

Restoration of Rights *in*
Adult Guardianship

Research & Recommendations

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About the American Bar Association Commission on Law and Aging

The American Bar Association Commission on Law and Aging is a collaborative and interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life and quality of care of aging persons. The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations and other groups working on issues of aging.

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Preface/Acknowledgments

Adult guardianship is generally viewed as permanent. With the stroke of a judge's pen, rights are lost, with the rationale of protection – rights that are seldom regained over an individual's remaining lifetime. But how seldom? How frequently and under what circumstances are guardianships terminated and rights restored to bolster self-determination? What policies and practices should guide courts, lawyers, advocates and families in securing restoration when the basis for guardianship does not exist because of changed conditions, supports, or new evidence?

The American Bar Association Commission on Law and Aging (ABA Commission) sought to answer these questions through legal research, empirical research involving collecting the first multi-state data on restoration, and convening a consensus-building roundtable of experts. We had skilled and knowledgeable partners in this important work.

The ABA Commission's inquiry concerning restoration procedures dates to 2013 when our summer law intern, Jenica Cassidy, conducted a 51-jurisdiction search of the restoration procedures in state guardianship codes. Jenica returned in 2014, with support from the Borchard Foundation Center on Law and Aging, to undertake a comprehensive case law search and analysis. Jenica's statutory and case law work for the ABA Commission formed the basis for her pioneering article, "Restoration of Rights in the Termination of Adult Guardianship" in the University of Illinois College of Law *Elder Law Journal*.

We knew we had made a good start. But what was missing was information from the field on how and when restoration actually occurs. Data on adult guardianship is scant, and looking for the tiny slice of data concerning guardianship restoration data is somewhat like looking for a needle in a haystack. We turned to Dr. Pamela Teaster of the Virginia Tech Center for Gerontology – a leading academic researcher of guardianship practices. We also continued our partnership with Jenica Cassidy, who had become a private practice elder law attorney at Alisa Kobrinetz Chernack, LLC in Howard County, Maryland.

With our partners, in 2015 we sought and received funding from The Greenwall Foundation to conduct empirical research and convene a broad-based policy and practice roundtable. We located two state court systems with databases in which restoration was a searchable element – the Minnesota Judicial Branch and the Washington Administrative Office. Additionally we identified two state public guardianship systems that tracked restoration – the Kentucky Guardianship Program and the Illinois Office of State Guardian. Their statistics and cases were essential to our efforts. Toward the end of the project, we also examined helpful statistics from the North Carolina Administrative Office of the Courts.

In September 2016, the project convened a Roundtable on Restoration of Rights, with supplementary funding from the Borchard Foundation Center on Law and Aging. The Roundtable's 20 diverse participants included: Amy Allbright, ABA Commission on Disability Rights; Phoebe Ball, National Council on Disability; Hon. Patricia Banks, Chair of the ABA Commission; Molly Burgdorf, U.S. Administration for Community Living; Karen Campbell, Office of Public Guardian, Inc., Tallahassee, Florida; Mary Jane

Ciccarello, Borchard Foundation Center on Law and Aging; Prof. Robert Dinerstein, American University Washington College of Law; Robert Fleischner, Center for Public Representation, Northampton, Massachusetts; Hon. Kristin Glen, City University of New York (CUNY) School of Law; Charles Golbert, Cook County Office of Public Guardian, Chicago, Illinois; Michelle Groman, The Greenwall Foundation; David Hutt, National Disability Rights Network; Prof. Nina Kohn, Syracuse University College of Law (by phone); Jonathan Martinis, The Burton Blatt Institute at Syracuse University; Dr. Jennifer Moye, VA Boston Healthcare System; Dari Pogach, Quality Trust for Individuals with Disabilities, Washington, DC; Mary Joy Quinn, National College of Probate Judges; Bernadette Sweeney, Attorney at Law, Rockville, Maryland; Brenda Uekert, National Center for State Courts; and Morgan Whitlatch, National Resource Center for Supported Decision-Making. We appreciate their keen insights, and their review of the Report.

To gain a personal perspective on guardianship restoration, Roundtable participants heard the story of Ryan King, who came to the meeting with his mother Susie King, to talk about his pending restoration petition in the DC Superior Court. Within a month after the Roundtable, in a landmark victory the court granted Ryan King’s motion to terminate his guardianship. The court found that Mr. King was able to “meet the essential requirements for his physical health, safety, habilitation, or therapeutic needs without the need for a guardian or conservator.” After 15 years subject to guardianship, he won the right to make his own decisions, with the support of his family.

Erica Wood
Project Director

Executive Summary: Research and Recommendations on Restoration of Rights in Adult Guardianship

Adult guardianship has been characterized as both a “gulag and a godsend” in which people with disabilities – including older individuals with dementia – lose their rights in the name of protection. Regardless of the good intentions of – and essential care provided by – many guardians who often step in at crisis points, guardianship is one of society’s most drastic interventions in which fundamental rights are transferred to a surrogate, leaving an individual without choice and self-determination.

It appears that an unknown number of adults languish under guardianship beyond the period of need – and that others may never have needed the guardianship in the first place, as a less restrictive option could have sufficed. A guardianship may be terminated by the court in three scenarios: (1) the court finds that the person has regained the ability to make decisions; (2) the court finds that the person has developed sufficient decision-making supports and no longer needs the assistance of a guardian; or (3) additional evidence becomes available to show that the person does not meet the legal standard of an incapacitated person. While, on paper, each state provides for “termination of the order and restoration of rights,” there are no data on the frequency with which restoration occurs and under what circumstances.

To enhance self-determination of individuals subject to guardianship, the American Bar Association Commission on Law and Aging (ABA Commission) conducted a project to shine a light on the little known process of restoration.

- Legal Research on Restoration of Rights. We identified statutory provisions in each state and analyzed the provisions as to: (1) general restoration procedure; (2) evidentiary standards; (3) procedural barriers and safeguards; and (4) roles of the court and the guardian. We researched reported restoration case law, primarily from state appellate courts, collecting a total of 104 restoration cases dating as far back as 1845. However, we focused on the 57 cases dating from 1984 to the present.
- Court File Research. With funding from The Greenwall Foundation, we partnered with the Virginia Tech Center for Gerontology to study preliminary cross-state restoration data on the frequency of guardianship restorations, the populations affected, and the case characteristics in which a restoration finding is made.

Few computerized guardianship court database systems exist. We located two state court systems in which guardianship restoration was a searchable element – Minnesota and Washington (and later identified North Carolina as well). To supplement this court data, we turned to two statewide public guardianship programs – Illinois and Kentucky.

- Interdisciplinary Roundtable. With funding from the Borchard Foundation Center on Law and Aging, we convened a pioneering consensus-building Restoration Roundtable on September 7, 2016.

Current attention to the emergent concept of “supported decision-making” has brought restoration to the fore. Supported decision-making is a process by which people with disabilities are encouraged to understand choices and make decisions for themselves, without a surrogate, and with the assistance of a support person or network. The principles of supported decision-making can also be used by a guardian or other surrogate in maximizing self-determination. In this new and fertile context, restoration of legal rights is key – and, in turn, identifying supports should be a critical part of restoration.

Court File Research Findings. We asked each of the four participating sites (MN, WA, IL, KY) to search its database for cases from August 2012 through August 2015 that resulted in a restoration of rights. The sites reported 191 court cases and 84 public guardianship cases, for a total pool of 275 cases, from which they extracted key information. We also collected 13 complete, redacted restoration case profiles for a qualitative examination.

- Who Was Restored?
 - Age of Individual: The average age was 40 years at the time of guardian appointment. In 78.9% of the cases, the individual was between ages 17 and 59; and in 21.1% of cases the individual was between 60 and 87 years old. Thus, essentially *four-fifths of the cases involved younger individuals, and one-fifth involved older individuals.*
 - Residential Setting at Time of Restoration Petition: A majority of individuals lived at home at the time of restoration (178 individuals or 65.7%), including the individual’s own home or the home of his/her family. This status was followed by 19 individuals (7.0%) residing in an assisted living facility and 16 individuals (5.9%) in a nursing home, with the remainder in a variety of other settings.
 - Size of Estate at Time of Restoration Petition: Of the 275 cases, 194 (70.3%) had estates under \$50,000; 15 (5.4%) were between \$50,000 and \$99,999; and 22 (8.0%) were between \$100,000 and \$249,999. The remainder were \$250,000 or above.
 - Trigger for Guardianship Appointment: The most prominent trigger was mental illness, accounting for almost one-third of the cases (90 individuals or 32.6%), followed by intellectual disability, with almost one-fifth of the cases (55 individuals or 19.9%). Dementia was a named trigger in only 4.7% of the cases.

- Scope of Order: In close to three-quarters of the cases (205 or 74.3%), the court named a guardian of both person and estate, but in 39 cases or 14.1%, the guardian had authority only over the estate, and in 27 cases or 9.8%, the guardian had authority only over the person.
- Who Was the Guardian? Of the 191 cases from the court data, family members were serving as guardian of person and/or property in over half the cases (112 or 58.3% for guardian of the person, and 105 or 54.7% for guardian of the estate). The second most common guardian was a private for-profit guardianship agency, and the third most common was a private professional guardian.
- Who Petitioned for Restoration? Generally, the petitioner for restoration of rights was the guardian (110 cases or 40.0%, often a family member), or the individual subject to guardianship himself or herself (104 cases or 38.8%). In some instances, Adult Protective Services (APS) petitioned (21 cases or 7.6%), and in a few instances the petitioner was a family member who was neither a guardian nor a service provider. In 13 cases (4.7%), the court itself initiated the restoration.
- Was There Legal Representation? In 118 cases (42.8%), the individual had no counsel, although the generally uncontested petition (see below) often was successful anyway. The court appointed an attorney in 73 cases (26.5%) and a guardian ad litem in 55 cases (20.0%). The individual had a privately retained attorney in 21 cases (7.6%) and a legal services attorney in two cases (0.7%).
- Was the Restoration Contested? The vast majority of cases (258 cases or 93.8%) were not contested. In total, the study included only 12 contested cases, in which individuals ranged in age from 20 to 73. The most common condition that had triggered the guardianship in these cases was mental illness, followed by brain injury and self-neglect.
- What Evidence Was Used to Prove the Restoration Case? Clinical evidence supported the judge's finding in just over half the cases (139 cases or 50.6%). Lay evidence supported the court's finding in just over half the cases as well (140 cases or 50.1%). The individual's own statements were evidentiary elements in 39 cases (14.2%).
- Were There Prior Attempts at Restoration? In the vast majority of cases (241 cases or 87.6%), the current case was the first attempt at restoration.
- What Proportion of Restoration Requests Were Granted? Data for our study did not include cases in which a restoration petition was filed but not granted. However, the North Carolina Administrative Office of the Courts data included restoration petitions and their dispositions over a five-year period (2010 – 2015) for 223 cases. The average rate of

petitions granted over the five years was 74.2% – that is, *about three-quarters of the restoration cases were successful*. It is not known how many of the petitions that were not granted were contested, nor how many had counsel. In comparison, the success rate of petitions in the reported case law was 39%. By definition, all of the reported cases were contested, and many were appellate cases.

