

From the Japanese point of view

Hiroshi Takahashi, Japan adult guardianship law corporate association

I OVER VIEW

Japan has an aging population. Those aged 65 or older comprised the 26% of the total population while the 74% comprised the younger population. This proportion of aging population is larger than any country in the world. With the rise of the aging population, comes the need for Adult Guardianship. The number of applications for the Adult Guardianship System in 2015 has increased to 34,782, which is almost tenfold than that in 2000. Those who used the system at the end of last year is 191,335, however the actual demand for the service is estimated at least 6 to 10 times more of this figure. As compared to other emergent countries, generally 1% of its total population needs the guardianship system.

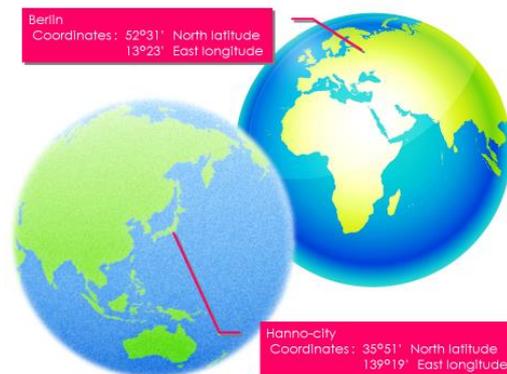
Hence, finding ways to promote the Adult Guardianship System and dealing with the unavailability of people who can assume the position of guardian have become a challenge.

In Japan we have no government established organization concerning Adult Guardianship. Legal experts consisting of solicitors or *shihoshoshi* voluntarily established a private organization. Approximately 7,600 out of 22,000 solicitors organized the Legal Support Adult Guardian Center. The goal is to have a network of experts to provide awareness, and educate people of the availability of the system of guardianship. Aside from the said Center, there exist other expert groups such as attorneys at law or barristers, social workers, and local small-scale organizations.

To deal with the unavailability of people who can assume the position of adult guardian, Japan passed a law directing all local governments to exert efforts to educate local citizens about the Adult Guardianship System so that they may be able to assume the position of a guardian when need be.

