State Statutory Authority for Restoration of Rights in Termination of Adult Guardianship

Guardianships\(^1\) are designed to protect the interest of incapacitated adults. Guardianship is the only proceeding in American courts in which adults can be permanently deprived of rights solely in order to protect their well-being when they are unable to care for themselves.\(^2\) Due to the loss of individual rights, guardianships should be a last resort option when no other less restrictive alternatives are available, both at the time of adjudication and throughout the guardianship. An adult under guardianship who has regained capacity has the right to restoration.

While it is most common for a guardianship to end upon the death of the individual, in all jurisdictions the court can terminate a guardianship upon finding that the individual has regained capacity sufficient to manage his or her personal or financial affairs. In some cases the conditions that interfere with capacity are temporary or the individual has responded to treatment. In other cases additional evidence and the presence of a supportive environment may demonstrate that a guardianship is unnecessary.

Unlike an appointment of a guardian, the statutory legal procedure for restoration is often unclear and ambiguous.\(^3\) The procedural process, as well and the duties of the court and of the guardian, vary significantly by state, court, and judge. Due to the inconsistency among state statutes, variations in practice, and lack of hard data on restoration proceedings, it is unclear whether current guardianship law adequately protects an individual’s right to restoration.

This paper examines state statutory provisions concerning restoration of rights\(^4\) in four areas: (1) general procedure for restoration; (2) the evidentiary standard expressly provided for in the statute; (3) the procedural barriers and safeguards in restoration proceedings; and (4) the role of the guardian and of the court upon termination.

PROCEDURAL PROCESS IN A PETITION FOR RESTORATION

The UGPPA, revised by the National Conference of Commissioners on Uniform State Laws (currently the Uniform Law Commission) in 1997, strongly supports the rights of the incapacitated person. Under the Act, guardians must encourage the protected individual to work towards regaining capacity.\(^5\) The UGPPA has played a major role in the development of

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\(^1\) Terms vary by state. In many states and the Uniform Guardianship and Protective Proceedings Act, a “guardian” makes decisions about health care and personal affairs, and a “conservator” makes decisions about money and property. Other states use the terms “guardian of the person” and “guardian of property” or “guardian of the estate.” Two states (CA and CT) use the term “conservator” to refer to a decision-maker about an adult’s personal and/or financial affairs. The same person or entity could be appointed as both guardian of the person and guardian of the property (conservator), or these roles could be filled by two different people or entities. In this paper, unless otherwise indicated, the terms “guardian” and “guardianship” refer to decision-making about both personal and financial affairs.

\(^2\) Jennifer L. Wright, Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA, 33 Int’l J.L. & Psychiatry 350, 351 (2010).

\(^3\) Wright, supra note 2, at 351 (explaining that the petitioner must prove by clear and convincing evidence that: the respondent is incapable of receiving and understanding relevant information and making decisions based on that information, that this incapacity creates a risk to the well-being of the respondent, and that the proposed guardianship will improve, if not maximize, the well-being of the ward).

\(^4\) While this paper focuses on termination of guardianships, the same principles apply to modification of guardianship. The same procedure used for termination can be used in most cases to seek a modification of an existing guardianship, limiting the scope of the order and enhancing self-determination.

guardianship law throughout the United States. Since its enactment, 15 states have adopted the official language or language substantially similar to the official UGPPA provisions concerning restoration of rights. Three states have provisions with similar language.

The primary issue before the court in a restoration proceeding is whether the protected individual has capacity. All jurisdictions permit a petition for termination and restoration should a protected individual regain capacity. The process for restoration, codified in the state statute, varies greatly. A determination of capacity can be made only after an adjudication wherein the court determines any change in circumstance and improvement in capacity of the individual. The manner in which this is accomplished depends on the jurisdiction. In 18 jurisdictions and the Uniform Guardianship and Protective Proceedings Act (UGPPA), the statute simply states that in a petition for restoration and termination, the same procedures apply as in an appointment of a guardianship.

