢必有介入之必要。

而在國際的發展趨勢下，特別是受到身心障礙者權利公約的影響，以第一次世界成年監護大會後所發表之橫濱宣言觀之，對於身心障礙者應視為權利主體，不論在其人身或財產之事務上，應尊重其意願，故國家須以「輔助」取代「保護」的觀念，僅有在必要範圍內方得協助之。法律，原則上不應再以代理制度作為保護身心障礙者權益之手段，應改以協助身心障礙者，視其行為能力之狀況，於權利行使上，能儘量由其自己作成決定。此外，更重視當事人在身上照顧之事宜。同時為保障受監護宣告人之利益，亦應加入公權力機關的監督，以防止監護人之濫權。

以上所述這些發展，皆使得成年監護制度，漸漸脫離家庭的領域，而有公法化的趨勢，隨著社會家庭的持續變動，造成成年監護制度亦有不斷調整修正之必要。

以下乃以台灣實體法與程序法之修正，先行說明台灣成年監護法制是否已符合各國對於成年監護制度修正之理念，並透過實務的運行，檢討台灣成年監護制度之不足之處，以及未來應繼續修法之方向。

貳、台灣實體法與程序法上之修正

台灣在實體法上之修正，包括民法總則與民法親屬編中之監護章節。修正重點包括，將禁治產宣告改為監護宣告，並增加輔助宣告，以維護受監護人之人格尊嚴，並在更為彈性的監護制度中，獲得權益之保障[1]；其次，調整監護人選任之方式，不再以家庭成員優先，而由法院依職權選任；再者，原本由親屬會議作為監督監護的機關，亦被法院所取代；最後，無論法院在監護人的選任上，或是監護人於執行職務時，皆應尊重受監護人之意見。

在實體法修正成年監護制度後，法院除了原本即為監護（或輔助）宣告之聲請機關以外，新增法院可依職權選任監護人。又監護人的職務，包括對受監護人之人身與財產上之照護，故監護人適任與否，將對受監護人之利益影響甚大，是以，監護人之選任應慎重為之，因而在與選任相關之程序法上，亦應為相應之修正配合。家事事件法制定時，即對原有之監護與輔助宣告在程序法（原規定於民事訴訟法與非訟事件法）上之規定，重新作了調整，以增加對於受監護或輔助人之程序保障。

[1] 司法周刊，1388 期，97 年 5 月 8 日。

一、實體法之修正

(一) 監護與輔助制度並行

在本次修法中，其最重要的變革在於，將成年監護採取雙軌制，以監護宣告制度，取代原禁治產宣告制度，另外再增加輔助宣告制度，使心智障礙較輕微之人，可宣告成為尚有相當行為能力之受輔助人，用以救濟原禁治產宣告無法區別該成年人因心神狀態無法處理事務之程度，而必須一體剝奪其行為能力之不合理性。

(二) 監護或輔助之開始

依照新修正之台灣民法第 14 條與第 15 條之一之規定，法院可依本人、配偶、四親等內之親屬，最近一年有同居事實之其他親屬、檢察官、主管機關或社會福利機構之聲請，對於有人因精神障礙或其他心智缺陷，而影響其為意思表示，或辨識意思表示效果之能力者，就其程度輕重，為監護宣告或輔助宣告。又依同法第 15 條與 15 條之二之規定，一旦受監護宣告之後，即成為無行為能力人，而無法為任何法律行為；至於受輔助宣告者，仍具行為能力，僅在特定行為上[2]，須輔助人之同意方生效力。

(三) 監護或輔助人之設置與選任

在監護人或輔助人的選定上，不再如舊法，有指定監護人與法定監護人之分，並有優先順位，而由法院直接依職權選任。

法院在選定監護人或輔助人時，應依職權就配偶、四親等內之親屬、最近一年有同居事實之其他親屬、主管機關、社會福利機構或其他適當之人選定一人或數人（台灣民法第 1111 條，第 1113 條之一準用)。

由於監護職務有時具有複雜性與專業性，例如財產管理事項可由金融專業人員負責，而身體之護養療治事項則由醫事專業人員處理較為適合，故有選任多數監護人或輔助人之必要，以期更能妥善執行監護或輔助事務。又依台灣民法第 1112 條之一，當法院選任數人為監護人或輔助人時，自得依職權指定其共同或分別執行職務之範圍。(民法第 1113 條之一準用)。

再者，考量監護事務於部分情形下，有轉由國家承擔的必要性，而不再限制監護人應為自然人，此依台灣民法第 1111 條之一第四款選定監護人注意事項之規定得知，法人亦可為監護人或輔助人（民法第 1113 條之一準用)，惟實際負責執行職務者，應視該法人為何種機關或機構，而由該機關或機構中適當

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[2] **請參照民法第 15 條之二的規定，包括不動產處分、拋棄繼承等權利。**

之人為之。

監護人亦有消極資格的限制，如未成年、失蹤或受監護、輔助及破產宣告者，皆不得為之（民法 1096 條）。

此外，法院於選任監護人或輔助人時，應依受監護人或受輔助人之最佳利益出發，優先考量其意見，並注意受監護宣告之人之身心、生活及財產狀況、其與配偶、子女與其他共同生活之人間之情感狀況、監護人之職業、經歷、意見與其與受監護宣告之人的利害關係，以及監護人為法人時，其事業之種類與內容，法人及其代表人與受護宣告之人之利害關係等，審酌一切情狀決定之。

法院選任適當之監護人以後，因考慮監護職務所具備之公益性，監護人欲辭任者，必須有正當理由，經法院許可後，方得為之（民法第 1095 條）。

(四) 監護或輔助職務內容

1. 監護職務內容

針對監護職務內容，台灣民法於第 1112 條，僅規定監護人執行職務之原則，包括對受監護人生活、護養療治及財產管理之職務時，應尊重受監護人之意思，並考量其身心狀態與生活狀況。由本條亦可知悉，監護之職務，包括財產管理與人身管理。

首先，依台灣民法第 1098 條之規定，監護人於監護權限內，為受監護人之法定代理人。此一代理權限，就解釋上而言，應涵括身分行為與財產行為。

其次，在財產管理上的具體規定，則準用未成年監護制度。依台灣民法第 1103 條之規定，受監護人的財產，由監護人管理。監護人對於受監護人之財產，非為受監護人之利益，不得使用、代為或同意處分。監護人亦不得受讓受監護人之財產（民法第 1102 條）。

至於人身管理的規定，本次民法修正後，並未以具體規定為之。在本次修正前，監護人為受監護人之利益，應按受監護人之財產狀況，護養療治其身體，此外監護人如將受監護人送入精神病院，或監禁於私宅者，應得親屬會議之同意，但父母或禁治產人同居之祖父母為監護人時，不在此限。

然而對於受監護宣告之人而言，最重要的人身管理即為護養療治。惟舊法之規定，雖以受監護人之最佳利益，並依受監護人之財產狀況為之，但仍以上對下監護之角度，處理監護事務。此外，無論送入精神病院或監禁於私宅之處置，皆為侵害人身自由之措施，卻僅依親屬會議之同意即可為之，甚或當父母或同住之祖父母為監護人者，更無庸再經親屬會議之同意。足見舊法之規定，顯然未將禁治產人視為權利主體，更未將其利益置於首位考量。