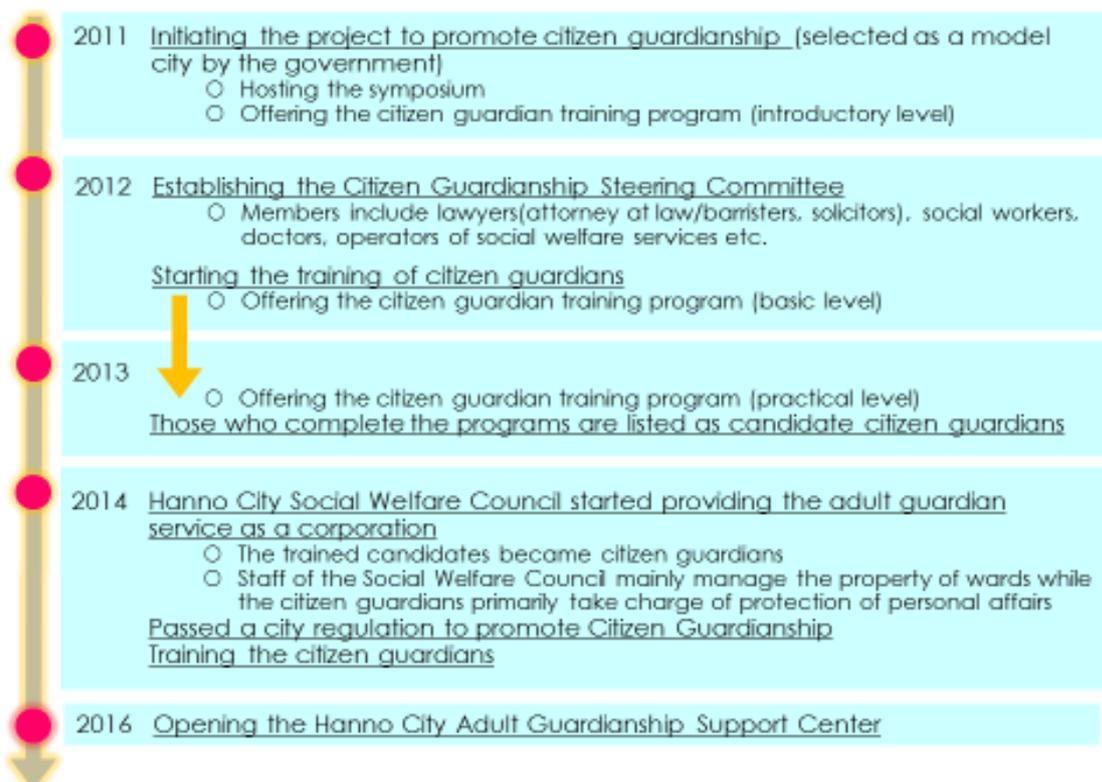
II CITIZEN GUARDIANSHIP

To promote citizen guardianship, the Japanese government selected a model city. Let me show you an example of a model city. For this project, they selected Hanno City where I am living.



Let us take the Actions undertaken by the Citizen Guardianship of Hanno City. In 2011, the city initiated the project to promote citizen guardianship. It hosted a symposium, offering the citizen guardian training program. After 5 years, the Adult Guardianship Support Center opened.

Actions Related to Citizen Guardianship Taken by Hanno City



Let me give you a view of Hanno City: City of Lush Forests. It is aptly called Lush City literally because you could find the spirit of the forest, dappled with mossy

greens and soft with the shimmer of luster. Moreover, it is also called “lush” because of the city’s luxuriant growth in terms of economy and a city as a whole. In fact, the Moomin of Finland shall be opening in this city next year. It is the first Moomin theme park to open outside Finland.

Hanno: City of Lush Forest



Library
made of
trees from
local forest

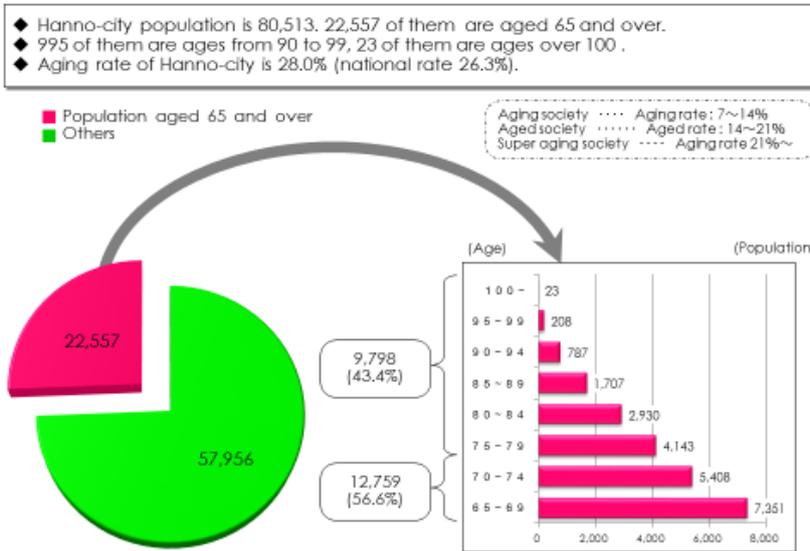


Moomin of Finland
The first Moomin theme park outside
Finland will open in Hanno next year



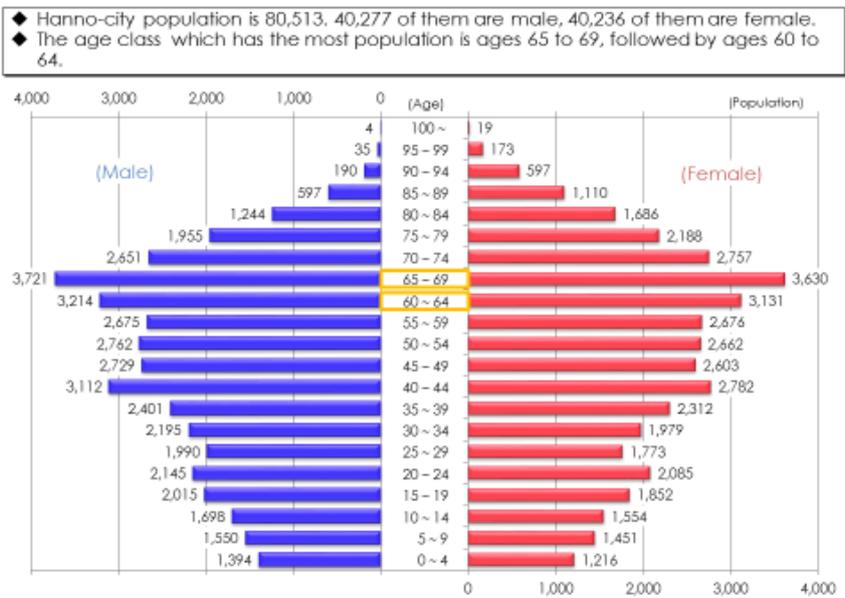
Japan has aging population. Along with the aging population on the rise, is the low birth rate. As the birthrate is substantially declining in Japan, the wards are having difficulty to ask support from their relatives. It is not a secret that Japan’s growing population is the driving force behind its economy. If the aging population continues, there will be fewer people in the workplace and the government will have to support millions of older citizens.

