

Care for the Elderly and Management of Their Property

Professor MASAYUKI TANAMURA*

1 The Present Situation of Aging and the Elderly in Japan

How does aging in Japan proceed? What are the characteristics of Japanese aged society and what is the present situation in Japan?

Characteristics of Japanese Aged Society

① Aging in Japan with Rapid Speed

The ratio of people whose age is over 65 in Japan was more than 7% in 1970, which figure is the touchstone of the “aged society”, and more than 15% in 1996, which means that Japanese society became a matured “aged society” similar to European countries and the United States. The ratio is estimated to increase to 17% in 2000, 25.8% in 2020, 27.4% in 2025 and 32.3% in 2050. According to the research by the Institute of Population Problems in the Ministry of Health and Welfare, while it took 130 years in France, 85 years in Sweden, 60 years in Italy, 50 years in the United Kingdom and 45 years in Germany, for the ratio of the elderly to increase from 7% to 14%, it took only 24 years in Japan. And while it took 95 years in France, 66 years in Sweden and 62 years in Germany, for the ratio to increase from 10% to 20%, it took only 22 years in Japan. All these figures indicate the especially rapid pace of aging in Japan.

② Rapid Increase of the Elderly in Need of Care

According to a report by the Ministry of Health and Welfare, in 1995 the number of the elderly who needed care was 1,410,000, the number of elderly bedridden people was 811,000 and the number of people suffering from senile dementia was approximately 1,000,000. It is estimated that in 2025 the number of elderly bedridden people will be 2,290,000 and the number of people suffering from

* Professor of Civil Law, Waseda University School of Law, Tokyo.

senile dementia will be 3,320,000. The total figure of 5,620,000 is about three times as large as the present figure. The number of the household of the elderly living alone is also increasing and will reach 4,630,000 by 2010. There two types of dementia. One is Alzheimer's disease, which causes contraction of the brain. The other type is cerebral blood vessel dementia caused by a brain thrombus or brain bleeding. In the case of people aged over 65, some 7% of them are suffering from dementia. The older they are, the higher the ratio of people who are always bedridden or suffering from dementia.

③ **Decreasing Capability of Care in the Home**

In 1995 the average number of members of one household was 2.83. Of all the elderly who need care, 862,000 are in the home and 554,000 are in institutions. That means some 60% of the elderly who need care are cared for by their family members in the home. More than 50% of them have been bedridden for more than three years, and 35.7% of the care-takers are people aged over 65. This means the elderly are caring for the elderly. 85.9% of those caring for old people who are bedridden are female. The burden on female family members has been increasing.

Anxieties about Life for the Elderly

The elderly tend to have three major anxieties. One is an anxiety for health. In the case of the people aged over 65, the ratio of people who are suffering from disease is much higher than that of people under 65. The older people become, the more likely they are to be ill. Secondly, the number of elderly people living alone is on the increase, and 17.4% of elderly people were living alone in 1995. The elderly are now likely to live apart from other parts of the society. They suffer anxiety over loneliness and mental emptiness. It is advisable that the elderly should be respected and live with people from other parts of the society. Thirdly, having retired, elderly people often feel anxiety about their economic situation. The average amount of annuity for an elderly couple (including the national pension) is some ¥200,000 (approximately A\$22,500, NZ\$25,000) per month. Minimum expenses for an elderly couple is said to be ¥231,000, which is some ¥30,000 higher than their pension benefit.

According to a research by the Management and Coordination

Agency, in Japan 52.3% of the elderly suffer anxiety over health, 31.1% for loneliness and 28.2% for their economic situation, while in the United States the numbers are 27% for health, 16.8% for loneliness and 15.3% for their economic situation. It followed that many old people experience strong anxieties for the three causes. A public opinion poll made by the Prime Minister's Office in 1995 showed that 67.2% of elderly worried that they would need care and support in the future and 72.9% of elderly people worried their family members would become in need of care, and nearly half of them were dissatisfied with the present situation of care in the home.