- How Long Was the Person Subject to Guardianship Before Restoration? On average, individuals were subject to guardianship for 4.86 years before their rights were restored. The median period was two years and 10 months. The specific time periods ranged from less than one year to 30 years and 5 months.
- What Were the Terms of the Restoration Order? In some 80% of the cases (220 cases), the court restored all personal/health care rights. However, in 3 cases (1.1%), only some personal/health care rights were restored. In close to 70% of the cases, (189 cases or 68.7%), the court restored all financial rights, but in 6 cases (2.2%), only some financial rights were restored.
- What Were the Stated Reasons for Restoration? In 15 cases, the survey responses showed the reasons the court found to grant the restoration petition, including that the individual: (1) was able to take care of him or herself; (2) had the help of family members or others; (3) was in a group home and receiving assistance; (4) had a representative payee; and (5) was not considered “disabled” by the Social Security Administration.

Conclusions from Court File Research. In essence, the court file research produced a snapshot of a “successful restoration case” across states. In this typical case, the individual is about 40 years old, lives at home, has an estate under \$50,000, and has a mental illness or perhaps a dual diagnosis with other conditions. The guardian is most likely a family member.

After two to five years, the individual is restored, and his or her rights are returned. Either the family guardian or the individual himself or herself petitions for the restoration, and it is the first attempt. The case is not contested. The individual has no legal representation – or may have a court-appointed attorney or guardian ad litem. The case is built on a combination of clinical and lay evidence. The court restores all rights without any particular terms.

Our research shows that for cases with “typical” characteristics, the restoration process can work. However, what about cases in which no petition is filed because the individual, family, and guardian are unaware of the procedure? What about cases in which a petition is filed but the guardian, a family member, or service provider opposes the restoration and there is no attorney to represent the individual?

Our research highlights only a piece of the larger puzzle of restoration. The legal research on reported case law shows a more complex picture, as these cases were all contested and frequently were appealed. The interdisciplinary Roundtable participants considered a spectrum of key policy and practice issues as described below. They articulated diverse perspectives in some cases, and made a number of recommendations.

Lack of Awareness of Restoration Option. While each state statute sets out a procedure for restoration of rights, the process appears little used, due in part to lack of awareness.

- Notice of Right to Restoration. The *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act* (UGCOPAA, formerly the Uniform Guardianship and Protective Proceedings Act) requires that within 14 days following appointment, a guardian must send the individual, as well as named parties, notice of the right to request termination or modification. Additionally, four states have enacted a “bill of rights” for individuals subject to or potentially subject to guardianship, including the right to seek restoration.

Roundtable participants recommended that restoration notice should be given every time the court has contact with the individual. Court investigators and guardians ad litem, including volunteer visitors, should explain the process. The most important thing is that the court, guardian, visitor, or anyone else explain the right in ways the individual understands – and do so multiple times over the course of the guardianship.

- Education and Training for Stakeholders. The extent to which current training programs for guardians, visitors, guardians ad litem, attorneys, clinicians, and judges include a component on restoration is not known.

Roundtable discussion highlighted the need for education and training of all stakeholders, especially guardians ad litem, investigators, and visitors, who may have personal contact with the individual over time. One suggestion was developing a model template for restoration to be posted on every state court website. Another was to inform service providers and care managers about restoration.

Court Review of Cases for Continuing Need for Guardianship. Many cases in which individuals no longer need a guardian fail to receive any regular court review. Two of our 13 project case profiles showed examples in which the individual’s functioning improved significantly and a scheduled court review resulted in restoration.

- Guardian Reports. The revised Uniform Act on guardianship (UGCOPAA) requires guardians to submit reports at least annually, including a recommendation as to the need for continued guardianship or changes in the scope of the order. Some 19 states require the

guardian's report specifically to include a recommendation about the continued need for the guardianship.

Roundtable discussion noted the importance of this requirement as an element in every report, and the need for guardian training to recognize and respond to changes.

- Judicial Review of Continuing Need. While courts may receive annual reports from the guardian, they may not regularly review the reports for continued need for the guardianship. The *National Probate Court Standards* direct probate courts to “periodically consider the necessity for continuing a guardianship or conservatorship.” Some states require courts to review regularly the continuing need for the order.

Roundtable discussion recognized the value of regular court review of cases for continuing need for guardianship – but acknowledged substantial obstacles. Many courts with guardianship jurisdiction are not probate courts with specific standards for guardianship review, and there may be huge hurdles in just getting guardianship reports filed as well as reviewing them.

- Expiration of Guardianship Orders. In a few states, guardianship orders expire after a given number of years.

Roundtable participants discussed the concept of guardianship orders that would “sunset” – so guardianship becomes “a way station and not a final destination.” That would change the conversation and perhaps the required standard of proof. At the same time, there could be costs to the individual and the court. A consensus was that courts and attorneys should explore the concept of “progressive restoration” that would emphasize the importance of building supports over time.

Access to Court. Individuals seeking restoration face many barriers in gaining court access. Some state statutes and court practices have sought to open doors, broadening access opportunities.

- Making Informal Requests. The revised Uniform Act (UGCOPAA), as well as 20 state statutes permit an informal communication or request for restoration such as a handwritten note to the judge.

While Roundtable discussion favored use of such procedures, there is no research showing their frequency or effectiveness and no indication that individuals are aware they can file such informal requests. However, our case profiles showed several successful examples.

- Targeting Interference. Some 16 states prohibit interference with any communication to a court requesting restoration, at the risk of a finding of contempt of court. There is no research on the frequency of use or effectiveness of such interference provisions.
- Getting Assistance. Texas and possibly other states afford individuals subject to guardianship a right to be informed of the purpose and contact information of the protection and advocacy agency, as well as the local independent living center, area agency on aging, aging and disability resource center and other agencies that could assist with helping a person gain access to court.
- Filing Complaints. State statutes or court rules may establish a guardianship complaint process that could facilitate restoration requests.
- Using Investigators. Guardians ad litem, court visitors/investigator staff, or trained volunteers sometimes can promote the restoration process, and our research found examples.

Roundtable discussion emphasized the important role of guardians ad litem and court visitors in explaining restoration rights and procedures in understandable modes of communication, spotting possible restoration cases, and helping to bring them to the attention of the court.

- Statutory moratoria. Some statutes require or allow courts to establish a moratorium on requests for restoration. While such provisions aim to reduce the filing of frequent, frivolous requests when conditions or circumstances have not changed, they may have a chilling effect on actions by individuals hoping to have rights restored.

Right to and Role of Counsel. Individuals subject to guardianship require the assistance of counsel to challenge the continuing need for the order and seek restoration. However, many lack counsel, and thus may remain in an unnecessary or overbroad guardianship. In the court files we studied, the individual had no counsel in 42.8% of cases; and while the court had appointed a lawyer in 46.5% of cases, almost half of these appointments were for a guardian ad litem to act in the person's best interests rather than according to his or her expressed wishes. The individual had retained counsel on his or her own in only 7.6% of the cases.

Reasons for lack of counsel may be related to lawyers' perceptions of liability and their interpretation of ethical rules, may be statutory, may stem from lack of legal education, or may be due to lack of resources:

- Legality and Ethics of Representation. Lawyers may be reluctant to represent individuals seeking restoration because they are unsure about whether they can do so ethically. They

may reason that since the individual has been determined by a court to be unable to make some or all decisions, he or she therefore may not be able to instruct the lawyer.

However, as endorsed by the Roundtable, a strong case can be made that there are no bars to such representation because of a combination of retained rights under limited orders and statutory protections, constitutional due process protections, and contract law principles.

- Role of Counsel. The ABA *Model Rules of Professional Conduct* Rule 1.14 on Representing Clients with Diminished Capacity embraces a traditional advocacy role for the lawyer, unless the lawyer thinks the client is at risk of substantial harm, in which case the lawyer may take protective action. However, lawyers would benefit by additional guidance in the Comments to Rule 1.14, specifically concerning representation of individuals subject to guardianship, using the expressed wishes or advocacy model rather than the best interest model.

Roundtable participants recommended that such a change be made.

- Statutory Right to Counsel. The revised Uniform Act (UGCOPAA), as well as 18 states require that the same procedural safeguards that apply in the appointment process also apply in a restoration proceeding. The right to counsel in appointment proceedings varies significantly by state, as does the role of counsel. Some 12 state statutes expressly require the court to appoint counsel for an unrepresented individual subject to guardianship who seeks restoration of rights.

Roundtable participants recommended that because of the significant liberty interests at stake, state statutes should provide individuals subject to guardianship with an explicit right to counsel of the person's choosing in restoration proceedings. They discussed challenging issues in implementing such a right, including payment. They emphasized that the state should have a "duty to provide access to justice to persons who want to challenge or end a guardianship."

- Public Legal Representation. In our case file research, a legal services attorney represented the individual in only 0.7% of the cases. Federally-funded state protection and advocacy (P&A) agencies were not involved in any of the cases. However, a subsequent P&A survey showed a significant rate of P&A involvement in work on restoration issues.