Hanno-city elderly population (January 1, 2016)



Let me show you a graph of the Hanno City population. As you can see, the age bracket of 60-64 years old as well as the age bracket of 65-69 years old is on the rise. This circumstance is not only experienced by Hanno City, it is also experienced by other parts of Japan.

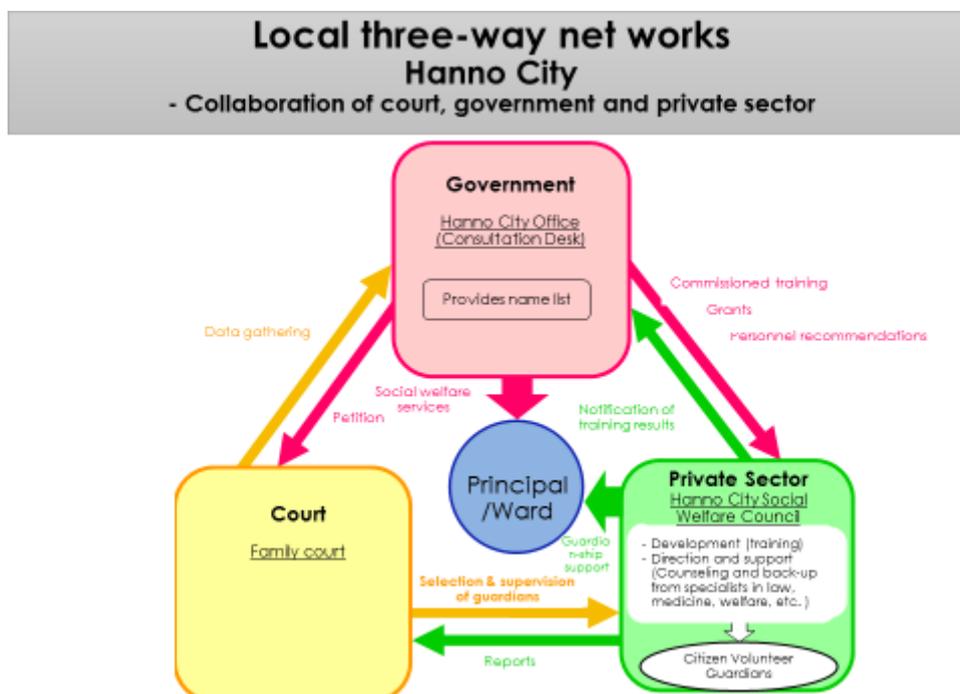
Hanno-city population graph (January 1, 2016)



III THREE WAY-NETWORK COORDINATION

Consequently, efforts have been made toward educating adult guardianship awareness so that people can receive support from the whole local community in lieu of support from their relatives. There is a need to emphasize the importance of coordination among three sectors namely; local governments, judiciary and the private sectors and if possible create a local rule binding these three to be able to properly cater to the needs of adults who may require support and/or protection.