Development of Policy for Social Welfare in the Aged Society

Social welfare services in Japan, including care and support services for the elderly, have been dependent on the public welfare financial disbursements from taxes, on the one hand, and the public welfare measures for which beneficiaries have to pay in order to receive benefits on the other hand. In the 1980s, in response to the change of policies from the highly economic growth policy to the slow economic growth policy, it became necessary to rationalize the finance of social welfare, to make supports for self-help, to encourage a cooperation between medical and welfare services, to improve the quality of social resources, to make use of private enterprises, and to promote the function of care in the home. By the Gold Plan (10-year campaign for the promotion of health and welfare for the elderly) in 1989, and the new Gold Plan in 1995, several measures for care in the home were to be promoted by municipal corporations, and the following targets were established for each service and institution:

	1993	1999
Home Helper	50,000	170,000 (number of people)
Day Service	4,300	1,700 (number of sites)
Short Stay	20,000	60,000 (number of beds)
Support Center for Care in the Home		10,000 (number of sites)
Elderly People's Home for Special Care	200,000	290,000 (number of beds)

Health Center for the Elderly	113,000	280,000	(number of beds)
Care House	17,000	100,000	(number of capacity)
Life & Welfare Center for the Elderly	160	400	(number of sites)

2 Care for the Elderly and the Burden on Their Families

Who should care for senile and bedridden people? What kind of relationship is between private support provided in the Civil Code and public aid by the state?

The Present Situation of Care for the Elderly Who Need Care

At present, the number of elderly people who need care is 1,416,000, of which 862,000 are in their home and 554,000 are in institutions (76,000 in welfare institutions for the elderly, 200,000 in nursing homes for special care, and 278,000 in hospitals). The number of elderly bedridden people is 811,000, 60% of which are cared for in their home, and 20% of which are in institutions or nursing homes. The remainder are in hospitals. This shows that the majority are treated and cared for in their home. The ratios of the old people who need care and the elderly bedridden people are 4.93% and 1.62% at the age of 65 or more, and 14.43% and 5.12% at the age of 80 or more. This shows that the older they are, the more likely they are to need care and be bedridden. More than 80% of those who care for elderly people are female, such as their sons' wives, their spouse (mostly wives) and their daughters. Moreover, 37.5% of the people who care for elderly people are more than 65 years old themselves. 53% of the elderly bedridden people are bedridden for more than three years. The ratio of elderly people 65 or over living with their children was 68% in 1980, and dropped to 54.3% in 1995. And the ratio of those living with their children and their spouses was 52.5% in 1980 and dropped to 35.5% in 1995.

Recently nationwide research was conducted at 400 Support Centers for Care in the Home. 220 Centers replied and reported that there were 209 incidents of abuse or neglect for a total of 144 persons. Typical examples are neglect by sons' wives because of their fatigue from hard work of care, and violence by sons. 70% of abuse

and neglect are against females, and there is a clear tendency that the older they are, the higher the ratio of elderly abuse. According to the experts' opinion, since public care services are not sufficient and supports by the state or municipal corporations are not enough, heavy burdens are imposed on family members, and consequently ill treatments are inflicted on weak old people who need care. We should reconfirm the general principle that the elderly people have the right to live safely, free of violence, abuse, neglect and exploitation.

Family Support

The Civil Code has a provision in regard to the support by family members (s. 877). This provision imposes generally on the lineal relatives by blood and brothers and sisters a duty to support each other, and also prescribes that if there are special circumstances, the Family Court may impose a duty to support as between the relatives within the third degree. Therefore, a duty to support which civil law imposes on family members is between lineal relatives by blood such as parents-children, grandparents and grandchildren, or brothers and sisters. There are only exceptionally rare cases in which a duty to support is imposed on uncles, aunts, nephews and nieces, or in-laws such as between a father and his son's wife.