Roundtable discussion highlighted possible reasons for the low rate of representation in our cases and urged legal services programs and P&As to continue or begin work on restoration.

- Education and Training of Counsel. Aside from the ethical and liability uncertainty, a lawyer may be stymied in representing a client in a restoration proceeding by the lawyer's possible inability to effectively communicate with the individual – or may feel that restoration is unlikely and not worth the effort of pursuing. Legal education (in law schools and in continuing legal education programs) targeted specifically at restoration proceedings could help to change lawyers' practices and attitudes.

Roundtable comments reinforced the critical need for education and training of both public and private lawyers in representing individuals in restoration of rights.

Role of Guardians. Some guardians oppose restoration of rights – for a variety of protective and pecuniary reasons. In such cases an individual subject to guardianship faces a heavy burden in mounting a contested case. Conversely, other guardians actively support the individual's self-determination and may be the ones petitioning for the restoration.

In our court file research of 275 cases, only 12 were contested, and only three of these by the guardian. In the reported case law we collected, guardians opposed the restoration petition in at least 30 of the 57 cases examined, and an additional 20 cases were unclear.

- Guardian Duties to Notify Court and Seek Restoration. Under the revised Uniform Act (UGCOPAA), a guardian must immediately notify the court if the person's condition has changed. One or more states and the *NGA Standards* include provisions for the guardian to assist the person in regaining capacity, notify the court of changes, and seek restoration in certain instances.

The Roundtable participants supported such defined duties, and their implementation in practice.

- Prohibiting Guardian Opposition. A 2011 Colorado appellate case found that a guardian or conservator may in good faith oppose a motion by a person subject to conservatorship and may be paid from the individual's funds for doing so. In response, the Colorado legislature revised the statute to preclude guardians or conservators from opposing or interfering with a proceeding for restoration initiated by the individual, but the statute allows the guardian or conservator to file a motion for instructions.

Roundtable discussion on the role of the guardian reflected varying perspectives. Some participants said the guardian should never oppose a restoration petition, as it goes against the duty to help the person develop or regain self-determination; while others said opposition may be needed to protect against continuing exploitation or undue influence.

- Effect of Fees. Our study found reported case law ordering the payment of attorneys' fees from the individual's estate for guardians who oppose the restoration.

Roundtable discussion noted a distinction between prohibiting guardian interference with or opposing the restoration petition, and prohibiting payment for costs of doing so from the individual's estate, with some favoring the position that guardians who oppose a restoration petition should not be paid for the costs of doing so from the person's estate.

- Guardian's Role in Decision Support. Overall, the guardian role is still seen primarily as protective – or at least as walking a fine line between protection and autonomy.

Roundtable participants recommended approaches that would change the perception of the guardian's role toward being a "supporter" – ensuring the guardian identifies and acts on the individual's values and preferences. Tools to help the guardian do so are critical.

Focus on Supports. Under the principles of the "least restrictive alternative" and "supported decision-making," a restoration proceeding should assess not only the individual's abilities and improved condition but also whether an individual has *supports* sufficient to make decisions and to manage affairs without the assistance of a guardian. The extent to which judges and lawyers in practice focus on identifying supports to enable decision-making is not known.

We found documentation of available support in 16% of our 275 court file cases, or 44 cases. In addition, several key reported case law decisions emphasize that courts must consider evidence of supports in making decisions about termination of guardianship orders.

- Statutory Guidance on Supports. The revised Uniform Act (UGCOPAA) directs the judge to take into consideration supports in a finding of incapacity.

Roundtable participants recommended that state law require that a judge's finding on "capacity" must take into account and make a finding on the availability and use of supports; and that laws and practice guidance should clarify what is meant by supports and give examples.

- Guardianship Plans. A growing number of states, as well as the *NGA Standards*, require the guardian to submit a forward-looking guardianship plan to guide the guardian's actions. Such a plan might include steps the guardian will take to support self-determination, and a timeline or goal for seeking restoration.

Roundtable participants recommended the use of guardianship plans to outline supports the guardian aims to arrange – and recognized that supports could be provided progressively over time. They also referenced several tools available for judges, lawyers and guardians in focusing on supports. As noted above, they strongly urged that a primary role

for all guardians should be to identify supports and sort out any administrative or practical barriers in their use. Guardians should *become* “supporters.”

- Post-Restoration Need for Supports. While restoration of rights may be granted based on a finding of supports in place, it is critical to ensure that the person continues to have the supports needed over time – as deterioration in supports may land the person back in a guardianship setting with loss of the very rights won in the restoration proceeding.

Kinds of Evidence and Evidentiary Standards. In proving a restoration case, (1) what kinds of evidence do and should courts consider; (2) what should be the evidentiary standard; and (3) where should the burden of proof lie?

Kinds of Evidence. Once a restoration petition is filed, state statutes generally afford the court wide latitude in the kinds of evidence needed to prove “capacity.” Reported case law shows that courts generally rely on two primary kinds of evidence – clinical statements and in-court observation of the individual.

- Clinical Evidence. Cases vary as to reliance on the individual’s physician, court-appointed clinician, or both, and on the clinician’s capacity assessment experience. In our court file research, clinical evidence was referenced in 139 cases or 50.6% of the cases, including clinical statements, clinical tests, and in-court clinical testimony.
- Court Observation and Statements of Individual. The reported case law does not indicate the extent to which in-court observation of the individual influences the judge’s determination. The case files we researched included use of the individual’s own testimony in 39 cases (14.2%) – including 37 cases of in-court testimony and two cases of deposition testimony.
- Lay Evidence. In the reported case law, some courts appear to view lay testimony as “secondary” to clinical evidence – which could discourage key comments by those who are most familiar with the individual’s abilities and supports. However, in our court file research, 140 cases or 50.1% used lay evidence to detail what the individual can do on a day-to-day basis and how the supporters and supports can help.

Roundtable participants recognized that while clinical evidence may be useful, it should not be required. In-court testimony by the individual or by lay witnesses can offer key perspectives on the individual’s day-to-day abilities, strengths and limitations. They noted that the question should not be phrased so much as “does the person have capacity” as “does the person continue to need state intervention through guardianship?”

Evidentiary Standards. In theory, if restoration is to be accessible to an individual already under the severe disadvantage of a determination of incapacity, the evidentiary standard should be less than that required to prove initial incapacity. The revised Uniform Act (UGCOPAA) requires that the petitioner for restoration need only establish a *prima facie* case, and then the burden shifts to the party opposing the restoration to establish by clear and convincing evidence that continuation of the guardianship is in the person's best interest.

Our legal research found that *34 jurisdictions do not statutorily provide an evidentiary standard*, leaving wide discretion for courts and uncertainty for litigants. Only two states follow the UGCOPAA in requiring a *prima facie* showing by the petitioner; seven states require a preponderance of the evidence; and eight states use the clear and convincing evidence standard.

Roundtable participants generally endorsed the UGCOPAA approach requiring establishment of a *prima facie* case, after which the burden shifts to the opposing party to establish by clear and convincing evidence that continuation of the guardianship is in the person's best interest. However, some participants noted that there may be differences by population.

Burden of Proof. As stated above, the Uniform Act (UGCOPAA) provides that once the petitioner for restoration establishes a *prima facie* case, the burden of proof shifts to the opposing party. Our legal research shows that four states place the burden of proof on the restoration petitioner to show that there is no longer a need for a guardian, and four states place the burden on the party contesting the restoration. Where the statute does not specify who has the burden, the courts appear divided.

Court Data and Research. Our empirical research was constrained by a widespread lack of data on restoration of rights. We could locate only three state courts and two statewide public guardianship programs that track restoration data. Moreover, we found that data on the number of successful restorations was more available and easier to access than data on the number and disposition of restoration requests, leaving compelling questions about what happened to the unsuccessful requests.

Roundtable participants supported tracking of data on restoration of rights by state courts and public guardianship programs; as well as research on the outcome of judicial restoration proceedings.

I. Introduction and Background

A. Introduction

Adult guardianship has been characterized as both a “gulag and a godsend”¹ in which people with disabilities – including older individuals with dementia – lose their rights in the name of protection. Regardless of the good intentions of – and essential care provided by – many guardians who often step in at crisis points, guardianship is one of society’s most drastic interventions in which fundamental rights are transferred to a surrogate, leaving an individual without choice and self-determination. In 1987, Rep. Claude Pepper said in a historic congressional hearing that “The typical ward has fewer rights than the typical felon.”² Moreover, guardianship generally is plenary and permanent, leaving no way out – “until death do us part” but often far harder to undo than a marriage.

It is apparent from press stories, agency and professional experience, and anecdotes that an unknown number of adults remain under guardianship beyond the period of need – and that others may never have needed the guardianship in the first place, as a less restrictive option could have sufficed. While, on paper, each state provides for “termination of the order and restoration of rights,” there are no data on the frequency with which restoration occurs and under what circumstances.

To enhance self-determination of individuals subject to guardianship, the American Bar Association Commission on Law and Aging (ABA Commission) sought to shine a light on the backwater and little-known process of restoration. We first secured the time and expertise of a law fellow to conduct comprehensive legal research. With this in hand, we partnered with the Virginia Tech Center for Gerontology to collect and analyze preliminary cross-state restoration data. The project was funded by The Greenwall Foundation, with supplementary support from the Albert and Elaine Borchard Foundation Center on Law and Aging for the consensus-building Roundtable discussion.

B. Background on Adult Guardianship³

Adult guardianship is the legal means by which a court gives one person or entity the duty and power to make personal and/or property decisions for another, based upon a finding that an adult is not able to make his or her own decisions. A judicial finding of “incapacity” may be based on medical, cognitive, and functional elements, as set out in state law. Judges receive

¹ Yeoman, B., “Stolen Lives,” *AARP The Magazine*, 2004.

U.S. House Select Committee on Aging, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Rpt. 100-641 (1987).