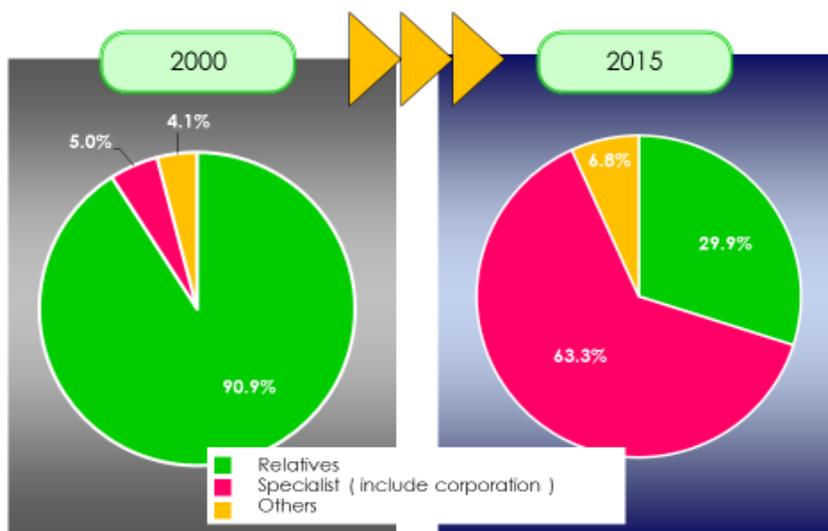
This is to guarantee that the government and a wider sector of society will be working hand in hand in developing a social welfare infrastructure. This is the “socialization of adult guardianship.”



IV DECLINE OF RELATIVE GUARDIANS

When the Legal Guardianship system started in 2000, 90.9% appointed as guardians were relatives of the wards, but this figure declined in 2015 to 29.9%. The decline was caused by the misconduct committed by the relatives serving as guardians for incapacitated adults which risk ruining public trust in the adult guardianship system.

Transition of the relationship between Adult Ward (include person under curatorship and under advisership) and Guardian of Adult (include his/her curator and advisership)



V GUARDIANSHIP SUPPORT TRUST

As a preventive measure against embezzlement, the courts have utilized two (2) mechanisms namely (1) Multiple Guardianship System and (2) Guardianship Support Trust. In Multiple Guardianship system, a relative and a legal expert is jointly appointed by the court as guardians. The reasons behind the multiple appointment of guardian are as follows: (a) The relative is in a best position to cater for the personal affairs and healthcare of the ward; (b) The legal expert to supervise the relative and to assess the property of the ward and cash flow. Generally, the court uses the multiple guardianship system in conjunction with the guardianship support trust. In such case, the legal expert assesses the property of the ward if it can fall under the purview of the Guardianship Support Trust. This is to ensure that the ward has enough available cash to sustain his cost of living. The legal expert will then submit his assessment report to the court. If the court deems that Guardianship Support System is suitable for the ward, it shall now order the legal expert to make a contract between the ward and the trust bank. After which, the court shall revoke the appointment of the legal expert as a guardian. The ward will now then be assisted through the Guardianship Support Trust, with his relative as the only guardian. On the other hand, Guardianship Support Trust is a kind of supervised account developed by trust banks with the court's approval. With this kind of mechanism, the guardian can only get money needed by the wards upon the court's approval; the court in turn issues an order for the trust bank to release it. This Guardian Support Trust is actually cheaper than appointing a legal expert as a guardian.



Guardianship
Support Trust

- **Relative guardians**

Only manage the money necessary for everyday life

Only get money needed by the wards upon the court's approval.

- **Trust banks**

Manage a large amount of money unnecessary for daily life

Only release money with an court order

- pay attention to Austria's representation by relatives
- public support system such as the OPG (Office of the Public Guardian) is needed.

VI ALTERNATIVE MECHANISMS

In dealing with the facilitation of adults who may require support and/or protection, there is a need to stress out the importance of exhaustion of all the available alternative mechanisms before giving them any legal representation. However, only some part of Japan is aware of these alternative mechanisms. Hence, the need to promote the alternative mechanisms to all areas of Japan. Two of the mechanisms being used is the establishment of a local network and the second one is being carried out by the social welfare council.