Theoretically, the duty to support is divided into two types; a duty to maintain life and a duty to assist life. The duty to maintain is said to be a heavier duty such as sharing a piece of meat, a cup of rice, or even a grain of rice, and a duty to keep the living standard at the same level as their own. Examples of this duty are maintenance between husband and wife (ss. 752 and 760 of the CC.) and maintenance by parents of their minor children (ss. 766 and 877(1) of the CC.). On the other hand, examples of the duty to assistance are support for elderly parents by their adult children, and support by brothers or sisters. Such duties are only imposed if the children or brothers/sisters are able to support other family members after they discharge their primary duty. Some writers assert that a duty to support for old parents by their adult children should be the duty to maintain life. The dominant opinion is that the duty is the duty to assist life. Practical benefits conferred under the duty to support

is determined after the needs of the person entitled to support, financial capacity of the person under the duty, and all other relevant factors are taken into consideration (s. 879 of CC.). Therefore, both parties concerned with support can negotiate as to what is needed and what can be conferred. They can also consult with a third party, and accept mediation by the third party. Only if they do not reach any agreement as to family support, they can seek an court order in Family Court (s. 878 of the CC.).

In 1996, 9,360 petitions were made as to matters of support in all Family Courts in Japan. 8,945 petitions (96%) dealt with supports for minors. Cases for adults were only 415 (4%). Mediation agreements were reached in 162 cases, 112 of which dealt with financial supports (69%), 23 cases were resulted in living together (14%), 9 cases were on in-patients or inmates (6%) while the remainder included both financial support and living together (11%) (“Judicial Statistics Annual 1996” at pp. 130-134).

Many cases of support for elderly parents are settled by negotiating between the parties, and only a few cases are decided by the Family Court. Care and support in daily life have real meaning if they are tendered with affection and trust of family members voluntarily, and they should not be provided only out of the sense of obligation or under the external pressures. Family support in the form of living together is not legally enforceable in nature, if the person entitled to the support and the person under the duty don't reach an agreement on support with living together, because it necessarily goes with living together in the same house. In particular, in cases of elderly bedridden or senile people, they may need 24-hour care. For these reasons, it is highly questionable for the Court to order reluctant children to provide support with living together, or to bear high costs of care.

Family Support and Public Assistance

There may be cases where problems concerning care for poor elderly, senile and bedridden people and their financial capacity are too serious and complex for their family member to deal with. What kind of relationship should exist between family support and public assistance as state responsibility? Among individual responsibility,

family responsibility and state responsibility, a primary duty is imposed on certain family members to take a private duty to support for family members who are poor or need care. On the other hand, if a family cannot support their members, they are entitled to be supported by the state as a welfare state under the right to life which is guaranteed in the Constitution. However, the state responsibility of support is secondary and supplementary. As the Life Protection Act prescribed, the support by family members is first and public assistance is supplementary protection in principle (supplementary nature of the public assistance, s. 4(2) of the Life Protection Act).

Public Care Insurance System

The public assistance in Japan has been provided by using nursing homes for special care under the welfare scheme for the old system or by using hospitals for the elderly under the medical system. Its costs are covered by taxes and premiums from medical insurance respectively. However, with rapid aging, it becomes apparent that the present system for the public aid will collapse financially. For example, because the medical expenses for elderly people increase rapidly, the financial situation of the medical insurance has deteriorated, and although the Ministry of Health and Welfare estimates that the expenses for care services in 2000 will be ¥5 trillion (approximately A\$55 billion, NZ\$62 billion), it is thought to be extremely difficult to find the financial sources to cover the expenses.

For these reasons, the part of medical services which has the nature of care for elderly people is detached from the medical services for elderly people, and in addition to medical insurance, a care insurance is to be established in order to improve the financial situation of the medical insurance. The idea of the public care insurance is introduced in view of opposition of the people to increase taxes for care services in welfare institution for elderly people and also in view of ensuring financial resources by introduction of care insurance as a social insurance.