Many states and the UGPPA require that a respondent seeking termination be afforded the same rights and protections that are provided in the establishment of the guardianship. Such rights might include the right to notice, the right to personally attend hearings, the right to counsel or a visitor or guardian ad litem, the right to cross-examine witnesses, and the right to appeal. These states include language similar to Nebraska’s statute that states, “If the court has reason to believe that additional rights should be returned to the ward, the court shall set a date for a hearing and may provide all protections as set forth for the original finding of incapacity and appointment of a guardian.”

Most states provide very broad permission to the protected individual or any interested party to seek restoration. Often, the only limitation in the statute is that such petition must be filed on

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behalf of and in the best interest of the protected individual. Three states, Connecticut, Iowa, and Wyoming, limit the authority to petition for restoration to the individual under guardianship.\textsuperscript{11} New Jersey limits authority to the individual and the guardian.\textsuperscript{12}

Upon the filing of a petition for restoration,\textsuperscript{13} the court will set a date for a hearing on the issue of capacity, pursuant to the state’s requirements. Some courts conduct a hearing immediately upon filing, so long as they find sufficient cause to warrant further proceedings. Other courts schedule a hearing only after it receives a medical examination report from a court-appointed expert. Notice of the hearing is given to the guardian and the protected individual, and to other interested parties as required by the statute.

After the hearing, the court may restore the individual’s rights and terminate the guardianship if the burden of proof for capacity is met and the court deems restoration to be appropriate. The adjudication of restoration is grounds for terminating the guardianship.\textsuperscript{14} The discharge of the guardian ends all rights and responsibilities of the guardianship, except for those involved in the winding up of the guardianship.

**EVIDENTIARY STANDARD**

The evidence considered in a guardianship hearing depends upon the guardianship laws of the state. The petitioner has the burden to show that the protected individual has capacity to manage personal or financial affairs such that guardianship is no longer necessary.\textsuperscript{15} The burden then shifts to the party opposing restoration to prove the continuation of incapacity. Unlike in a petition for appointment of a guardian where the burden of proof is generally clear and convincing evidence, the standard in termination proceedings varies greatly and is often unclear.

Under the UGPPA, once the petitioner establishes a *prima facie* case for termination the court shall order the termination unless the opposing party establishes by clear and convincing evidence that continuation of the guardianship is in the best interest of the protected individual.\textsuperscript{16} The lower evidentiary standard of *prima facie* evidence for termination, as compared with the standard in an appointment for guardianship, is consistent with the Act’s philosophy that a guardian should be appointed only for as long as necessary. In determining “best interest,” every effort should be made to determine the individual’s personal values and desires.\textsuperscript{17}

Only two states, Minnesota and Maine, have adopted the UGPPA’s *prima facie* evidentiary standard for restoration. Minnesota courts have interpreted this to mean evidence showing that

\textsuperscript{11} Conn. Gen. Stat. Ann. § 45a-660(a)(1); Iowa Code Ann. § 633.679(1); Wyo. Stat. Ann. § 3-3-1105(a) (stating that “At any time, not less than six (6) months after the appointment of a guardian or conservator, the individual may petition the court alleging that he is no longer a proper subject of the guardianship or conservatorship and asking that the guardianship or conservatorship be terminated).
\textsuperscript{13} This is also possible upon the court’s ruling *sua sponte*, although this is rare.
\textsuperscript{14} State ex rel. Nat. Bank of Commerce of Seattle v. Frater, 18 Wash. 2d 546, 140 P.2d 272 (Wash. 1943).
\textsuperscript{16} U.G.P.P.A. §§ 318(c), 431(d) (1997).
\textsuperscript{17} U.G.P.P.A. § 318 cmt. (1997).
the proof the guardianship was needed is no longer applicable. In Maine, once a petitioner establishes a *prima facie* case that the individual has capacity, the burden shifts to the respondent to prove incapacity by clear and convincing evidence.” Seven states require the petitioner to prove by a preponderance of the evidence that the individual has sufficient capacity to manage his or her own affairs. Eight states use the higher standard of clear and convincing evidence. Mississippi requires “such proof as the chancellor may deem sufficient.”