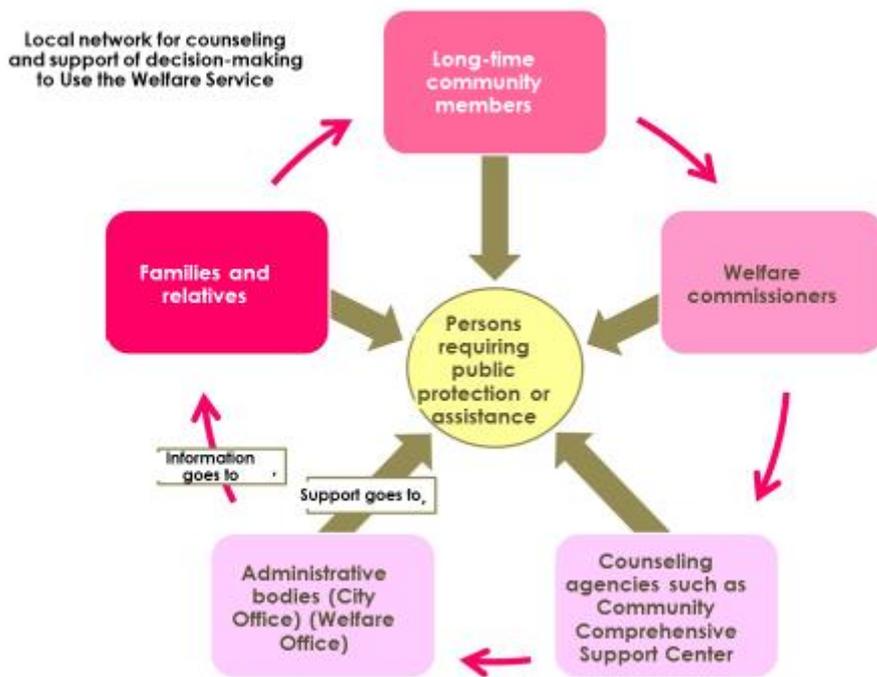


As mentioned, one of the mechanisms available is establishment of local networks. These local network's activities are essential to assess the adults who may require support and/or protection before giving them any legal representation. The following are the activities that a local network may undertake:

- a. Establishment of welfare offices by the local government throughout the country;
- b. Appointment of local welfare commissioners
- c. Decision-making support services provided by welfare specialists who can either be a social worker, a care manager and a public health nurse

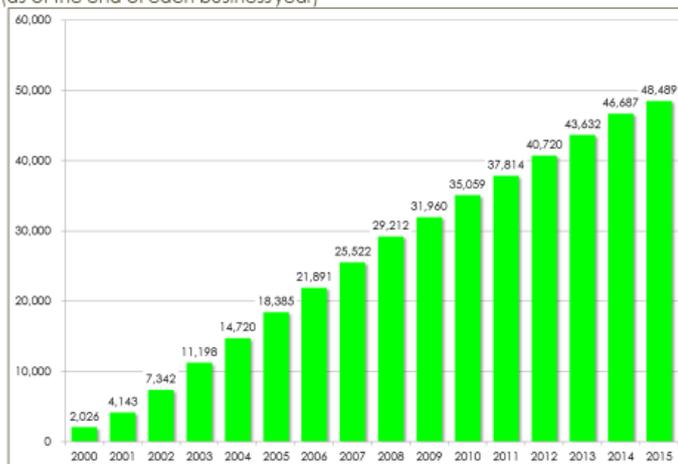
Establishment of local networks throughout the country is of primary importance since this gives the adults who may require support and/or protection:

- a. Easier/immediate access
- b. Immediate help or support could be given
- c. Assessment of adults who are deserving can be easily identified within the neighborhood. This shall prevent deceit perpetuated by those pretending to need support and by those who want to take advantage of the Legal Guardianship System.



Alternatively, the second mechanism is being carried out by the social welfare council. One of the aims of this council is to support people who have insufficient mental and/or capacity to make decision for themselves. The council act as a safe-keeper of all the documents pertaining to the ward including but not limited to the following: land certificate of titles, passbook accounts or any other important documents. The number of users of this alternative mechanism was 48,489 as of the end of September 2015, showing an increase of 2,359 users in only half a year. This figure is 24 times higher compared in 2000 when the system was first introduced but this statistics is not enough. The aspiration is for the alternative mechanisms to be accessible and applied to all those who need it.

Number of Participants in the Self-Reliance Support Service in Daily Life (as of the end of each business year)



* The number of participants for 2015 is the number as of the end of September 2015.

VII SUPPORTED DECISION-MAKING

In Japan, the Ministry of Health, Labor and Welfare, is proposing what a supported –decision making is; generally, people perceive it to have three steps: (a) giving alternative options and consequences of their respective choices when adults make their decisions; (b) giving the principal the right to exercise their free will to make a choice among the options available; (c) plan of action. For instance, in the case where the principals want to have their hair cut, options are provided to them whether: they (a) cut their hair by themselves; (b) have their hair cut by their family; or (c) have their hair cut at a hair salon. Then, to make a choice from such options, consequences of such options should be explained to the principals to make the best choice; (a) if they cut their hair by themselves or they have their hair cut by their family, services are free of charge but they may feel disappointed with their hairstyle; (b) if they want to use a hair salon, they must go there and pay money, but they are likely to be satisfied with their hairstyle. In addition, in the case where they choose the option of using a hair salon, it will be necessary to give support to the principals so that they can act, such as taking them to a hair salon; asking the staff to cut their hair; and bringing them back home after the haircut. Hence, there are three essential elements in a supported-decision making namely: forming, expressing and realizing decisions.