本次修法，雖有考量成年人在受監護宣告前，已經歷長時間之獨立自主生活，故於其能表意時，對於護養療治之方式應儘量尊重本人意思，並應考量其

身心狀態與生活狀況。可惜，新法仍未就護養治療之內容具體說明，只刪除監禁私宅或送入精神病院之規定，就有無強制安置之可能，則改由依照精神衛生法加以處理，對於罹患精神疾病之人或該法中定義之嚴重病人，於情況緊急非立即保護或送醫，其生命或身體有立即之危險者，可給予緊急安置之處分。精神衛生法並就緊急安置之要件、期間、結束、救濟管道、以及監督有明文規定。

此外，依照台灣民法第 1113 條準用民法第 1101 條之規定，就監護人替受監護人購置或處分不動產，以及替受監護人交還租屋，或將其原本居住之房屋出租給他人時，因其涉及受監護人所熟悉環境的變動，對其利益影響重大，故應經由法院的許可，方得為之。

2. 輔助職務內容

法院為輔助宣告之後，受輔助人原則上仍有行為能力，只有為重要法律行為時，方應經輔助人之同意，以保護受輔助宣告之人。而其他事務，則應由受輔助人自行決定，單獨為之。

何謂重要法律行為，則明定於台灣民法第 15 條之二。依該條之規定，多屬於財產行為，而身分行為亦無明文具體之規定。此外，該規定又分為列舉與概括之事由：

列舉事由中，包括受輔助人為獨資、合夥營業或為法人之負責人、為消費借貸、消費寄託、保證、贈與或信託、為訴訟行為、為和解；調解；調處或簽訂仲裁契約、為不動產、船舶、航空器、汽車或其他重要財產之處分、設定負擔、買賣、租賃或借貸、為遺產分割、遺贈、拋棄繼承權或其他相關權利等，皆應經輔助人之同意方生效力（15 條之二第 1-6 款）。

概括事由，則可讓法院依聲請權人或輔助人之聲請，而指定其他行為。（15 條之二第 7 款）

至於身分行為，由於並無明文規定，因而產生疑義。原則上，受輔助宣告之人應有自行決定之權利，例如醫療行為的決定權，但其並不在台灣民法第 15 條之二所規定的範疇中，除非有依概括規定，由法院依聲請指定之之情形。另外，依該法第 15 條之二第一項第三款之規定，在為訴訟行為時，應經輔助人之同意，但此一訴訟行為，是否包括因身分關係所提起之訴訟，例如婚生否認之訴或是強制認領訴訟等，就此類具有高度人格自主性之行為，若以訴訟為之，因而必須受民法第 15 條之二的限制？此恐有再商榷的餘地。

（五）監護人之權利與義務

針對監護人的權利與義務，在修法之後，肯認監護人之專業性，而允許其請求報酬。其數額由法院按其勞力及受監護人之資力酌定之(民法第1104條)。又既可請求報酬，故其執行職務所應負之注意義務，亦提升至善良管理人之注意義務，若因過失造成受監護人之損害，自應負賠償責任（民法第1100，1109條）。

（六）法院的監督義務

在選任監護人執行監護職務時，當監護人濫用其職權時，即會使受監護人之權益受到損害。故監護事項，應有監督之機關。

在修法前，此一任務由親屬會議承擔，但因親屬會議在現代社會之功能日漸式微，已經無法承擔這個責任。本次修法之後，規定由法院承擔此一任務。

在監護人選任之後，若有事實足認監護人不符受監護人之最佳利益，或顯有不適任之情事者，法院得依受監護人、四親等內之親屬、檢察官、主管機關或其他利害關係人之聲請，或依職權，另行選定適當之監護人。又於財產管理之監護職務上，針對一些財產行為之作成，亦對監護人設有限制，必須以法院的許可為前提要件，此包括處分受監護人之不動產，交還租屋，以受監護人之財產為投資行為等（民法第1101條）。

（七）監護或輔助之終止

依台灣民法第14條第二項與第15條之一第二項之規定，在受監護或受輔助宣告之原因消滅時，可依原聲請權人之聲請，撤銷其宣告。

二、程序法之修正－家事訴訟至家事非訟之程序保障

台灣於2012年1月1日公布家事事件法，並於同年6月1日施行。該法正視家事事件之特殊性，將分散在民事訴訟法中之人事訴訟與調解程序，以及非訟程序中之家事事件，加以統合，使法官得以於同一程序中，迅速妥適解決相關連之家事紛爭。此外，亦藉助各項專業資源，協助法官用以妥善根本解決家事紛爭，重整相關當事人之關係，並為回應家事事件具公益性之色彩，而針對事件性質，採用不同之程序法理，包括職權探知主義的運用以發現真實。

家事事件法以訟爭性強弱程度、當事人或利害關係人對程序標的所享有之處分權範圍、及需求法院職權裁量以迅速裁判之不同,將家事事件區分為五類，分屬家事訴訟與家事非訟事件，其中自然也包括為落實實體法中所規定之成年監護制度，而明定之監護與輔助宣告事件。

自家事事件法制定後，整合人事訴訟程序，與非訟事件法中之家事訴訟程序，就有關監護輔助宣告事件之程序規定，產生相當大的變動，而將原屬於訴訟程序之監護輔助宣告事件，移為家事非訟程序處理。

無論監護亦或輔助事件，其主要目的在使行為能力喪失或減退之人，能經由監護人或輔助人之設置，使其法律行為之進行不受到影響。因此，在符合監護或輔助設置之要件後，法院應儘速依職權，為其選任適當之監護人及輔助人，以保護其權益，故其非訟性質濃厚。

依家事事件法第 3 條第四項第四款之規定，將監護與輔助宣告事件、與選任監護與輔助人事件，列為丁類家事非訟事件，並適用同法 74 條以下之家事非訟程序，而於家事非訟程序中之分則，予以明文規定（家事事件法第 164 條至第 176 條，第 177 條至第 180 條）。

其次，就具某程度之訟爭性，或需由法官以職權裁量之宣告停止監護權及撤銷停止監護宣告事件、與監護人報告財產狀況以及監護人報酬事件，列為戊類家事事件（家事事件法第 3 條第五項第十、第十一款），而依家事事件法第 74 條以下之規定，適用家事非訟程序。

只有因監護所生之損害賠償事件，例如民法第 1109 條所定事項，因仍具訟爭性，屬於與身分關係有關之財產紛爭，其金額又屬可得確定，而被劃歸丙類家事訴訟事件，適用家事訴訟程序處理（家事事件法第 3 條第三項第五款、家事事件法第 37 條）。

有關監護或輔助宣告事件之相關規定，主要規定於家事事件法中之家事非訟分則第十章與第十一章。所有因監護或輔助宣告之設置所產生之程序，皆涵蓋在內，如監護或輔助之設置、撤銷、監護人或輔助人之改定、辭任、酌定報酬、指定或撤銷其執行職務範圍、或聲請法院許可、監護人或輔助人之損害賠償等。另外，第十三章中所規定之保護安置事件，則涉及受監護或輔助宣告人有因緊急安置或強制住院之情形，亦有適用之可能。