Thirty-three states do not provide a specific evidentiary standard. There is little case law in the area of restoration and it is not entirely clear what standard of proof should apply. Courts have taken different approaches. A circuit court case in Florida suggests that the standard is a preponderance of the evidence. Cases in Ohio have found that the evidence presented need not be clear and convincing but need only ensure that the guardian’s removal will serve the ward’s best interests. New Jersey cases suggest that the burden be clear and convincing.

Rhode Island does not set out an evidentiary standard. Rather, it requires the court to remove any guardian upon finding that the ward, based on a decision-making assessment tool directly in the statute, has the capacity to make decisions regarding his or her personal affairs. The functional assessment tool is an all-encompassing evaluation of the individual’s medical status, social assessment, mobility, social network, and financial matters to ease the court’s decision-making regarding capacity.

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24. *In re Guardianship of Branch*, 10 FLW Supp. 23, 25 (2nd Cir. 2002) (citing Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45 (Fla. 2001) (establishing the presumptions and burden of proof required by banks to execute on accounts titled in the names of husband and wife who claimed the accounts were held as tenants by the entirety and therefore not subject to execution by the husbands judgment creditors).
In states without an express burden of proof, courts may simply use the same evidentiary standard as is used in a petition for guardianship, which is generally the high standard of clear and convincing evidence. But there is no research to substantiate this. Courts may be more inclined to use the same evidentiary standard when the statute expressly requires the court to follow the same procedural standards as in a petition for guardianship. Of the 18 states that require the court to follow the same procedural standards as in a petition for guardianship, only four expressly state an evidentiary burden of proof. 28 Minnesota requires prima facie, 29 Hawaii and Oregon require clear and convincing evidence after the petitioner establishes a prima facie case for termination, 30 and Louisiana’s standard is a preponderance of the evidence. 31 The remaining 13 states that require the same procedures as in a petition for guardianship do not state an evidentiary standard. 32 The legislative intent is unclear.

In spite of the variation and ambiguity, it is clear that at least eight states require courts to use a lesser burden of proof (either prima facie or preponderance of the evidence) in a petition for termination than in an initial petition for guardianship. There is no research to determine whether courts in these states may grant restoration more frequently. Due to the nature of the issues and the presumptions to be overcome, codifying an evidentiary standard can be an additional tool for states to protect the autonomy of the protected individual.

MORITORIUM PERIODS ON FILING REQUESTS FOR REVIEW

States may enact procedural bars to petitions for restoration. Eleven states permit courts to specify a minimum time period after the issue of the order adjudicating incapacity during which a petition for a review of the order may not be filed without special leave. 33 Of these states, eight require that the period not exceed one year, two require that it not exceed six months, and one state, Michigan, sets the maximum period at 182 days. While this may reduce frivolous and hasty attempts to remove a guardian, it could at the same time delay legitimate petitions for removal and restoration of rights.

Four states specify a period during which a petition for reconsideration of a determination of incapacity cannot be filed, regardless of what the original order says. 34 Arizona precludes an interested person, other than the guardian or protected individual, from filing such a petition

within one year of the order adjudicating incapacity unless the court believes that the individual is no longer incapacitated.\textsuperscript{35} Texas expands the one-year period to apply to any person.\textsuperscript{36} Iowa and Wyoming preclude the filing of any petition for termination within six months of the denial of a former petition for termination.\textsuperscript{37} Other states don’t place any limitations on the time in which a petitioner may file a request for restoration. For example, California permits the guardian to petition the court at any time for a hearing to challenge the guardianship on the basis that he or she no longer meets the legal criteria.\textsuperscript{38}

**PROCEDURAL SAFEGUARDS**

As a practical matter, the only way an individual can end a guardianship against the wishes of the guardian is by initiating a contested court proceeding.\textsuperscript{39} Under the UGPPA and in similar jurisdictions, once a guardian has been appointed, the court will ordinarily act only if a moving party so requests.\textsuperscript{40} Twenty states and the UGPPA expressly permit the petitioner to informally communicate a request for restoration instead of filing a formal application.\textsuperscript{41} Individuals need not secure counsel to file an informal petition. This makes the judicial process more accessible by reducing procedural barriers to filing, such as cost and time, which may deter interested parties from taking action.\textsuperscript{42} However, it would be critical for the individual to secure counsel should the petition proceed further.\textsuperscript{43} As an additional safeguard, 17 states expressly bar willful interference with a request for restoration to the court.\textsuperscript{44} The court may hold any person who knowingly interferes with the transmission to be in contempt of court. This reflects certain guardianship policy to promote open lines of communication directly between the court and the protected individual.