The term support

- The Ministry of Health, Labour and Welfare in Japan is working to create guidelines to clarify the definition of terms used in offering concrete assistance for decision-making.
 1. Support for “forming”, “expressing” and “realizing” decisions
 2. Offering options and information, helping the wards’ actions to realize the decisions
...and more.

VIII OUTLOOK OF GUARDIANSHIP IN JAPAN

Among the systems to legally support adults who have an insufficient capacity for judgment in Japan, the whole system in which courts get involved directly or indirectly is broadly called the Adult Guardianship System. The Adult Guardianship System has two kinds: 1. Voluntary Guardianship and; 2. Statutory Guardianship. Voluntary Guardianship is done, utilizing a continuing power of attorney based on a conditional agreement among the parties wherein the court appoints a supervisor upon the happening of the condition. Statutory guardianship on the other hand is judicially executed wherein the court appoints a guardian. Statutory Guardianship is further subdivided into three depending on the degree of the mental capacity of the principal/ward to make judgments: (1) Advisership wherein the principal or ward has weak mental ability to make decisions; (2) Curatorship wherein the principal/ward has a very weak mental ability to make decisions; (3) Comprehensive guardianship wherein the principal/ward totally loses his/her cognitive impairment.

Outlook for Adult Guardianship in Japan

- 1 Voluntary guardianship (contract)
- 2 Statutory guardianship
 - I. Advisership
(weak mental ability to make decisions)
 - II. Curatorship
(very weak mental ability to make decisions)
 - III. Guardianship
(ward totally loses cognitive impairment.)

2-II and 2-III above → certain capacity of
the adult ward is restricted unconditionally

Social stigma has been placed on the limitations on the rights of the wards. One of the biggest issue was the limitation of the voting rights. This has already been resolved. Voting rights of the wards has already been re-instituted three years ago. However, there are other limitations imposed on the ward falling under the Curatorship/Comprehensive guardianship are as follows:

- They cannot work as a public servant
- They cannot take the position of a director in a company. In case they are

already a director at the time of the avilment of guardianship, their position shall be automatically vacated.

IX PROMOTION OF THE ADULT GUARDIANSHIP SYSTEM

On May 13, 2016, the Act on Promotion of Use of the Adult Guardianship System was enacted, aiming to realize the philosophy of the Yokohama Declaration. The Act is intended to make a review of the current application of the system that tends to be biased toward the use of comprehensive guardianship and to promote the use of voluntary guardianship, advisership, and curatorship. It is hoped that there will be further studies to be conducted to determine the best interest of the principal or ward.

As cited in the message of the president of the Organizing Committee of this Conference Web site “the right to equal recognition before the law is a key requisite for persons to be able to exercise their rights and freedoms on an equal basis with others. However, persons with an illness or a disability are still often restricted in exercising their legal capacity, or may even be deprived of their legal capacity completely, because of their illness or disability.”

This stigma is sought to be resolved. Article 12, UNCRPD provides that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” It should be noted that persons with mental illness or disability should still exercise their free will to decide for themselves and that the “substitute-decision making” done by a third party for them should only be used as a last resort. Hence, “supported-decision making” should always be favored. Consequently, there is a need to concretely define the word “support” as mentioned in Article 12, UNCRPD. It also important to take notice that the definition of support may vary from one country to another depending on the circumstances surrounding the persons with disabilities or illness. The better way would be to reconcile the definition of “support” with the system the country is using in relation to Article 12 of the UNCRPD. Only in that way can we fully serve the needs of the persons who needs support and/or protection.

X CONCLUSION

Finally, I would like to emphasize that we should not forget the basic philosophy of the guardianship system such as normalization, respect for the right of self-determination, protection of personal affairs and healthcare. The principal should always

be placed in the center of the guardianship system giving them primary importance. After all, the purpose of the guardianship system is for their interest and it is our moral and social obligation to serve for their interest and their social well-being as a whole.