³ Terminology varies by state. In this report, the generic term “guardianship” refers to guardians of the person as well as guardians of property, frequently called “conservators,” unless otherwise indicated.

clinical and lay evidence and have broad discretion in the determination of the individual's capacity, the selection of a guardian, and the scope of the court order transferring decision-making authority to the guardian. Individuals subject to guardianship may be older persons with dementia, adults of any age with intellectual or developmental disabilities, people with mental illness, people with brain injuries or substance abuse – and often individuals with a combination of these conditions.

Guardians may be family members, willing friends, professionals, or public or private agencies. A guardian may have authority over a person's health and personal affairs, financial and property affairs, or both. Guardians are fiduciaries with a very high duty of care and accountability. Following appointment of a guardian, the court is to have continuing oversight under state law and receive regular reports and accountings. However, in practice, judicial monitoring varies widely, and often guardians have little supervision.⁴

Guardianship data are sparse to nonexistent at state and local court levels. In 2016, the National Center for State Courts estimated the number of open adult guardianship cases at approximately 1.3 million.⁵ While legal experts have tracked guardianship law for the past three decades, there are little data and little empirical research on actual practices by judges, attorneys, and guardians. We know from press stories, anecdotes, and discussion lists that practice varies from the heroic to the satisfactory to the deficient to the abusive,⁶ but the proportions in each category are unknown. In looking at guardianship, we are looking “through a glass darkly.”

Guardianship derives from the medieval English concept of *parens patriae*, in which the state has a duty to care for those who cannot care for themselves.⁷ Thus, the court appoints guardians as surrogates to make decisions that will protect individuals from risk or harm. But guardianship is a double-edged sword. In appointing a protective guardian, the court removes fundamental rights, transferring the individual's voice and decision-making role to a substitute

⁴ Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute, 2012; Uekert, B., *Adult Guardianship Court Data and Issues: Results from an Online Survey*, Center for Elders and the Courts, National Center for State Courts (March 2010).

⁵ A 2010 estimate by the National Center for State Courts found approximately 1.5 million adults under guardianship, but noted the number could be as low as 1 million or as high as 3 million Uekert, B. & Van Duizend, R., “Adult Guardianship: A ‘Best Guess’ National Estimate and the Momentum for Reform,” *Future Trends in State Courts 2011*, National Center for State Courts (2011). In 2016, an NCSC survey of state courts showed that 178,000 new guardianship or conservatorship cases were filed in 2015, and there were an estimated 1.3 million open cases. National Center for State Courts, “State Court Leaders Strive to Improve Guardianship and Conservatorship Oversight,” *Background*, November 20, 2016.

⁶ U.S. Government Accountability Office, “Elder Abuse: The Extent of Abuse by Guardians is Unknown, But Some Measures Exist to Help Protect Older Adults,” GAO-17-33, November 2016. See also GAO, “Guardianships: Cases of Financial Exploitation, Neglect and Abuse of Seniors,” GAO-10-1046, September 2010.

⁷ Wood, E., “History of Guardianship,” in Quinn, M. J., ed., *Guardianships of Adults: Achieving Justice, Autonomy, and Safety*, New York, Springer (2005).

and drastically reducing the person’s legal status. Guardianship may affect a person’s right to make decisions about income or assets, health care and treatment, marriage, voting, sexual choices, participation in social networks, and routine lifestyle choices – and has been said to “unperson” individuals.⁸

Despite recent reforms⁹ emphasizing the guardian’s duty to use the person’s values and preferences in making decisions, state protection generally trumps individual autonomy. Because of the constant, inherent tension in guardianship between autonomy and beneficence, rights and needs, protection and self-determination, adult guardianship is a virtual minefield of ethical and practice dilemmas.

C. Background on Restoration of Rights

Aside from emergency or temporary orders, court appointment of a guardian generally is assumed to be permanent throughout the life of the individual or until appointment of a different guardian. However, a guardianship may be modified, or may be terminated by the court, in three scenarios: (1) the court finds that the person has regained the ability to make decisions – perhaps through recovery from injuries, improvement in medical conditions, gaining of functional skills, or use of effective medications – and no longer meets the state standard of an “incapacitated person” (or similar term); (2) the court finds that the person has developed sufficient decision-making supports and no longer needs the assistance of a guardian; or (3) additional evidence becomes available to show that the person does not meet (perhaps never met) the legal standard of an incapacitated person, as described in the reported case law examples below:

- Regained Ability to Make Decisions. An 86-year-old woman had a stroke, and her niece was appointed conservator to manage her financial affairs. The aunt moved to assisted living, where her condition improved significantly. She then wanted to go home and to manage her own affairs. She petitioned for termination of the conservatorship. Her petition was opposed by the niece but was granted based on clinical records showing improvement, as well as her own in-court testimony. The niece appealed, and the trial court decision was affirmed.¹⁰

⁸ Bayles, F. & McCartney, S., *Guardianship of the Elderly: An Ailing System*, Associated Press, Sept. 20, 1987.

⁹ Elders and the Courts, National Center for State Courts, <http://www.eldersandcourts.org/Guardianship/Guardianship-Monitoring.aspx>; American Bar Association Commission on Law and Aging, <http://ambar.org/guardianship>; National Guardianship Network, <http://www.naela.org/NGN>.

¹⁰ *In re Maxwell*, 2003 WL 22209378 (Tenn. Ct. App.).

- Developed Sufficient Decision-Making Supports. The court appointed a mother as guardian of her 29-year-old daughter with intellectual disabilities. Three years later, the individual had developed a network of assistance including a supportive husband as well as help from her mother, close neighbors, a cousin’s wife, and a social worker who secured necessary supportive services. The court found that guardianship was no longer needed because “there is now a system of supported decision making in place.”¹¹
- Identified New Evidence Concerning Capacity. The court appointed a guardian of the estate for an individual on the basis that she was legally blind. She appealed and filed a motion for appointment of a psychiatrist. The psychiatrist found no mental deficiencies but a vulnerability to financial exploitation. He recommended the guardianship be terminated and that “some protection short of guardianship” be put in place to protect her funds. The individual petitioned for and was granted restoration of rights based on the new psychiatric evidence.¹²

Each state statutorily sets out a restoration procedure. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA, formerly the Uniform Guardianship and Protective Proceedings Act) provides that “unless the court otherwise orders for good cause, before terminating or modifying a guardianship for an adult, the court shall follow the same procedures to safeguard the rights of the adult which apply to a petition for guardianship.”¹³ Some 18 states use similar language – resulting in varied procedural protections at termination just as at appointment. The remaining states have differing language and requirements, but all establish a process.¹⁴ Upon termination of the guardianship order, the person is “restored to capacity” and to the exercise of decision-making and fundamental rights – in other words, to autonomy.

While data on frequency of restoration are almost nonexistent, it appears quite rare,¹⁵ and orders may continue unnecessarily, thus depriving adults of self-determination and liberty. Although guardianship reforms – including changes in the restoration process – have been underway for the past three decades, the culture in which these cases exist still bends toward paternalism and institutional inertia once a guardianship has been created.

Current attention to the emergent concept of “supported decision-making” has brought restoration to the fore. Supported decision-making is a process by which people with

¹¹ *In the Matter of the Guardianship of Dameris L.*, 956 N.Y.S. 2d 848 (Sup. Ct. 2012).

¹² *In re Bolander*, 88 Ohio App. 3d 489, 624 N.E.2d 322 (App. Ct. 1993).

¹³ UGCOPAA §319(e).

¹⁴ See ABA chart of state statutory restoration provisions at: <http://ambar.org/guardianship> .

¹⁵ Cassidy, J., “Restoration of Rights in the Termination of Adult Guardianship,” *The Elder Law Journal*, University of Illinois College of Law, pp. 83-122 (2015).

disabilities are encouraged to understand choices and make decisions for themselves, without a surrogate, and with the assistance of a support network.¹⁶ The United Nations Convention on the Rights of Persons with Disabilities, in Article 12, states that all persons have full legal capacity regardless of their disability.¹⁷ It requires governments to provide the support necessary for persons with disabilities to make their own decisions. While the United States has signed the Convention, the U.S. Senate has not ratified it. Nonetheless, following the lead of several other countries in recognizing the significance of this emergent paradigm, the U.S. Administration on Community Living has funded a National Resource Center on Supported Decision-Making,¹⁸ and the concept is gaining increasing visibility in the guardianship community. In this new and fertile context, restoration of legal rights is key – and, concomitantly, identifying supports should be a key part of restoration.

D. Prior Examination of Guardianship Restoration

Despite its significance as a legal process by which an individual can gain back his or her “personhood,” there has been little examination of the seemingly infrequent and arcane court restoration procedure. However, in 2013, the Florida Developmental Disabilities Council and the Florida Guardian Trust commissioned a research study on guardianship restoration in the state.¹⁹ The project team was coordinated by the Office of Public Guardian, Inc., in Tallahassee. The study aimed to collect restoration data to determine the need for assistance with restoration among persons with developmental disabilities subject to guardianship in Florida. The research methodology included four components:

- **Web-based Surveys.** A project survey drew 256 responses from agency staff, attorneys, clerks of court, and guardians. Among attorneys, clerks, and agency staff, 62% reported receiving inquiries about restoration, but the median number was only two per year. Among 38 responding attorneys, 26 had not pursued a restoration case in 2012, and another six had pursued just one. Responding guardians (including both professional and family guardians) had more experience with restoration – with over 25% reporting at least one person who expressed interest.

¹⁶ Blanck, P. & Martinis, J., “The Right to Make Choices: The National Resource Center for Supported Decision-Making,” *Inclusion*, Vol. 3, No. 24, 2015.

¹⁷ U.N. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N.Doc. A/RES/61/106, Dec. 13 2006.

¹⁸ <http://www.supporteddecisionmaking.org>

¹⁹ Florida Developmental Disabilities Council & Guardian Trust, *Restoration of Capacity Study and Work Group Report*, February 2014.