(一) 監護與輔助宣告事件

1. 當事人或關係人

有關監護或輔助宣告事件的當事人，於家事事件法之家事非訟分則中，雖並未進一步規定，但於家事非訟程序通則中，則有程序參與之相關規定。

依此，為保障利害關係人之程序參與權及聽審請求權，對聲請人、相對人

外之利害關係人，如有法律規定應依職權通知其參與程序，或因程序之結果致其權利受侵害之情形，自應保障其程序參與權。此外，法院亦得通知因程序之結果而法律上利害受影響之人，或該事件相關主管機關或檢察官參與程序（家事事件法第 77 條）。又上述所言之人，或有其他之利害關係人，亦可自行聲請參與程序，惟法院為避免參與浮濫，認不合參與要件時，應以裁定駁回。

2. 程序能力

為保障應受監護宣告人及受監護宣告之人之程序主體權及聽審請求權，不論其是否具有意思能力，於聲請監護宣告事件及撤銷監護宣告事件，皆應賦與程序能力（家事事件法第 165 條本文）。至於受輔助宣告之人，依台灣民法第 15 條之二之規定，其不因輔助宣告而喪失其行為能力，故亦應有程序能力。民法第 15 條之一第一項所定受輔助宣告之人，雖就某類影響其權益之重大事項為法律行為，依民法第 15 條之二第一項規定，應經輔助人同意，始生效力，惟其本人仍具有行為能力，即具有程序能力，只是就其欲為某類訴訟行為時，應受輔助人同意之限制而已。又同條項第三款明文規定，受輔助宣告之人為訴訟行為，應經輔助人同意。所以家事事件法第 45 條之一第一項規定，「輔助人同意受輔助宣告之人為訴訟行為，應以文書證之」。此項應經輔助人同意之訴訟行為，以起訴行為為限，至於受輔助宣告之人就他造之起訴或上訴為訴訟行為，則無須經輔助人同意。即使由自己提起上訴，亦不在需經輔助人同意的範圍之內。但為捨棄、 認諾、 撤回或和解，則皆應經輔助人以書面特別同意。

惟此規定之適用，應限縮於丙類財產權事件。有關人身上之行為，應無須輔助人之同意即有程序能力，而可獨自為訴訟行為。

3. 程序監理人

依家事事件法第 15 條第一項第三款之規定，處理家事事件，為保護有程序能力人之利益認有必要者，法院得依利害關係人聲請，或依職權選任程序監理人。其中包括受監護宣告之人，其雖不能獨立以法律行為負義務，但在撤銷監護宣告、聲請監護宣告等就有關其身分之事件，只要能證明有意思能力，即有程序能力，而能獨立行使其權利，但因受心理及精神狀態等影響，事實上無法在程序上行使權利，或行使有困難，故應為其選任程序監理人。

又，此除了於家事事件法總則編有規定之外，進而在家事非訟分則中，亦於該法第 165 條但書中有類似規定，於聲請監護宣告事件及撤銷監護宣告事件，承認

不論應受監護宣告之人或受監護宣告之人有無意思能力，皆有程序能力，進而在其為無意思能力者，即無法辨識利害得失時，即便有程序能力，法院仍應依職權，為其選任程序監理人，以充分保障其實體及程序利益。

法院於程序進行中，認為當事人有適合之代理人、有程序能力人自己已能保護其實體及程序利益，或程序監理人不適任，且有必要時，自得隨時以裁定撤銷程序監理人之選任，或變更選任更適當之程序監理人。

程序監理人之選任、變更或撤銷，影響當事人及其法定代理人等程序上之權益，是以，法院於裁定前，應聽取當事人或關係人、法定代理人、被選任人及法院依職權已知之其他利害關係人陳述意見。惟如親自聽取其意見存在有礙難情形，或有害其身心健康，或顯有延滯程序之虞時，法院自宜以其他適當方法調查。

由於程序監理人擔任受監理人與法院間溝通之橋樑，並保護受監理人之利益，協助法院迅速、妥適處理家事事件，自有為受監理人進行程序之權。程序監理人既然是為受監理人之利益進行程序，故受監理人本人依法所得為之程序行為，程序監理人始得為之。反之，受監理人本人不得為之程序行為，程序監理人當然不得為之。

至於程序監理人之酬金，法院得依程序監理人聲請，按其職務內容、事件繁簡等一切情況，以裁定酌給酬金，其報酬為程序費用之一部。前項酬金，法院於必要時，得定期命當事人或利害關係人預納之。但其預納顯有困難者，得由國庫墊付全部或一部。其由法院依職權選任者，亦得由國庫墊付之。

4. 聽審權之保障

關於聲請監護輔助宣告事件、撤銷監護輔助宣告事件、就監護宣告聲請為輔助宣告事件，及另行選定或改定監護或輔助人事件，則可準用家事事件法第 106 條之規定。依該條規定，法院為審酌受監護人或輔助人之最佳利益，得徵詢主管機關或社會福利機構之意見、請其進行訪視或調查，並提出報告及建議，供法院參酌。法院斟酌前項調查報告為裁定前，為確保關係人之聽審請求權，應使關係人有陳述意見之機會，但其內容涉及隱私或有不適當之情形者，不在此限。此外，法院認為必要時，得通知主管機關或社會福利機構相關人員於期日到場陳述意見。

又上開事件，對於應受監護宣告人，或應受輔助宣告之人之權益，影響重大，法院除應依家事事件法第 77 條程序參加之規定，保障其他利害關係人之聽審請求權之外，於裁定前，更應依受監護人或輔助人之年齡、理解及辨識能

力等不同狀況，於法庭內、外，親自聽取其意見，或藉其他適當之方式，曉諭裁判結果對其可能發生之影響，藉以充分保障其意願表達權，在此亦有準用同法第 108 條規定之必要（家事事件法第 176 條、178 條)。

5. 專業鑑定書

為使受訴法院能儘快把握事證調查之方向，及決定有無鑑定之必要，或如何為鑑定，而於家事非訟法第 166 與 178 條規定，聲請人為監護或輔助宣告之聲請時，宜提出診斷書。

又關於應受監護或輔助宣告之人及鑑定人之訊問，已於民事訴訟法中規定，於家事事件法亦直接採取其內容。依家事事件法第 167 與 178 條之規定，法院應於鑑定人前訊問受監護或受輔助宣告之人，但有礙難訊問之情形，或恐有害其健康者，不在此限。此外，不論監護或輔助之宣告，皆應先詢問鑑定人有關受監護或輔助宣告之人之精神及心智狀況，方得為之。又為提高鑑定之準確性，鑑定應有精神科專科醫生或具精神科經驗之醫師參與（家事事件法第 167、178 條)。

(二) 保護安置事件

在家事事件法第184條與第185條中，對保護安置與停止安置事件，有就管轄權與其他程序上事項予以規定。所謂安置事件，包括關於身心障礙者之繼續安置，或其他法律規定應由法院裁定之安置事件，以及停止緊急安置事件與強制住院事件。

關於上述事件，有準用家事事件法第106條、108條、165條、166條之可能，即前述有關審前報告及意見陳述之聽審保障、聽取未成年子女意見、程序能力、診斷書之提出之相關規定。