In June 1997, the Care Insurance Bill prepared by the Ministry of Health and Welfare did not pass in the Diet, and a slightly amended bill is being discussed in the extraordinary session of the Diet in autumn 1997. The contents of the bill are that the insurers are cities,

towns, villages and special districts which are sponsored by the state and prefectures, that the insured are the medical insurance policy holders who are more than 40 and under 65, provisions in kind are made to people over 65 who need care in the home or in support institutions, and that benefits are made within the extent of provision for care under the recognition of the entitlement to care. However, there are criticisms against the care insurance scheme to the effect that the social security program should be carried on by the state, that a heavier burden will be imposed on the people by introducing private insurance, that arguments are concentrated only on financial aspects, and that the components and quality of care services which will be provided are not clear.

3 The Management of Property of Elderly People and the Guardianship for Adults

What kind of legal system should be applied for the management of property of those whose capacity of judgment has been lowered such as elderly senile people? How is such a system applied in practice? What system is the guardianship for the adult? What kind of legislation will be made in the future?

The Transaction and Management of Property by Elderly People

As people become older, their abilities cannot help decreasing both mentally and physically. As their capacity for judgment decreases, many elderly people become victims of dishonest dealings or fraudulent transactions such as the *Toyotashyoji* case, the *Wagyushoho* cases (dealing with Japanese oxen), and *Genyashoho* cases (transactions of valueless lands). There are cases in which children or other family members transact the property of elderly people without any authority or permission, or misuse the property as a security or collateral for their obligations. There are also cases in which savings and deposits of old people are withdrawn or spent by their family members or others, when they are in nursing homes or hospitals for elderly people. However, it is impossible to deny the legal capacity of elderly people to make transactions by themselves, because it amounts to a denial of self-determination, and because it is not suitable to the fact that capacity of judgment will gradually decrease.

For these reasons, the question of the management of property of elderly people is extremely important in the aged society.

The Limit of the Existing System of Incompetency and Quasi-incompetency

In the present Civil Code, when a person lose completely his or her capacity of judgment, a petition for adjudication of incompetency may be made to the Family Court, and the person shall be placed under guardianship if the Court thinks it is suitable to do so (ss. 7 and 8 of the CC.). In the case of guardianship, the guardian does all transactions for the person adjudged incompetent, and the acts of that person are voidable (s. 9 of the CC.). When a person becomes feeble-minded or spendthrift, but does not completely lose capacity, that person may be adjudged quasi-incompetent and placed under curatorship (s. 11 of the CC.). In the case of quasi-incompetency, it is necessary to obtain the consent of the curator in order to do certain acts such as borrowing money, surety, transactions regarding real property or valuable personal property and disclaims of inheritance. Such acts are voidable if they are made without the consent of the curator.

Therefore, under the present system for the management of property of elderly people whose capacities have decreased, there is no other option other than the selection of the adjudication of incompetency with a guardian or quasi-incompetency with a curator, taking the degree of lost capacity into consideration. However, under this present system, there is no reflection that decreasing of capacities of elderly people become worse gradually, and that elderly people whose capacity of judgment decreased may sometimes make an adequate judgment. The present system also lacks flexibility, for it denies capacities of elderly people evenly and uniformly. Moreover, lots of time will be spent in the proceedings for the adjudication in the Family Court, and ¥300,000 ~ 500,000 (approximately A\$3,350 ~ 5,600, NZ\$3,750 ~ 6,250) will be needed for the necessary experts' opinions. Furthermore, when the adjudication is made, it will be published as an "official announcement" in the Official Gazette, and in a notice board of the Family Court, and the entry "On the 1st of December 1997, adjudication of incompetency is made, and

on the same day, xxx is appointed as the guardian” is made in the family registration, so-called “koseki,” which the person adjudicated and his family does not like. When a person is adjudicated incompetent or quasi-incompetent, lots of disadvantages occur to the person, because the adjudication makes it impossible for that person to take a certain job such as civil servant or some kind of expert, of which the total number of disqualification is estimated to be 140. The word “incompetent” may be discriminatory, for the meaning of the word is to prohibit from transaction of property. There is another criticism that although public prosecutors are eligible applicants for the adjudication, representatives of public interests such as the head of municipal corporations should be entitled to apply for the adjudication. For these reasons, although the number of the cases of adjudication has increased (2,242 cases of incompetency and 730 cases of quasi-incompetency in 1996), it is severely criticized that the system is hard to use. The Subcommittee of Property Law in the Civil law Division of the Legislative Council started to review the system of incompetency and quasi-incompetency in June 1995.