- Focus Groups. The project team conducted three focus groups of guardians, family members, and individuals under guardianship and found that most of the participants were unaware of the option to pursue restoration.
- Florida Case File Reviews. Florida does not maintain data on guardianship restoration, necessitating individual review of court files. The Florida annual report form includes a question about guardian activities to advance restoration. The project reviewed this section of the guardian reports for persons with developmental disabilities in two counties, but found no reports with plans for restoration, confirming that “restoration activity is rare at best.”²⁰
- Point-of-Intake Data Collection. The project found that of 3,500 requests for assistance from across the state during the six-month study period, only eight involved restoration.

The Florida Developmental Disabilities project produced a series of manuals called *Developing Abilities and Restoring Rights* – including a *Workbook for Persons with Disabilities* and companion publications including a guide for supporting persons with disabilities and a guide for legal professionals.²¹

²⁰ Florida Developmental Disabilities Council, p. 6.

²¹ Florida Developmental Disabilities Council & Guardian Trust, *Developing Abilities and Restoring Rights: A Workbook for Persons with Disabilities; A Guide for Supporting Persons with Disabilities; A Manual For Legal Professionals*, funded by the U.S. Department of Health and Human Services, Administration for Intellectual and Developmental Disabilities, 2016.

II. Research on Restoration of Rights

A. Legal Research on Restoration - Methodology

In 2013-2014, the ABA Commission completed a three-part pioneering legal research project on restoration:²²

- Statutory Search. The Commission identified statutory provisions in each state and analyzed the provisions in four key areas: (1) general restoration procedure; (2) evidentiary standards; (3) procedural barriers and safeguards; and (4) roles of the court and the guardian.²³
- Case Law Search. The Commission collected and researched reported case law concerning guardianship restoration of rights, primarily from state appellate courts. We collected a total of 104 restoration cases dating as far back as 1845. However, the focus of analysis was on the 57 cases dating from 1984 to the present.²⁴ The analysis looked at the case facts, the condition or trigger for the guardianship case, the petitioner, disposition of the petition, legal authority relied upon, evidence, and role of the guardian.
- Convenience Sample Questionnaire. We also conducted preliminary research probes on legal and judicial practice through selected “convenience sample” discussion list queries and interviews. The respondents were not randomly selected and were not necessarily representative nationally. We received responses from 152 judges in 35 states and the District of Columbia and 412 attorneys in elder and disability law, trust and estate law, and general practice in 30 states and the District of Columbia; and conducted 31 interviews of guardianship stakeholders from 12 states to personalize and animate the research questions.

Findings from the Commission’s 2013-2014 research are reflected in the sections discussing key issues below.

²² The ABA Commission research was conducted by law fellow Jenica Cassidy, and summarized in Cassidy, Jenica, “Restoration of Rights in the Termination of Adult Guardianship,” *The Elder Law Journal*, University of Illinois College of Law, pp. 83-122, 2015.

²³ See the ABA Commission’s state-by-state chart by Cassidy, as of 2013, at <http://ambar.org/guardianship>.

²⁴ Commission staff identified three additional restoration cases over the 2014 – 2016 period. See the table of cases at <http://ambar.org/guardianship>. Shortly following the Restoration Roundtable, the Superior Court of the District of Columbia issued a restoration order, *In Re Ryan Herbert King*, October 6, 2016.

B. Court File Research - Methodology

The objective of the court file research project was to collect primary data and information on: (1) the frequency of guardianship restorations; (2) the populations affected; and (3) the case characteristics in which a restoration finding is made.

As demonstrated by the Florida Developmental Disabilities Council study, randomized court file searches for restoration cases present an intractable barrier: so few cases exist that finding them is tantamount to looking for the proverbial “needle in the haystack,” and is simply not cost-effective.

Thus, the project team turned to court databases. As noted above, few computerized adult guardianship court database systems exist.²⁵ Many jurisdictions still have no searchable, computerized system for aggregating information on adult guardianship cases generally – and certainly not on restoration specifically. The project team posted an inquiry on a national 169-member court-based discussion list managed by the National Center for State Courts, asking whether courts identify and track restoration as a searchable element. Most replies indicated that a manual “case-by-case” search would be required, adding that such a search could be problematic in that many case files are incomplete, and files of adults and minors are sometimes mixed.

However, we located two state court systems in which guardianship restoration was a searchable element – the Minnesota Judicial Branch and the Washington Administrative Office of the Courts, both of which agreed to participate in the project. Additionally, near the completion of the research, we found that the North Carolina Administrative Office of the Courts²⁶ also tracks restoration as a searchable element. While we have not incorporated the North Carolina data in our initial findings due to time constraints, it added an important dimension to our findings.

To supplement the court data in Minnesota and Washington, the project team turned to statewide public guardianship programs, as they offered a potential pool of cases in which restoration might also be flagged. We contacted eight states with a statewide public guardianship office that had a computerized database. Two such offices said restoration was a searchable element – Illinois and Kentucky, both of which agreed to participate in the project.²⁷

²⁵ Uekert, *Adult Guardianship Court Data and Issues*, 2010.

²⁶ Electronic correspondence from Amy Funderburk, North Carolina Administrative Office of the Courts, and Dr. Mary Anne Salmon, University of North Carolina-Chapel Hill, on file with author, July 2016.

²⁷ The Washington Office of Public Guardianship also tracks restoration, but is located in the Administrative Office of the Courts, which offered a larger pool of data.

The project team asked each of the four sites to search its database for cases that resulted in a restoration of rights from August 2012 through August 2015. The sites reported 191 court cases and 84 public guardianship cases, for a total pool of 275 cases. The cases did not include emergency guardianships that ended at the duration of the time period and did not include appeals from guardianship orders. The search was for cases in which *restoration was the disposition*, not cases in which there was an unsuccessful petition for restoration. A search for such petitions could illuminate the barriers to seeking restoration, but did not appear possible given current databases.²⁸ However, late in the project, we learned that the North Carolina court database includes unsuccessful restoration petitions. These data, for the first time, shed some light on case dispositions.

We asked staff of the four state offices (MN, WA, KY, IL) to complete a brief web-based questionnaire for each case focused on demographics of the person subject to guardianship, key information about the guardianship case, and key information about the restoration case. We also asked each of the four sites to identify the four most recent restoration cases and to redact, copy, and send the complete files. The team received 13 restoration cases – although, frequently, clinical reports and other primary evidence were not included in the file, either because they were sealed or because they were simply missing, revealing problematic evidentiary gaps. This qualitative “deep dive” on selected cases was meant to complement and enrich the quantitative data collected through the questionnaire.

Following the analysis of our legal research and court file research, we convened a Roundtable on the Restoration of Rights in Adult Guardianship in September 2016 with 20 participants including judges/judicial representatives, disability advocates, public guardianship staff, elder law specialists, academics with expertise in decision-making issues, federal staff with aging and disability backgrounds, and a psychologist with experience in capacity assessment. The participants commented on the project findings, engaged in discussion, and made recommendations as presented in this report.

C. Court File Research - Empirical Findings

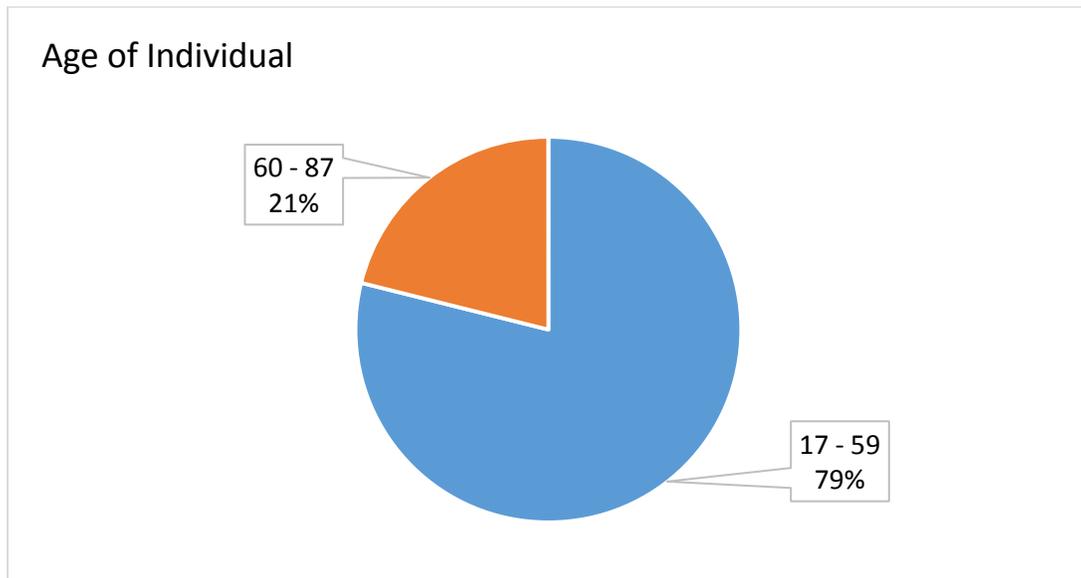
The total pool of 275 cases considered over three years included 191 from courts and 84 from public guardianship programs. In some instances, we ran separate queries using only court data, as public guardianship cases would be likely to have somewhat different characteristics –

The Kentucky Guardianship Program reported that “our data base does not currently track these cases. We would need to search individual cases to determine who these clients might be.” The Illinois Office of State Guardian said “unfortunately, our data base does not track those cases.” The Washington Administrative Office of the Courts said “That information is not tracked; however, with research it may be possible to identify these cases. The Minnesota Judicial Branch said identifying such cases would be possible.

particularly as to income of the individuals, support from public systems, and who serves as guardian.

Who Was Restored?