參、台灣現行法所產生之缺失與未來變革之方向－代結論

依據橫濱宣言之理念，成人監護制度最重要的原則，乃在於保障身心障礙者之自我決定權，其應享有與一般人相同之權利能力與行為能力。因此，成年監護制度為實踐宣言精神，必須以受監護人作為權利主體。首要之處，應儘量尊重受監護人或輔助人之意願，以各種機制，在監護輔助宣告之聲請、監護人、輔助人之選任，以及財產與人身管理事項上，特別是醫療方式等方面，儘量充分落實其自我決定權。其次，再以法院之監督機制，避免監護人或輔助人濫用權利，以防止對受監護或輔助人造成侵害，並在受監護或輔助人行使自我決定

權時，若有可能發生嚴重損及自身之人身財產安全的狀況下，能作為適當調控之機關。

就此，台灣雖然在成年監護之修法上，已注意尊重受監護人之獨立人格，但修法內容上卻仍有不足之處。台灣現行制度仍舊無法跳脫上對下監護之色彩。一來,雖以二元制來區分監護宣告或輔助宣告,但仍無法就成年人之個別需求，進最大可能尊重其殘存之自我意志；二來，台灣尚未引進意定監護制度，也無法讓當事人之自我決定權，能透過事前的指定監護或輔助人而達成；三來，對於人身管理之規定欠缺，使得對於當事人之重大醫療行為，只能適用特別法之規定，而各該特別法大多仍不脫代理色彩，加上各該特別法本有其個別特殊之立法目的，自然無法要求對於當事人之意願予以充分保障。故未來修法時，應朝下述方向進行：

一、成年監護制度應與行為能力制度切割

現行成年監護制度受舊有禁治產宣告之框架影響，即使增訂輔助宣告制度，卻仍然無法脫離與行為能力之連結。受監護宣告之人，會喪失行為能力，而仍由法定代理人代為決定一切事務，包括日常生活所需之法律行為。就此，台灣法制仍舊無法落實成年監護應以「輔助」取代「代理」的精神。

二、引進意定監護制度，且優先於法定監護制度加以適用

建議於現行法中，增訂意定監護制度，讓當事人得以在意思能力喪失前，透過訂定意定監護契約之方式，針對監護人或輔助人之人選、或安排日後人身與財產管理的事項，包括財產如何運用、採行何種醫療方式等，預先表明其意志。如此一來，即使在當事人意思能力喪失之後，在其所指定之監護人的協助下，依然能儘量按其本人之意思處理其事務，並依其意願決定其生活的型態與內容。此一制度，比法定監護更能保障當事人之自主決定權，故應優先適用。

三、加強法院監督監護之功能

台灣成年監護制度在立法修正後，不論在事前的監護輔助宣告之聲請、選任監護人輔助人，或是在事後對於監護人輔助人執行監護事務的監督，法院皆扮演決定性的角色。

在家事事件法將監護與輔助宣告定位為家事非訟事件後，雖然法院依職權介入之色彩濃厚，但為兼顧當事人之自我決定權，不論在實體法或程序法亦有相應之措施，包括給予受監護、輔助人程序能力，於決定是否為宣告前，應聽取本人之意見，並應經醫生之專業鑑定等。

然而，在事後的監督監護職務上，現行法卻只規定，法院於必要時，得命監護人提出報告，並僅針對重大財產行為，設有法院許可之前提要件。此一監督機制過於被動，又欠缺對重大人身行為的管制，實在有需要改進之處。

若是再考量，一旦引進意定監護制度後，對於意定監護人之監督，更形重要。是以，台灣立法者應考慮，增訂監護監督人制度，或是加強家事調查官的功能，方能對受監護輔助人之權益，建立完整可行的保障機制。

四、財產管理與人身管理應並重考量

台灣的成年監護舊制，僅以保護受監護宣告之人的財產安全為任務，而幾乎未正視人身管理在成年監護的重要性。成年監護新制，主要目的在強調維護當事人之人格權，尊重其殘存意志，因此理應對於人身管理有具體之規定。畢竟護養療治之方式將影響其未來生活，應與財產管理一樣重要。

然而現行台灣成年監護法，確仍然未對重要人身管理事項為明文規定，造成監護人在執行受監護人之重要人身行為時，必須依各相關特別法之規定處理之，例如醫療相關法規。然而各該特別法中，卻又未必將受監護人視為權利主體看待，即可能對其重要之人身行為，會罔顧本人之意願加以作成，因此實質上並未能充分保障其自我決定權，此為我國之成年監護法仍有待改善之處。

I. Introduction

The original purpose of adult guardianship law is to provide necessary legal protection to persons with congenital or acquired disabilities. However, as mental capacity sometimes deteriorates with age, in an aging society the number of older people who gradually lose the capacity to deal with financial and legal affairs is increasing, and therefore the demand for guardianship services is also increasing. This phenomenon directs national governments to reconsider the significant implications of the adult guardianship law, and to improve the adult guardianship systems in their countries.

The recent amendment of Taiwanese adult guardianship law originates from a public hearing held by the Parents Association for Persons with Intellectual Disability at the Legislative Yuan in 2000. After that public meeting, the Ministry of Justice began to draft the amendment bill and submitted it to the Legislative Yuan for legislation. However, because the amendment bill was related to the laws on the adjudication of interdiction and the guardianship over minors, it has been discussed for several years and finally it became law in 2008.

In order to underline that the purpose of adult guardianship law is to protect the rights and dignity of the wards, the amendment does not only change the discriminatory term 'the adjudication of interdiction' to 'the order of commencement of guardianship', but also creates "the order of commencement of assistance" to provide appropriate protection to the persons with minor mental incapacity.

Japan is the first country in East Asia to improve its adult guardianship system. The year 1981 was proclaimed the International Year of Disabled Persons (IYDP) by the United Nations, and in December 1982 the World Programme of Action Concerning Disabled Persons was adopted by the UN General Assembly. Following these developments, Japanese adult guardianship law was amended in order to establish a new adult guardianship system in which the ward's right of self-decision can be ensured. In the new adult guardianship system, the interdict/quasi-incompetency system was changed to a system of assistance, curatorship, and guardianship. And a voluntary guardianship system was also instituted.

After Japan and Taiwan, South Korea also amended its adult guardianship law in 2011, and the law came into force in 2013. Since there are more and more nuclear families in South Korea and the relations among family members are deteriorated, the legislators in South Korea considered that, in order to affirm the need for the persons with disabilities to be guaranteed full enjoyment of their human rights, adult guardianship should not be regarded as a matter for the family to deal with, but as a responsibility of the government. As a result, the amendment creates an adult guardianship system in which a guardian cannot exercise comprehensive protection authority, and decision-making rights of the guardian can be exercised only when the ward's capacity is lost. The current system in South Korea is similar to the one in Japan. It has two types of guardianship, the optional guardianship and the legal guardianship. The legal guardianship has three categories, the adult guardianship, the limited guardianship and the special guardianship.

Observing the development of adult guardianship systems in three countries, it is not difficult to notice that, because of ageing population and low fertility, all the responsibilities of taking care of persons with disabilities and ageing people cannot be imposed on the family members, and the government should be more active in fulfilling the responsibilities.