The System of Guardianship for Adults

Against this background, arguments are made for the legislation of the system of guardians for adults. It is argued that the present system or a newly introduced system should be given flexibility, and the scope of the system should be extended to include the intellectual disables and elderly people whose capacity of judgment becomes worse, and supplementary function to support the management of their property and personal care should be added to the system in order to protect their rights. The system is called guardianship for adults or law of guardianship of adults, for the objects of protection under the system are adults in comparison with the guardianship for minors. In European countries and U.S.A., in view of the respect for self-determination and the promotion of participation in social activities (Normalization), such systems have been established and social conditions have been improved for that purpose. Examples are the system of advocacy in Austria, the system of adult guardian in Germany, the system of public guardianship in the United

States and Canada, and the system of enduring power of attorney in England. Such systems do not deny full capacity of act as the present system in Japan, but have flexibility in order to respond each case separately to the extent that it is necessary to represent or support the people under the systems. There are a variety of types such as voluntary guardianship and statutory guardianship. However, a common feature is that both management of property and care and support for daily life are done only to the necessary extent, respecting the self-determination and personal dignity in view of the protection of human rights. In Japan, it is not desirable to deny or restrict the capacity formally and evenly. The right of self-determination and the will of elderly people should be respected to the utmost extent. And a similar system, which is closely related to the care and support for daily life, should be established to support supplementarily to the necessary extent.

In April 1998, the tentative plan for revision of Civil Code regarding Adult Guardianship Law will be proposed by the Justice Ministry. **Maintenance Services of Property by Municipal Corporations and the System of Using Assets**

Some municipal corporations such as Nakano Ward, Suginami Ward and Bunkyo Ward of Tokyo tender services for elderly people living alone, in which services for keeping of their passbooks, the deposits or withdrawal, the payment of charges of public utilities, the keeping in safe-deposit boxes in banks of important documents such as title deeds and negotiable instruments are included. In some municipalities such as Musashino City, a system of using assets of elderly people like reverse mortgages is established, under which with their assets as collateral the city lends money for a welfare fund to the users of the services in public non-profit corporations for welfare.

However, there are shortcomings such as the reduced value of collateral in case of the increase of total money lent when the users live longer, what kind of step should be taken in cases of the loss of mental capacity of elderly people while using the services, and the unexpected event of decrease in value of the assets.

4 Conclusion

In addition, there are problems about charged nursing homes which have increased in number rapidly since 1980. In 1996, there were 250 homes in Japan. It cost ¥20 million (approximately A\$225,000, NZ\$250,000) on average to enter such a home, and after that it also cost some ¥100,000) approximately A\$1,150, NZ\$1,250) per month for living expenses. It is rather expensive for elderly people to enter such a home. Although charged nursing homes have the advantage of promoting self-help under the difficult circumstance of financial resources for the welfare budget of elderly people, some troubles have occurred. For example, private enterprises run homes without adequate staff and training for care and treatment, elderly people in such a home dissatisfied with care services and expenses, and bankruptcies after the payment of the entire amount necessary to enter a home.

Although elderly people in Japan are willing to work and have working ability, it is very difficult for them to find a suitable job. It is true that they have considerable assets, but they mostly consist of real property as their residence. If it can be turned into cash flow, elderly people can ensure living expenses in addition to the public pension system. In Japan, it is a crucial question whether elderly people can help themselves, what type of support their family members should provide, and what the state should do for them in order for the elderly people to live a peaceful life.