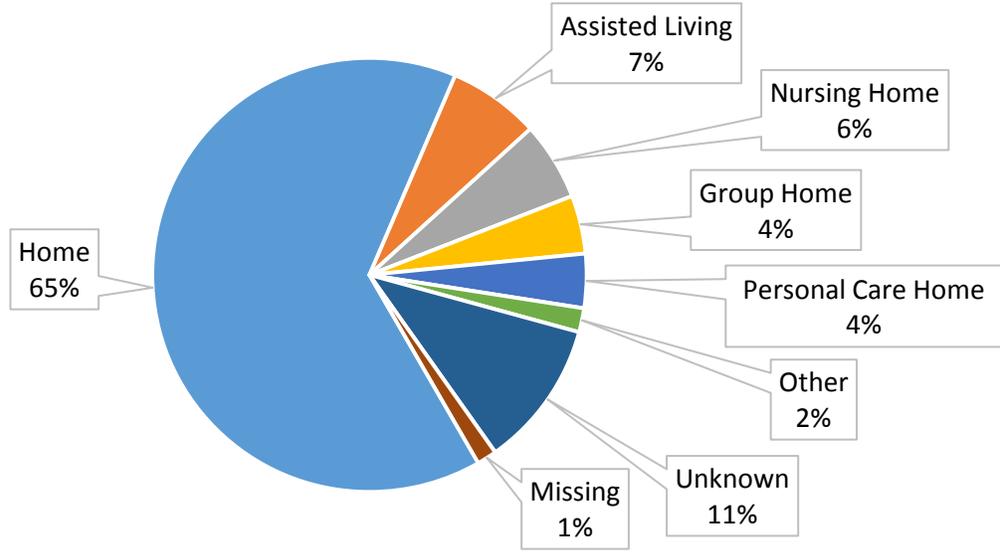
Age of Individual: The average age of the individual subject to guardianship was 40 years at the time of appointment of a guardian. The age range was 17 to 87. In 78.9% of the restoration cases, the individual was between ages 17 and 59. In 21.1% of cases, the individual was between 60 and 87 years old. Thus, essentially *four-fifths of the cases involved younger individuals, and one-fifth involved older individuals.*



Sex of Individual: A total of 135 males (52.7%) and 121 females (47.2%) had their rights restored.

Residential Setting at Time of Restoration Petition: A majority of individuals lived at home at the time of restoration (178 individuals or 65.7%), including the individual's own home or the home of his/her family. This status was followed by 19 individuals (7.0%) residing in an assisted living facility and 16 individuals (5.9%) in a nursing home. The remainder lived in a variety of settings including group homes, personal care homes or other settings, with some cases in which the residential setting was not known or missing.

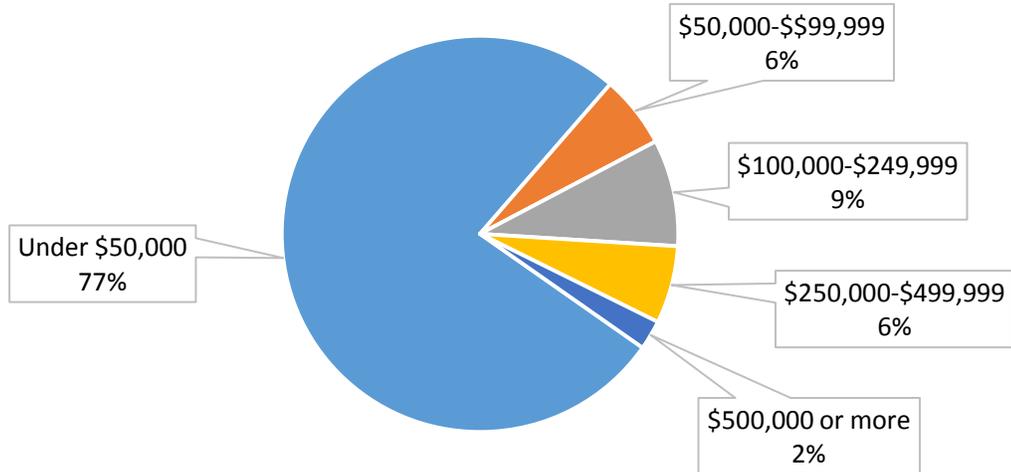
Residential Settings of Persons Restored



Size of Estate at Time of Restoration Petition: For size of the estate, we ran two reports. The first includes all 275 cases. Of these, 194 (70.3%) had estates under \$50,000, 15 (5.4%) were between \$50,000 and \$99,999, and 22 (8.0%) were between \$100,000 and \$249,999. As shown in the chart below, the remainder (22 cases or 8%) were \$250,000 or above.

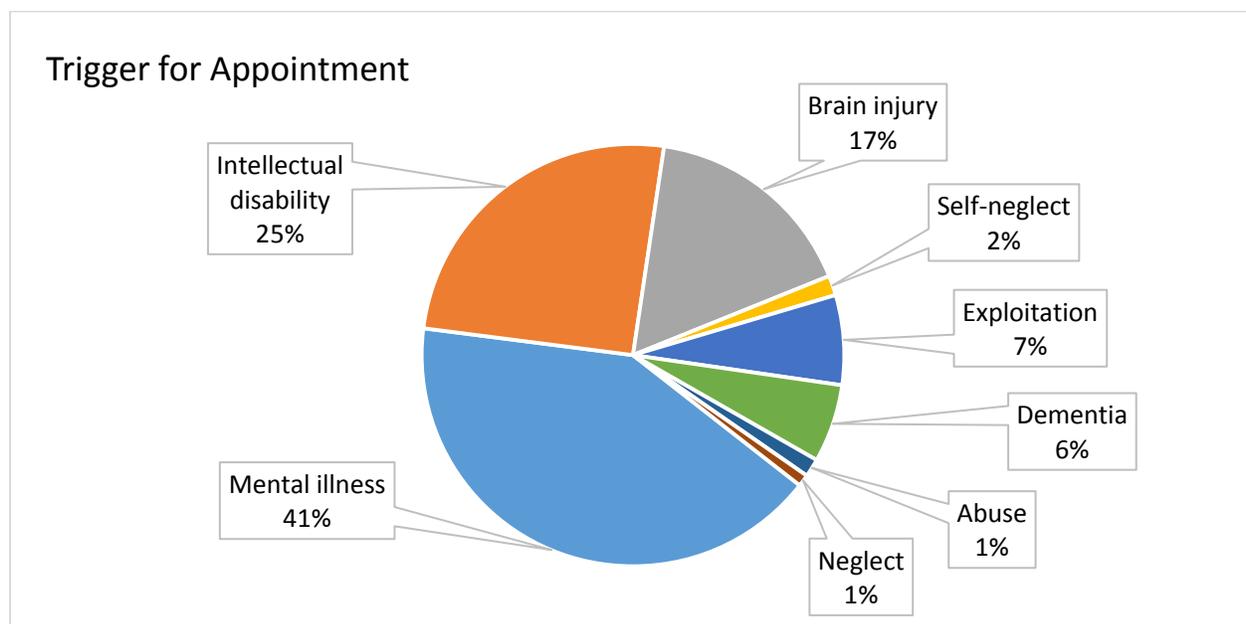
The second report was for court cases only – since the public guardianship cases would be likely to have a smaller estate. Of the 192 court cases, 116 (60.4%) were under \$50,000, with 12 (6.3%) between \$50,000 and \$99,999, and 21 (10.9%) between \$100,000 and \$249,999. The remainder (20 cases or 10.4%) were \$250,000 or above.

Size of Estate



Condition or Trigger for Guardianship Appointment: We examined eight triggers for the guardianship – four conditions of the individual (i.e., mental illness, intellectual disability, brain injury, and dementia), and four external risk/harm factors (i.e., self-neglect, exploitation, abuse, and neglect).

The most prominent trigger was mental illness, accounting for almost one-third of the cases (90 individuals or 32.6%) followed by intellectual disability, with almost one-fifth of the cases (55 individuals or 19.9%). Dementia was a named trigger in only 4.7% of the cases – but it is important to note that dementia is sometimes mis-diagnosed. Moreover, sometimes the diagnosis was not in the file, and there may have been no prognosis, functional assessment to help gauge changes over time. Highest among the external risk/harm factors named was self-neglect (21 cases or 7.6%). (Responses to this question included multiple counts.)



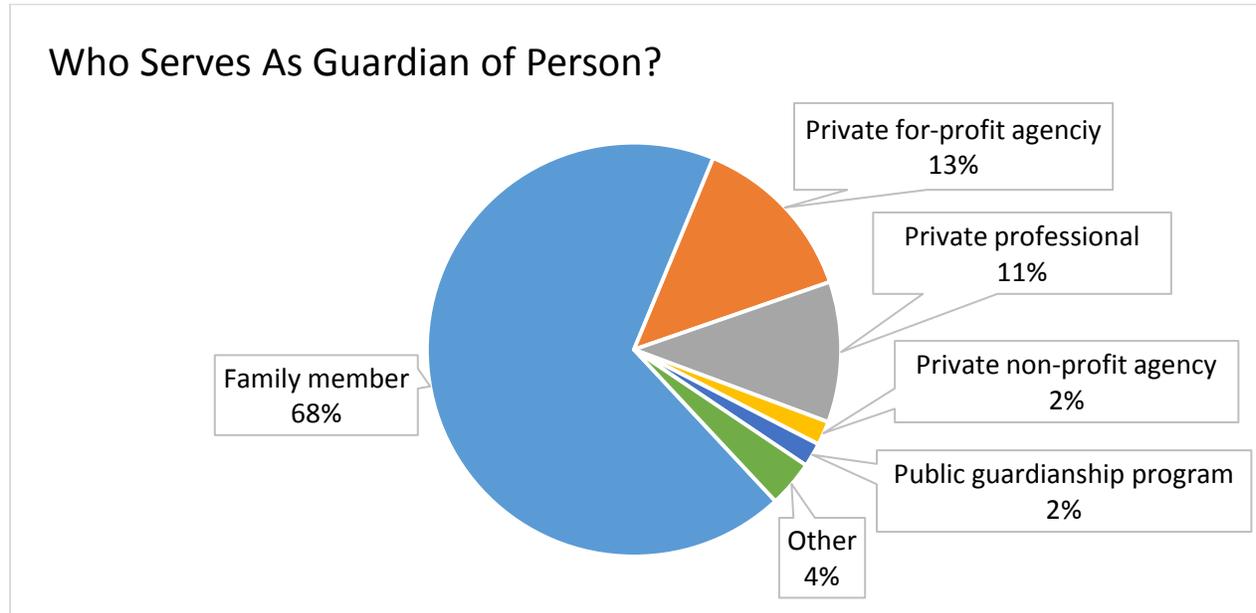
Scope of Order: In close to three quarters of the cases (205 or 74.3%), the court had named a guardian of both person and estate, but in 39 cases or 14.1%, the guardian had authority only over the estate, and in 27 cases or 9.8%, the guardian had authority only over the person.