In view of the Yokohama Declaration issued by the World Congress on Adult Guardianship Law 2010, which is under the influence of The United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities, the persons with disabilities must be assumed to have legal capacity, and their decisions about how to handle their personal and financial matters should be respected. Therefore, the concept of "protection" should be replaced by that of "assistance", and the states should ensure that the assistance occurs only when it is necessary. Instead of using substituted decision-making mechanisms to protect the rights of persons with disabilities, the legislation should in principle support the persons with disabilities to exercise their legal capacity to the greatest extent possible. Furthermore, more attention is paid to matters of personal health and welfare. And in order to protect the wards, the government should introduce safeguards against abuse of the adult guardianship system.

With all the above mentioned developments, the adult guardianship system is gradually moved out of the domestic sphere and into the public law domain. As society changes, the adult guardianship must evolve to reflect these changes.

Hereafter the amendments to the adult guardianship law in Taiwan, both the substantive and procedural laws, will be discussed, and through the discussion, it will be examined whether the Taiwanese adult guardianship system conforms to the principles embodied in the improved adult guardianship systems of other countries. The problems of the current adult guardianship system in Taiwan will be discussed, and the direction for the future improvement of the system will be proposed.

II. The Amendments to the Substantive and Procedural Laws in Taiwan

The amended substantive law on adult guardianship in Taiwan includes the General Principles and the Guardianship Chapter of Family Law in the Taiwanese Civil Code. The amendments include: the law on the adjudication of interdiction is replaced by the law on the order of commencement of guardianship and the law on the order of commencement of assistance, and therefore the rights and dignity of the ward can be respected in a more flexible system; the court is authorized to designate a qualified person to be the guardian, and the family member does not have the priority to be selected; the court is substituted for the family council to review the guardianship; finally, both in designation of a guardian and in performance of duty of the guardian, the ward's opinion should be taken into consideration.

After the amendments to the substantive law, the court is authorized to designate a guardian and the duty performed by the guardian is relating to the ward's life, treatment, and financial management, and hence the competence of the designated guardian is material to the interest of the ward. Therefore, the procedural law concerning the designation of a guardian should be amended so that the guardian can be designated prudently. When the Family Proceeding Act was legislated, it modified the procedure of commencement of guardianship and commencement of assistance in order to protect the rights and interest of the ward or the person under assistance.

A. The Amendments to the Substantive Law

1. The Parallel Systems of Guardianship and Assistantship over Adults

The most important amendment in the Taiwanese adult Guardianship law is to substitute the law on the order of commencement of guardianship for the law on the adjudication of interdiction, and to institute the law on the order of commencement of assistance. This amendment allows the persons with less intellectual disability can be declared as the person under assistance, in order to remedy the problem of the adjudication of interdiction as a measure of protection which is all-embracing and result in the deprivation of capacity in all areas of decision-making.

2. Commencement of Guardianship or Assistance

Under the Amended Taiwanese Civil Code articles 14 and 15-1, with respect to any person who is not able or has insufficient capacity to make declaration of intention or to discern the outcome of the declaration of intention due to mental disability, the court may order the commencement of guardianship or the commencement of assistance, at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority or an organization of social welfare. And under the Amended Taiwanese Civil Code articles 15 and 15-2, a person who has become subject to the order of the commencement of guardianship has no capacity to perform any juristic act, but a person under assistance still has the capacity to perform juristic acts, and only if he/she intends to perform the acts identified in the article 15-2, he/she must obtain the consent of his/her assistant.

3. The Designation of Guardian and Assistant

The amendment revoked the distinction between designated guardian and legal guardian, and authorized the court to select and designate the guardian without being required to follow any priority rule.

When ordering commencement of guardianship or commencement of assistance, the court shall elect one or more guardians or assistances among spouse, any relative within the fourth degree of kinship, relative resides together in recent year,

competent authority, organization of social welfare or other proper person. (The Taiwanese Civil Code article 1111, and this provision applies mutatis mutandis to the commencement of assistance under article 1113-1).

Because a guardian sometimes needs to perform his/her duty with complicated and specialized knowledge, for example, the duty of financial management could be performed by financial professionals, and the duty of medical treatment could be performed by medical professionals. Therefore, in order to allow the duty of guardianship or the assistance to be performed more properly, it is necessary to select more than one guardian or assistant. Pursuant to articles 1112-1 and 1113-1 of the Taiwanese Civil Code, when selecting several persons as guardians or assistants, the court may designate the guardians or the assistants to perform their duties jointly or separately.

Moreover, it is occasionally necessary for the government to perform the duty of guardianship vicariously. Therefore, a guardian needs not to be a natural person. Pursuant to subparagraph 4 of articles 1111-1 and 1113-1 of the Taiwanese Civil Code, a juridical person can be selected as a guardian or an assistant. However, the person who represents the juridical person and performs the duty of guardian practically should be a qualified staff in the juridical person and be selected in terms of the nature of the juridical person.

There are passive qualifications for a guardian; for example, minors, absent persons, persons who are subjects to the commencement of guardianship or assistantship, or persons who declare bankrupt, cannot be designated as a guardian (article 1096 of the Taiwanese Civil Code).

And pursuant to the Taiwanese Civil Code, when electing guardians or assistants, for the best interest of the ward, the court shall first take the ward's opinion and every other things into consideration, and shall pay attention to the following things: 1. ward's physical and spiritual health, his/her life and finance; 2. relations between the ward and his/her spouse, children, and others living in the same household; 3. occupation, experience, opinion of the guardian and relations between the guardian and the ward; and 4. when a juristic person is the guardian, the category and content of its business; and relations between the juristic person and its representative and

the ward.

After a qualified guardian has been designated by the court, due to the public interest involved in the duty of guardianship, if the guardian wants to dismiss his/her duty, he/she needs to have good causes and with the court's permission.

4. The Content of the Duty of Guardianship or Assistance

a. The Content of the Duty of Guardianship

As for the content of the duty of guardianship, article 1112 of the Taiwanese Civil Code describes only the principle of performing the duty of guardianship: when enforcing guardianship responsibilities relating to the ward's life, treatment and financial management, the guardian shall respect the ward's intent and take the ward's physical and spiritual health, as well as his/her life condition into consideration. And it can be inferred from the article mentioned above that the duty of guardianship comprises of the duty of property management and the duty of personal care.

Pursuant to article 1098 of the Taiwanese Civil Code, a guardian within the scope of his/her delegated power is the statutory agent of the ward. The delegated power should ne interpreted as including the power to conduct actions concerning property and actions concerning status.

The minor guardianship law applies mutatis mutandis to the performance of the duty of property management by the guardian in adult guardianship. Pursuant to article 1103 of the Taiwanese Civil Code, the ward's property is managed by the guardian. The guardian shall not use or dispose of the ward's property except in the interest of the ward (article 1101), and the guardian shall not acquire the property from his ward (article 1102).

As for the duty of personal care, there is no substantial regulation in the amended Taiwanese Civil Code. Before the amendment entered into force, the guardian should, in the interest of the ward and based on the financial condition of the ward, provide medical treatment and care to the ward, and moreover, the permission of the

family council was necessary when the ward was sent the ward to the asylum or confined in the private residence by the guardian, except that the guardian was the parent of the ward or the grandparent who lives together with the ward.

However, for the person under guardianship, receiving medical treatment and care is the most important part of his/her personal care. Although under the previous law, the guardian should provide medical treatment and care in the interest of the ward and based on the financial condition of the ward, the duty of guardianship was still performed in a paternalistic manner. In addition, both sending to the asylum and confining in the private residence were the measures to restrict the ward's personal freedom, but under the previous law, it could be done simply with the permission of the family council, or even without the permission of the family council when the guardian was the parent or the grandparent who lives together with the ward. In sum, the previous law did not consider the ward as a subject of right and give the most weight to the interest of the ward.