Colorado specifically targets the guardian, stating that the fiduciary shall not take an active role opposing or interfering with a proceeding for restoration initiated by the protected individual.\textsuperscript{45}

\textsuperscript{38} Cal. Probate Code § 1850
\textsuperscript{39} Cavey, supra note 40, at 29.
\textsuperscript{40} U.G.G.P.A. § 414 (1997).
\textsuperscript{42} Mary Joy Quinn & Howard S. Krooks, The Relationship Between the Guardian and the Court, 2012 Utah L. Rev. 1611, 1638 (2012).
\textsuperscript{43} See Patricia M. Cavey, Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths, 2 Marq. Elder’s Advisor 5 (2000).
\textsuperscript{45} See Colorado Revised Statutes Annotated § 15-14-318(3.5)(c).
However, the guardian may file a report on matters relevant to the termination proceeding, and may file a motion for instructions regarding the appointment of an attorney or visitor, investigations to be conducted, and the guardian’s involvement in the proceedings. The UGPPA does not contain a similar provision.

These procedural safeguards – permitting informal requests for restoration and sanctions for interference with such requests – increase accessibility to the judicial process independent of the guardian. Seventeen states have codified both protections. Thirty-one statutes do not include either protection. This high number may cause concern because, “the relationship between the guardian and the court is generally seen as a critical partnership that supports the incapacitated person who cannot support himself.” However, general statutory provisions requiring guardians to act in the best interest of the individual and the common law likely apply in this context. The common law impliedly allows a guardian to oppose a petition for restoration so long as the guardian acts reasonably and in good faith. It recognizes that opposing a motion for restoration does not necessarily create a conflict of interest. The guardian’s general duty of loyalty to the protected individual may require the guardian to oppose a petition for restoration where it is clear the individual has not regained capacity.

Following appointment of a guardian, courts have an on-going responsibility to ensure that the terms of the order remain consistent with the respondent’s needs and conditions. Due to possible changes in capacity, periodic assessment of capacity is necessary to determine whether guardianship is still necessary. Courts generally receive annual guardianship reports with updates of the protected individual’s condition, and can often impose additional requirements on the guardian to provide more frequent or more detailed reports. Submitting an annual report forces the guardian to stop and think directly about the often elusive issue of the individual’s capacity.

46 See id. § 15-14-318(3.5)(a).
49 Quinn & Krooks, supra note 39, at 1621.
51 Id.
52 See id.
It can also be an opportunity for discussion and input from the protected individual and interested parties about the continued need for guardianship.

Three states, Connecticut, Missouri, and New Mexico, require the court itself to periodically analyze whether the individual’s circumstances have changed sufficiently to justify termination of the guardianship and restoration of rights.\(^55\) Connecticut requires the court to conduct a review “not later than one year after the conservatorship was ordered and not less than every three years after such initial one-year review.”\(^56\) Missouri requires that the court inquire into the status of every protected individual at least annually, to determine whether the incapacity may have ceased.\(^57\) New Mexico requires the court to hold a status hearing to review the continued need for a guardian “at any time following the appointment of a guardian, but not later than ten years after the initial appointment of a guardian for a protected person and every ten years thereafter.”\(^58\) These states provide additional oversight to the protected individual because the mental capacity of the individual is periodically and regularly assessed by the court, regardless of whether a petition for restoration is filed.