Who Was the Guardian?

For the questions on who served as guardian of the person and of property, we used only the data from the two courts (total of 191 cases), as, by definition, the public guardian was always the guardian in the public guardianship databases.

For both guardian of the person and guardian of the estate, family members were serving in over half the cases (112 or 58.3% for guardian of the person and 105 or 54.7% for guardian of the estate). In both kinds of cases, the second most common guardian was a private for-profit

guardianship agency (22 cases or 11.5% for guardian of person and 26 cases or 13.5% for guardian of the estate), and the third most common guardian was a private professional guardian (18 cases or 9.4% for guardian of the person and 24 cases or 12.5% for guardian of the estate). The chart below shows guardian of the person appointments.

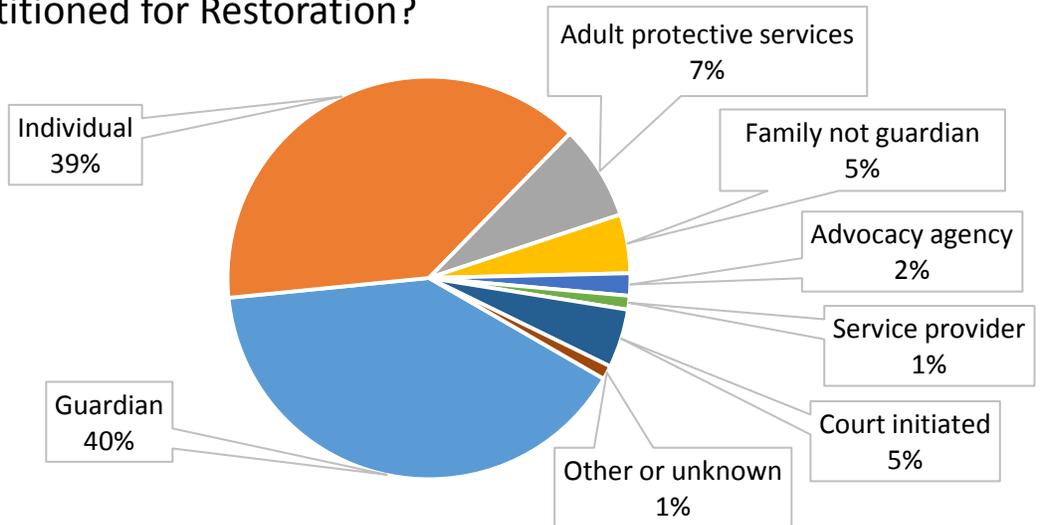


The Restoration Case

The most important project data concerned the restoration process. We examined who petitioned, whether the case was contested, whether there was legal representation, what evidence was used, and whether there were any prior attempts at restoration. We calculated the length of time from the guardianship order to the restoration order, and whether the court placed any limits or terms on the restoration of rights. Finally, in some cases, we were able to determine the court’s findings and stated reason for the restoration.

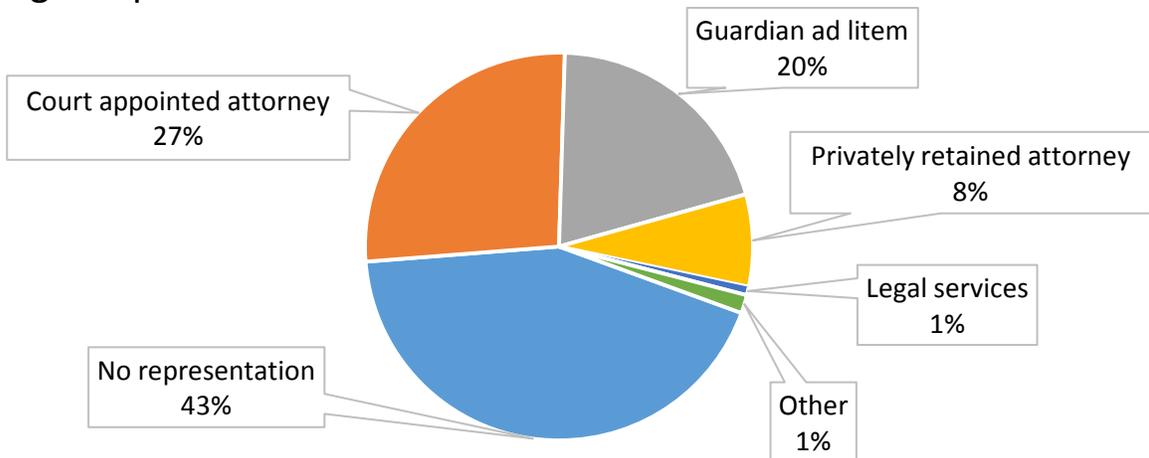
Who Petitioned for Restoration? Generally, the petitioner for restoration of rights was the guardian (110 cases or 40.0%, often a family member), or the individual subject to guardianship himself or herself (104 cases or 38.8%). In some instances, Adult Protective Services (APS) petitioned (21 cases or 7.6%), and in a few instances the petitioner was a family member who was neither a guardian nor a service provider. Interestingly, in 13 cases (4.7%), the court itself initiated the restoration.

Who Petitioned for Restoration?



Was There Legal Representation for the Individual To Be Restored? Legal representation is a critical safeguard in securing restoration of rights. In 118 of our cases (42.8%), the individual had no counsel, although the generally uncontested petition (see below) often was successful anyway. Thus, in close to 43% of the cases, the individual was acting on his or her own, without any legal counsel to help secure rights. The court appointed an attorney in 73 cases (26.5%) and a guardian ad litem in 55 cases (20.0%). The individual had a privately retained attorney in 21 cases (7.6%) and a legal services attorney in two cases (0.7%).

Legal Representation



Was the Restoration Contested? The vast majority of cases (258 cases or 93.8%) were not contested. These successful cases by and large were not controversial, and the court granted restoration without opposition.

In total, the study included only 12 contested cases. Individuals in these cases ranged in age from 20 to 73. The most common condition triggering the guardianship was mental illness, followed by brain injury and self-neglect. A guardian opposed the restoration in three cases, a non-guardian family member in three cases, APS in one case, and “other” parties in five cases. There was no legal representation in three cases, a court-appointed or privately retained attorney in four cases, and a guardian ad litem in five cases.

Where the restoration was contested, was size of the estate a factor? All of the three cases in which the guardian opposed the restoration involved estates in the range of \$50,000 to \$99,000. Two of the cases in which family members opposed involved estates in the \$100,000 to 249,999 range, but one was below \$50,000. Where the restoration was opposed by APS or others, the estate was under \$50,000.²⁹ It is possible that the two cases opposed by family members involved financial motivations, but there is no evidence to support that conclusion and the numbers are too small to be meaningful.

What Evidence Was Used to Prove the Restoration Case? What kinds of evidence make a strong restoration case? The survey asked for all evidence presented (multiple counts).

- Clinical evidence supported the judge’s finding in just over half the cases (139 cases or 50.6%). This included clinical statements (78 cases or 28.4%), clinical test/assessment results (47 cases or 17.2%), and clinical in-court testimony (14 cases or 5.1%).
- Lay evidence supported the court’s finding in just over half the cases as well (140 cases or 50.1%). This evidence included both lay depositions and in-court testimony.
- The individual’s own statements, whether through depositions (two cases), or, more frequently, in-court testimony (37 cases or 13.5%), were evidentiary elements in 39 cases (14.2%).
- “Other” evidence was noted in 20% of the cases. Generally, there was no additional information to indicate what this evidence might include.

Were There Prior Attempts at Restoration? In the vast majority of cases (241 cases or 87.6%), the current case was the first attempt at restoration.

²⁹ One case opposed by others showed a higher range, but no additional information was available.

However, there were prior unsuccessful attempts in 23 cases (8.4%) – and in two cases there were two prior attempts. The time between the prior unsuccessful restoration request and the final successful restoration order ranged from four months to over five years. The age of the individual subject to guardianship in these prior attempt cases ranged from 18 to 81.

What Proportion of Restoration Requests Were Granted? As stated above, data for our study did not include cases in which a restoration petition was filed but not granted. However, the North Carolina Administrative Office of the Courts data included the restoration petitions and their dispositions over a five-year period. The Office identified 223 cases in which a restoration petition was filed between 2010 and 2015. The court calculated the percent of restoration petitions granted in whole or in part, as follows:

2010-2011	80.0%
2011-2012	74.7%
2012-2013	76.1%
2013-2014	73.8%
2014-2015	66.2%

The average rate of petitions granted over the five years is 74.2% – that is, *about three-quarters of the restoration cases were successful*. It is not known how many of the petitions that were not granted were contested, nor how many had counsel. In comparison, the success rate of petitions in the reported case law collected by Cassidy for the ABA Commission (57 modern cases from 1984 to present) was 39%. By definition, all of the reported cases were contested, and many were appellate cases – generally complex, aggravated cases with multiple motions over time.

How Long Was the Person Subject to Guardianship Before Restoration? We calculated the time between the guardianship order and the restoration order; and found that on average individuals were subject to guardianship for close to five years (4.86 years) before their rights were restored. The median time period was close to three years (2.8 years). The specific time periods ranged from less than one year to over 30 years (30.4 years).

What Were the Terms of the Restoration Order? In some 80% of the cases (220 cases), the court restored all personal/health care rights. However, in three cases (1.1%), only some personal/health care rights were restored.

In close to 70% of the cases, (189 cases or 68.7%), the court restored all financial rights. However, in six cases (2.2%), only some financial rights were restored.

In 15 cases, the survey response included “terms” for the restoration. It was not clear from the response whether these actually were court-assigned terms, or simply statements made in the

record. In six of these cases, having a Social Security representative payee was mentioned, in six cases having a durable power of attorney for finances was mentioned, in three cases having a health care power of attorney was mentioned, and one case referenced a mental health advance directive. One case noted that the restoration order was based on completion of a rehabilitation program.