In consideration that an adult ward has lived independently for a long time before being put under guardianship, the amended law on adult guardianship in Taiwan states that when deciding the manner of providing medical treatment and care, the intent made by the ward when he/she is able to do so should be respected and the ward's physical and spiritual health as well as his/her life condition should be taken into consideration. However, the content of medical treatment and care is not elaborated in the amended law. The rules concerning confinement in private residence and sending to the asylum have been omitted, and therefore the rules concerning mandatory hospitalization and community treatment in the Mental Health Act should apply. Pursuant to the Mental Health Act, emergency management should be taken for those severe patients whose life and body is in imminent danger or a likelihood of danger under critical conditions unless immediate protection or access to medical care is provided. The same Act also provides the requirements for taking emergency management, defines the duration and termination of the management, provides the remedy and institutes a monitoring mechanism.

Furthermore, pursuant to article 1101 of the Taiwanese Civil Code, which is concerning the guardianship over minors and shall apply mutatis mutandis to the

guardianship over adults, the guardian shall acquire permission from the court, when he/she purchases or disposes of real property for the ward, rents out the ward's living building, or terminates lease of the ward's living building. The reason for this legislation is that the above-mentioned acts of the guardian can result in changes in the ward's familiar environment and therefore have significant implications for the ward.

b. The Content of the Duty of Assistance

After the court orders commencement of assistance, in principle the person under assistance still has the capacity to perform juristic acts, and only when he/she intends to perform important juristic acts, he/she must obtain the consent of the assistant for his/her own protection. And the person under assistance can decide and perform acts other than important juristic acts by him/herself.

The important juristic acts are defined in article 15-2 of the Taiwanese Civil Code, and most of them are actions concerning property. The important juristic acts are enumerated as follows: 1. being a responsible person of a sole proprietorship, of a partnership company, or of a juristic person; 2. making loans for consumption, consumption deposit, a guaranty, a gift, or a trust; 3. taking any procedural action; 4. agreeing to compromise, conciliation, adjustment, or signing arbitration contract; 5. performing any act with the purpose of obtaining or relinquishing any right regarding real estate, vessels, aircrafts, vehicles, or other valuable property; 6. performing partition of the inheritance, legacy, waiving the right to inheritance, or any other related right. And the Court is authorized to appoint any other act as an important juristic act at the request of the assistant, the person under assistance, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority or an organization of social welfare.

It is uncertain whether and how article 15-2 applies to actions concerning status. In principle, the person under assistance should be entitled to decide on the matters which are not enumerated in article 15-2, such as receiving medical treatment, unless it is an act appointed by the court in accordance with the same article. Moreover, pursuant to subparagraph 3 of paragraph 1 of article 15-2, it is necessary for the person under assistance to obtain the consent of the assistant in order to take

any procedural action, but whether a procedural action concerning status, such as bringing an action for disavowal of legitimacy or claiming acknowledgement from the nature father, should be considered as a "procedural action" referred in article 15-2 and therefore be taken in accordance with the same article, is an issue needed to be addressed.

5. The Right and Obligation of the Guardian

In recognition of the expertise of a guardian, the Amended law allows the guardian to claim for compensation, and the amount of compensation is determined by the court based on the labor involved and the assets of the ward (article 1104 of the Taiwanese Civil Code). Since a guardian could claim for compensation, he/she shall exercise guardianship with the care of a good administrator (article 1100 of the Taiwanese Civil Code), and if the guardian, intentionally or negligently, has caused damage to the ward when performing his/her duties, the guardian shall compensate the ward any injury arising therefrom (article 1109 of the Taiwanese Civil Code).

6. The Monitoring Duty of the Court

The abuse of guardianship duties is detrimental to the interest of the ward, and therefore the exercise of guardianship should be monitored.

Under the law before amended, the family council should monitor the exercise of guardianship. However, the family council has gradually lost its function in modern society and could no longer perform the monitoring duty, and therefore the law is amended to impose the duty upon the court.

If there is enough fact which indicates that the guardian does not act for the best interest of the ward, or there are other reasons which indicate that the guardian should not be the guardian, the court may order guardianship to other proper person based on application made by the assistant, the person under assistance, any relative within the fourth degree of kinship, a prosecutor, a competent authority or other person in interest (article 1106-1). In addition, it is necessary for the guardian to acquire the permission from the court in order to take certain kind of actions concerning property, such as disposing of the ward's real property, or terminating

lease of the ward's living building.

7. The Termination of Guardianship or Assistance

Pursuant to paragraph 2 of article 14 and paragraph 2 of article 15-1 of the Taiwanese Civil Code, When the cause of guardianship or assistance ceases to exist, the court must revoke the order of the commencement of guardianship or assistance at the request of the person in question, his/her spouse, any relative within the fourth degree of kinship, a prosecutor, a competent authority or an organization of social welfare.

B. The Amendments to the Procedural Law

The Family Proceedings Act (hereafter the Act) was published on January 1, 2012 and came into force on June, 1, 2012 in Taiwan. In recognition of the unique nature of family cases, the Act streamlines and consolidates various procedures in the Taiwan Code of Civil Procedure and the Non-Contentious Cases Procedures Act, in order to allow judges to resolve related family cases promptly and properly in a uniform procedure. Moreover, with the help of professional resources, judges can be better prepared to resolve disputes relating to family matters and to reform the relationship between the persons involved. And in response to public interest concerns, the Act provides procedures based on different procedural principles for cases with different characteristics, including judicial initiative in evidential matters for fact-finding.

Family cases are categorized into five categories in the Act according to the level of contentiousness, the scope of power held by parties or persons in interest over proceedings, the need for judicial discretion to make judgment timely. Family cases are also differentiated as family litigations and family non-contentious cases, the former includes category Ⅰ,Ⅱ,and Ⅲ cases, and the latter includes category Ⅳ and Ⅴ cases. And the proceedings of the cases concerning commencement of guardianship and assistance over adults are also regulated in the Act.

After the legislation of the Act, the cases concerning commencement of guardianship and assistance are no longer regulated as family litigations but as

family non-contentious cases. The purpose of adult guardianship or adult assistance is to allow the persons with no or deteriorated capacity to perform juridical acts to perform the acts with the help of guardians and assistants. Therefore, after determining that the requirements for commencement of guardianship or assistance have been met, the court should appoint qualified guardian or assistant as soon as possible in order to protect the persons under guardianship or assistance. And this is the reason why it is more appropriate to apply the procedure rules of non-contentious cases to the cases concerning commencement guardianship and assistance.

Pursuant to subparagraph 4 of paragraph 3 of article 3 of the Act, the cases concerning commencement of guardianship and assistance, as well as the cases concerning appointment of guardian and assistant, are categorized as category Ⅳ and family non-contentious cases, and therefore the procedure rules for family non-contentious cases shall apply (articles 74 through 97, 164 through 176 and 177 through 180 of part Ⅳ of the Act).