**DUTIES OF THE GUARDIAN AND RIGHTS OF THE INDIVIDUAL**

The authority and responsibility of a guardian terminates when the individual’s rights are restored.\(^59\) Generally, in a termination proceeding the guardian must submit a final report of the individual’s status and actions taken on his or her behalf, as well as a final accounting of the estate assets for the court’s review and approval.\(^60\) While states require a periodic status report from the guardian, some statutes impose additional reporting duties upon a change in the individual’s capacity.

Three states expressly require the guardian to *immediately* notify the court if the incapacitated individual’s condition has changed.\(^61\) This is consistent with existing standards that call attention to a guardian’s duty to report to the court should a change in capacity occur.\(^62\) The UGPPA states that, “the guardian shall immediately notify the court if the ward’s condition has changed so that the individual is capable of exercising rights previously removed.”\(^63\) The National Guardianship Association Standards of Practice requires the guardian to “promptly inform the court of any change in the capacity of the person that warrants a restriction of the guardian’s authority.”\(^64\)

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\(^60\) *See supra* note 41 at p. 81.


\(^62\) These standards include the National Probate Court Standards (NPCS), the Uniform Guardianship and Protective Proceedings Act (UGPPA), and the National Guardianship Association Standards of Practice (NGA).


\(^64\) The 2011 Third National Guardianship Summit, comprised of ten National Guardianship Network organizations, developed new standards which are incorporated into the 2013 edition of the NGA Standards of Practice for Guardians; NGA Standards of Practice for Guardians, Standard No. 1.4 (Third Nat’l Guardianship Summit: Standards of Excellence 2011).
Similarly, Rule 6 of The Model Code of Ethics for Guardians states that, “the guardian has an affirmative obligation to seek termination or limitation of the guardianship whenever indicated.” (Emphasis added). The Rule also states that, “the guardian shall diligently seek out information which will provide a basis for termination or limitation of the guardianship,” and shall promptly notify the court upon any indication that termination is warranted. While The Model Code and The National Guardianship Standards of Practice are not law, they are in line with the policy of guardianship law to protect the interest of the individual and work towards the regaining of capacity.

Only three states have codified the right to restoration at the earliest possible time. Florida, Georgia, and Michigan expressly state that the individual has the right to have their autonomy and rights restored at the earliest possible time. This begs the question: What is the “earliest possible time”? And what do courts do in practice to determine the earliest possible time? There is little data or literature to provide an easy answer.

CONCLUSION

This statutory review is an initial examination of current state law on restoration of rights in the termination of adult guardianships. There are many unknowns, including the number of petitions for restoration that are filed in each jurisdiction and the number of petitions granted. In light of the findings in this paper, there is a compelling need for additional research and data collection to determine which state practices adequately protect the individual’s right to restoration. Eighteen states and the UGPPA apply the same procedures used in an appointment of a guardian to a petition for termination and restoration. In these states, the barriers to establishing a guardianship are equally as challenging to overcome in restoring rights to an individual who has regained capacity. Adults with capacity are constitutionally guaranteed certain fundamental rights yet only three states expressly state that the protected individual has the right to be restored at the earliest possible time.

All but three states provide broad permission for any interested party to petition for restoration, yet states vary as to the burden of proof that the petitioner must meet. Depending on the level of burden, the evidentiary standard acts as either a barrier to restoration or a guard to protect the right to restoration. Two states and the UGPPA require the relatively low standard of prima facie evidence. Seven states use a preponderance of the evidence standard, and eight states use the higher standard of clear and convincing evidence. Thirty three states do not expressly provide an evidentiary standard, leaving courts to determine the adequacy of evidence and the appropriate bars to restoration.

It’s unclear whether more restorations occur in states that codify detailed restoration procedure and protections. Twenty states and the UGPPA permit an informal request for restoration. Seventeen states permit the court to hold any person who knowingly interferes with a petition for restoration to be held in contempt of court. Thirty one states do not include either protection. Further, it is unknown whether in practice such detailed procedural requirements lead to more

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66 Id. Rule 6.1, Rule 6.2
petitions for restoration. A second phase of this study, including a restoration case law summary and intensive reviews of probate court procedure in jurisdictions with exemplary practices, is necessary to document and articulate restoration practices for replication across the United States.