With higher level of contentiousness or being matters of judicial discretion, the cases concerning dismissing a guardian, revoking order dismissing guardian, reporting the ward's assets by a guardian, and awarding compensation to a guardian are categorized as category Ⅴ cases (subparagraphs 10 and 11 of subparagraph 3 of article 3 of the Act), and therefore the procedure rules for family non-contentious cases shall apply.

Only the cases concerning damage resulting from exercising guardianship, such as the matters regulated by article 1109 of the Taiwanese Civil Code, with much higher level of contentiousness and being property disputes in which damage awards can be determined, are categorized as category Ⅲ and family litigations, and therefore the procedure rules for family litigations shall apply (subparagraph 5 of paragraph 3 of article 3 and article 37 of the Act).

The procedure rules for commencement of guardianship are described in chapter 10, and the procedure rules for commencement of assistance in chapter 11, part Ⅳ of the Act. All related proceedings, such as ordering the commencement of guardianship or assistance, revoking the order, electing or changing a guardian or

assistant, withdrawal from the duty of a guardian, determining the guardian's compensation, defining or reducing the scope of exercising guardianship, petition for permission of the court, and determining the damage award, are regulated under the two chapters of the Act. In addition, the procedure rules for cases concerning protection and rehabilitation described in chapter 13 of the Act may apply to the emergency placement or mandatory hospitalization of the ward or the person under assistance.

1. Cases Concerning Commencement of Guardianship and Assistance

    a. The Party or the Person in Interest

Although the procedure rules for cases concerning commencement of guardianship and assistance do not provide the procedure participation right to the parties involved in the cases, the procedure participation right is in general provided under the general principles of the procedure rules for family non-contentious cases.

In order to protect the procedural participation right and the right to a fair hearing of the person in interest, if there is any regulation requiring the court to notify the person of his/her right to participate, or if the result of the proceedings will cause harm to the person, his/her procedural right should be protected. Moreover, the court may notify the person whose legal interest can be affected by the result of the proceedings, a competent authority or a prosecutor of procedural participation (article 77 of the Act). And the persons mentioned above or other person in interest can file a petition for participation, while the court can determine that the requirements are satisfied to deny the petition by a ruling in order to prevent too much participation.

    b. Capacity to Proceed

In order to protect the procedural subject right and the right to a fair hearing of the person who should become or has become subject to the order of the commencement of guardianship, no matter whether he/she has mental capacity, in cases concerning commencement of guardianship and revoking the order of the commencement of guardianship, he/she should have the capacity to proceed (article

165 of the Act).

As for the person under the assistance, pursuant to article 15-2 of the Taiwanese Civil Code, he/she does not lose the capacity to make juridical acts due to the commencement of assistance, and therefore he/she should have the capacity to proceed. Although pursuant to paragraph 1 of article 15-2 of the Taiwanese Civil Code, the person under assistance must obtain the consent of his/her assistant to perform certain important juridical acts, the person under assistance still has the capacity to capacity to make juridical acts, and therefore he/she should have the capacity to proceed, only when he/she intends to make certain procedural actions, pursuant to subparagraph 3 of the above-mentioned paragraph, he/she must obtain the consent of his/her assistant. Pursuant to paragraph 1 of article 45-1 of the Act, the assistant's consent that the person under his/her assistance can make a procedural action should be evidenced in writing. The procedural action referred in the above-mentioned subparagraph should be restricted to initiation of an action, and when the person under assistance makes procedural actions in response to the initiation of an action or the appeal made by the other person, he/she needs not to obtain the consent of his/her assistant. Even when the person under assistance takes an appeal, he/she needs not to obtain the consent. But when the person under assistance intends to abandon or to admit a claim, to voluntarily dismiss an action, or to settle, he/she should obtain the assistant's written consent.

The above-mentioned rules should apply only to property disputes categorized as category Ⅲ cases. When the person under assistance intends to take a procedural action concerning status or identity, he/she should have the capacity to proceed without the assistant's consent and can take the action by him/herself.

c. Guardian Ad Litem

Pursuant to subparagraph 3 of paragraph 1 of article 15 of the Act, the court may appoint a guardian ad litem at the request of person in interest or on its own initiative when it is necessary to protect the right and interest of the person with capacity to proceed. The person with capacity to proceed includes the person who has become subject to the order of the commencement of guardianship. Although the person who has become subject to the order of the commencement of

guardianship cannot perform juristic acts individually, in cases concerning commencement of guardianship or revoking the order of the commencement of guardianship, he/she has the capacity to proceed and therefore can enforce his/her right individually. In these cases, the person with capacity to proceed cannot practically or has difficulty to enforce his/her right in the proceedings due to the mental disability, and therefore it is necessary to appoint a guardian ad litem.

The rules for the appointment of a guardian ad litem are not only described in the general principles of the Act, but also in the proviso of article 165 of Act. The latter provides that in cases concerning commencement of guardianship or revoking the order of the commencement of guardianship, the person who should become or has become subject to the order of the commencement of guardianship has the capacity to proceed, but if he/she lacks the ability to discern the outcome of the declaration of intention, the court should appoint a guardian ad litem for him/her in order to protect his/her substantive and procedural interest.

During the proceeding, if the court determines that the party has a qualified agent, the person with capacity to proceed can protect his/her substantive and procedural interest, or the guardian ad litem is not qualified, it can revoke the appointment of the guardian ad litem by a ruling, or can reappoint another guardian ad litem anytime when it is necessary.

The appointment, change or dismissal of a guardian ad litem has impact on the interest of the party and his/her legal representative, and therefore, before making the ruling, the court should hear the statements from the parties, the related persons, legal representatives, the appointed guardian ad litem and the persons in interest who are identified by the court on its own initiative. If to hear the statement in person is difficult, harmful or may delay the proceeding, the court can investigate in other proper ways.

Because the guardian ad litem serves as the bridge for communication between the person represented and the court, protects the interest of the person represented and assists the court to deal with the case rapidly and appropriately, he/she can represent the person to conduct all proceedings of the action. Since the guardian ad litem represents the person to conduct all proceedings of the action, the guardian ad litem

can only conduct the actions which can be conducted by the person represented. If the actions cannot be conducted by the person represented, the guardian ad litem should not be allowed to conduct these actions.

As for the compensation of guardian ad litem, the court can determine, at the request of the guardian ad litem and taking all conditions into consideration, to award reasonable compensation to a guardian ad litem, and such award is constituted part of the costs of proceedings. The court may require part of the award being paid by any party or the person in interest in advance, but when it is obvious that there is difficulty in making the payment in advance, it may be paid by the treasury partially or fully. If the guardian ad litem is appointed by the court on its own initiative, the compensation may be paid by the treasury.

d. Protection of the Right to a Fair Hearing

Article 106 of the Act applies mutatis mutandis to the cases concerning commencement of guardianship or assistance, revoking the order of the commencement of guardianship or assistance, ordering commencement of assistance in reply to the application of commencement of guardianship, and reelecting or changing guardians or assistants. Under the above-mentioned article, in order to consider the best interest of the ward or the person under assistance, the court can ask for the opinion of competent authority or organization of social welfare, or require the authority or the organization to conduct an interview or investigation for providing a report and advice to the court. The court considers the report before making a ruling, and in order to ensure the right to a fair hearing of a related person, the court should allow the related person to state his/her opinion, except for the content of the report including private or inappropriate information. In addition, the court may notify the staff of competent authority or organization of social welfare for stating the opinion in the hearing when it is necessary. Since the results of above-mentioned cases can significantly influence the interest of the person who should become subject to the order of the commencement of guardianship or assistance, the court shall ensure the right to a fair hearing for other persons in interest under article 77 of the Act. And before making a ruling, the court shall, in terms of the various age and understanding level of the wards or the persons under assistance, hear the statements in person, either inside or outside the

trial of the court, or use other proper methods to inform them of the influence of the case result, in order to fully protect their rights to make a statement. Therefore, article 108 of the Act should apply mutatis mutandis to the proceedings of the above-mentioned cases (articles 176 and 178 of the Act).

e. Written Expert Testimony

In order to assist the court in determining how to conduct the investigation and whether it is necessary to seek an expert testimony, articles 166 and 178 of the Act provides that, when an applicant files a petition for guardianship or assistance, it is better to submit a diagnostic report with the petition.

The rules concerning the examination of the persons who should become subject to the order of the commencement of guardianship or assistance and an expert witness have been established in the Taiwan Code of Civil Procedure, and the Act also follows the rules. Pursuant to articles 167 and 178 of the Act, the court should examine the ward or the person under assistance in the presence of the expert witness, except that there is difficulty in examining or there is a risk of harming the ward's health. In addition, before ordering commencement of guardianship or assistance, the court should inquire of the expert witness about the mental and intellectual condition of the ward or the person under assistance. In order to ensure the accuracy of expert testimony, there should be psychiatrists participating in giving expert testimony (articles 167 and 178 of the Act).

f. Cases Concerning Protection and Rehabilitation

The rules regarding jurisdiction for and the proceedings of cases concerning protection and rehabilitation are provided in articles 184 and 185 of the Act. The cases concerning rehabilitation include cases concerning rehabilitation of persons with disabilities, cases concerning rehabilitation ordered by a court ruling, and cases concerning termination of emergency placement or mandatory hospitalization.

Articles 106, 108, 165 and 165 may apply mutatis mutandis to the above-mentioned cases, including the rules for ensuring of the right to a fair hearing, obtaining the statements of minor children, the capacity to proceed and submission of diagnostic

report.

III. The Problems of the Current System in Taiwan and Recommendations for its Future Improvement

According to the spirit of the Yokohama Declaration, the most important principle of the adult guardianship law is to protect the rights to self-determination of persons with disabilities, and to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Therefore, an adult ward should be recognized as a full citizen before the law in the adult guardianship system. Most of all, the will of the ward or the person under assistance should be respected to the utmost, and various measures should be adopted to enable them to retain their decision-making rights in all matters relating to guardianship or assistance, such as commencement of guardianship or assistance, appointment of a guardian or assistant, performing juristic acts relating to property management and personal care, and access to medical treatment services. And the court should play a monitoring role in preventing the abuse of guardianship duties and in protecting the ward or the person under assistance in the enforcement of their decision-making rights.

Although the adult guardianship law in Taiwan has been amended to respect the independent personality of the ward, there are still problems with the amended law. Under the current law, the duty of guardianship was still performed in a paternalistic manner. Firstly, although the parallel systems of guardianship and assistantship over adults have been established, there is a lack of flexibility in the systems to meet the individual needs of vulnerable adults and to enable them to exercise their remaining capacities for decision-making. Secondly, the voluntary guardianship system has not been established in Taiwan, and therefore the rights to self-determination cannot be exercised through anticipatory decision making. Finally, there is no rule for personal care in the current law on adult guardianship, and therefore the rules provided in the special laws apply when making a decision regarding medical treatment for the person under guardianship. However, the rules provided in a special law are often established on the model of substituted decision-making and in accordance with the legislative intent of the special law, and therefore the decision-making right of the person under guardianship cannot be fully protected. As a result, the current adult guardianship system should be improved in the following ways:

A. Distinguishing Adult Guardianship from Interdiction for Mental Incompetence

Even though the subsystem of adult assistance has been established in the current adult guardianship system in Taiwan, under the influence of the previous legal framework of adjudication of interdiction, the current adult guardianship is still executed on the assumption that the person under guardianship is incompetent. Since the person under guardianship is incompetent, he/she loses all the capacity to perform juristic acts, and therefore the guardian should make decisions for him/her on all matters, including the matters being necessary for daily life. As a result, the current adult guardianship system in Taiwan does not shift away from the paradigm of "substituted decision-making" to the paradigm of "supported decision-making".

B. Establishing the Voluntary Guardianship System Which should Prevail over the Legal Guardianship System

It is recommended that a voluntary guardianship system should be established to allow the person, before losing the mental capacity, to make a voluntary guardianship contract, in which the person can appoint an enduring guardian and describe how the duty of guardianship should be performed, including the duty of property management and the duty of personal care. After the person loses his/her mental capacity, the appointed guardian can perform the duty of guardianship in accordance with the content of the voluntary guardianship contract, and the person can live in a way which he/she has chosen. And because the right to self-determination can be better protected in the voluntary guardianship system, it should prevail over the rules provided in the law on adult guardianship.

C. Enhancing the Monitoring Role of the Court

After the adult guardianship law in Taiwan has been amended, the role of the court is enhanced in ordering commencement of guardianship or assistance, appointing the guardian or the assistant, and monitoring the performance of the duty of guardianship.

And after the cases concerning commencement of guardianship and assistance has been categorized as family non-contentious cases in the Family Proceedings Act, although the court is authorized to conduct the proceedings on its own initiative to a certain extent, in order to ensure the rights to self-determination of the parties, there are measures adopted in the substantive and procedural laws, including providing the ward or the person under assistance with the capacity to proceed, requiring that the court should hear the statement from the person in question before making a ruling, and requiring the expert testimony from a psychiatrist.

After ordering commencement of guardianship, the law provides that the court may order the guardian to submit a report when it is necessary, and that the permission of the court must be obtained before important actions concerning property are conducted. However, because the monitoring role of the court after ordering commencement of guardianship is too passive, and because the court is not authorized to monitor the conduction of important actions concerning status, the monitoring role of the court should be enhanced.

And if the voluntary guardianship system were established, it would be more important to monitor the performance of the duty of the enduring guardian appointed in the voluntary guardianship contract. Therefore, it should be considered to establish the system of guardianship supervisor or to improve the function of family investigator, so that the right and interest of the ward can be protected better.

D. Both Property Management and Personal Care Should Be Taken into Consideration

In the previous adult guardianship system in Taiwan, the purpose of guardianship was to ensure the security of the ward's property, without considering the materiality of personal care. The purpose of establishing the new adult guardianship system is to protect the right of the person under guardianship and to respect his/her will, and therefore matters concerning personal care should be regulated by law. Since the manner of providing medical treatment and care would have impact on the life of the person under guardianship, matters concerning personal care should be given the same weight as matters concerning property management.

However, there is no rule provided for handling important matters concerning personal care in the current law on adult guardianship in Taiwan, and therefore when the guardian exercises the decision-power over matters concerning personal care for the ward, the power is regulated by other special laws, such as the laws concerning health care. In the special laws, the person under guardianship may not be regard as the subject of rights, and therefore it is possible that the matters concerning personal care of the person would be handled without considering the person's right to self-determination. Since the right to self-determination is not fully protected, the current system should be improved.