What Were the Stated Reasons for Restoration? In 15 cases, the survey responses showed the reasons the court found to grant the restoration petition. These can be categorized as follows:

- Able to Care for Self. In four instances the case record showed that an individual was “taking care of himself,” “has been managing her own affairs . . . for four years,” “said she could handle her affairs,” or “was better and could manage her affairs.”
- Family Support. Some cases indicated that the person was caring for himself “with the help of family,” “the parents could handle his needs with a power of attorney,” “the family was taking care of him” and did not need a guardian, or the “parents helped with daily living.”
- Residential Setting. In one case, the individual was in a group home and receiving needed assistance from staff.
- Representative Payee. In four cases, the court appeared to take into account the use of a Social Security representative payee in determining whether to grant the restoration request. One person “had been managing her own affairs with the help of a representative payee.” In another case the estate consisted only of Social Security benefits, and “the facility could be the representative payee.” In two additional cases, the record showed that the parents were serving as representative payee.
- Use of Social Security Finding. In one intriguing case, the record noted that the modification (restoration of some but not all rights) was “based on the Social Security finding that he was not disabled.” It was not clear how the court knew about such a finding, and how the SSA finding of ability to manage SSA benefits related to the particular rights the court restored.

D. Court File Research - Conclusions

Because the 275 cases we studied were all instances in which restoration of rights had been achieved – and because the added North Carolina data showed that close to three-quarters of restoration petitions were granted in whole or part – what emerges is a snapshot of a “successful restoration case” across states. In this typical case, the individual is about 40 years old, lives at home or in his or her family’s home, and has an estate under \$50,000. The

individual may have a mental illness, and perhaps a dual diagnosis with other conditions such as intellectual disability, brain injury, or more rarely, dementia. No particular harm/risk factors show up in the court file as triggers for the guardianship case.

In this typical case, the court has appointed a guardian for both person and estate. The guardian is most likely to be a family member – or perhaps a for-profit guardianship agency.

In the typical case, after a period of between two and five years, the individual is restored, and his or her rights are returned. Generally, either the family guardian or the individual himself or herself petitions for the restoration, and it is the first attempt. The case is not contested. The individual has no legal representation – or may perhaps have a court-appointed attorney or guardian ad litem. The restoration case is built on a combination of clinical evidence and lay evidence. The court restores all rights, both personal and property, without any particular terms. The specific court findings supporting the restoration are not articulated in the file, and the file is perhaps missing key evidentiary documents.

Thus, our research shows the “sunny side.” It shows that for cases with these “typical” characteristics, the restoration process can work, and the self-determination that comes with return of rights can be achievable. Indeed, living with supportive family members – who understand the history and who may perceive their role as guardian to encourage progress – appears an important element for restoration.

However, what about cases in which no petition is filed because the individual, family, and guardian are unaware of the procedure? What about cases in which a petition is filed but the guardian, a family member or service provider opposes the restoration and there is no attorney to represent the individual? What about the one-quarter of cases in the North Carolina data in which restoration was not granted?

Our empirical court file research highlights only a piece of the larger puzzle of restoration. The legal research on reported case law shows a more complex picture, as these cases were all contested and frequently were appealed. The following policy and practice issues draw on our empirical findings, as well as our legal research findings and the Florida Developmental Disabilities Council findings, and reflect a number of remaining unanswered questions that were the focus of the project’s 2016 Restoration Roundtable:

- To what extent are individuals, families, service providers, and advocates aware that restoration is an option?
- To what extent does and should the court regularly review cases to determine if the need for a guardian continues?

- How can individuals subject to guardianship best gain access to the restoration process?
- How frequently does an individual who seeks restoration have legal representation, and what is and should be the nature of that representation?
- What should be the role of the guardian once a restoration petition is filed?
- How can decisional, family, and community supports be recognized as a key element in restoration cases? Are there workable options for progressive restoration plans?
- What kinds of evidence and what evidentiary standards best promote restorations?
- How can court data be improved to facilitate better research and understanding of restoration of rights?

III. Discussion & Recommendations on Key Restoration Issues

This section combines the results of the project’s legal research, results of the empirical case file research, background readings, and the discussion and recommendations of the 20 Roundtable participants.

A. Lack of Awareness of Restoration Option

While each state statute sets out a procedure for restoration of rights, the process appears little known and little used, due at least in part to lack of awareness. Indeed, “individuals who lack suitable resources like social services and dedicated family members may never learn of their right to seek restoration.”³⁰ The Florida Developmental Disabilities Council found “a widespread lack of education and knowledge among families of persons with disabilities and guardians regarding the rights of persons under guardianship and the duties of guardians . . .” and that many were unaware of mechanisms for restoring rights.³¹

The low number of cases found in our court file research, the North Carolina research, and the Florida Developmental Disabilities Council research suggests that the restoration option simply is not well known. Our file research found only a paltry 275 restoration petitions granted over three years across four states; North Carolina found 223 petitions over five years; and the Florida Developmental Disabilities Council found a miniscule number of cases.

Notice of Right to Restoration. Some statutory guidance exists on providing notice of the right to restoration. The *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act* (UGCOPAA, formerly the Uniform Guardianship and Protective Proceedings Act) requires that within 14 days following appointment, a guardian must send to the individual, as well as parties that originally were given notice of the hearing, a copy of the order of appointment “together with a notice of the right to request termination or modification.”³² At least one state, Vermont, statutorily requires the court to mail an annual notice on the anniversary date of the appointment, setting forth the procedure for terminating the guardianship.³³

Additionally, four states have enacted a “bill of rights” for individuals subject to or potentially subject to guardianship. Among the rights listed in the Florida code is the right “to be restored to capacity at the earliest possible time.”³⁴ Minnesota lists the right to “petition the court for termination or modification of the guardianship or conservatorship . . .”³⁵ Michigan lists the

³⁰ Cassidy, p. 115.

³¹ Florida Developmental Disabilities Council, 24.

³² UGCOPAA, §311(a) for guardians; §412(a) for conservators.

³³ *Vt. Stat. Ann.* Tit 14, §3077.

³⁴ *Fla. Stat. Ann.* §744.3215(1)(c).

³⁵ *Minn. Stat. Ann.* §524.5-120(12).

right “to at any time seek modification or termination of the guardianship by informal letter to the judge.”³⁶ Texas specifies the right “to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence . . . with the eventual goal, if possible, of self-sufficiency,”³⁷ and requires the guardian to explain the rights both on appointment and on annual renewal of the guardianship.³⁸

The question, though, is how these provisions are implemented in practice; and whether individuals subject to guardianship have any needed support in understanding and activating their rights. While Vermont and possibly other states require an annual notice of right to restoration, we do not know how courts enforce any such requirements – or whether individual courts send or provide for notices even if not required by statute. For example, a 2007 study of guardianship monitoring noted that the court in Hennepin County, Minnesota, required the guardian to send such a notice.³⁹ The real concern is whether the court, the guardian, or anyone else must or does explain the right to the individual orally, and in language he or she understands.

Roundtable participants made a number of suggestions about notice. Restoration notice should be given every time the court has contact with the individual. Court investigators and guardians ad litem, including volunteer visitors, should explain the right and the process. The most important thing is that the notice be made understandable to the person. It is best to avoid legal terms like “termination of the order” and “restoration of rights” – instead, the notice should indicate “how to end the guardianship and get rights back” and set out the steps for doing so. At the same time, some participants pointed out, regular or frequent notice may in some cases prompt filing of frequent petitions when there has been no change in condition or circumstances.

Education and Training for Stakeholders. To raise awareness of individuals and families, we need to raise awareness of professional and other stakeholders, as well as guardians. The extent to which current training programs for guardians, visitors, guardians ad litem, attorneys, clinicians, and judges include a component on restoration is not known. The Florida Developmental Disabilities Council project produced three groundbreaking guides on *Developing Abilities and Restoring Rights*⁴⁰ that offer models for adaptation by other states.

³⁶ *Mich. Comp. Laws Ann.* §700.5306a(1)(v).

³⁷ *Tex. Estate Code* §1151.351(b)(2).

³⁸ *Tex. Estate Code* §1151.351(b)(24).

³⁹ Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute, #2007-21, p. 39.

⁴⁰ Florida Developmental Disabilities Council and Guardian Trust, *Developing Abilities and Restoring Rights*, 2015 & 2016.

The 2013 National Guardianship Association *Standards of Practice* (NGA Standards) alerts guardians to watch for the potential for modification or restoration, and directs them to petition when improvement occurs and the person no longer meets the guardianship standard or when there is an effective alternative.⁴¹ Training in what to look for and what steps to take would bring this standard to life. For example, if the annual reporting form asks whether the guardian believes there is a continuing need for the guardianship, responses should be more than a boilerplate check-off.

Roundtable discussion highlighted the need for education and training of all stakeholders, especially guardians ad litem, investigators, and visitors, who may have personal contact with the individual over time. One suggestion was development of a model template for restoration to be posted on every state court website. Another was to inform service providers and care managers about restoration – including nursing home, assisted living, and group home staff, especially those who might contribute to a care plan in which restoration might become a goal.

B. Court Review of Cases for Continuing Need for Guardianship

Despite statutory court oversight requirements, in practice, guardianship monitoring remains uneven,⁴² and in some local courts, it is markedly weak or next to non-existent. Thus, many cases in which individuals no longer need a guardian – or perhaps never needed a guardian – fail to receive any regular review and may slip through the cracks, leaving individuals with an unnecessarily restricted life. Even if court review is triggered – by an annual report, by court visitor investigation, or by a complaint – the review may not specifically target the potential for restoration.

Nonetheless, in some unknown percentage of cases, a court examines the continued need for the order and potential for a restoration of rights. Two of our 13 project case profiles showed examples in which the individual’s functioning improved significantly and a scheduled court review resulted in restoration:

- In Case Profile WA-03, a 76-year-old woman had a sudden change in medications, and her condition deteriorated rapidly, during which time a guardian was appointed. The court scheduled a review hearing for six months later. At that time, a petition for restoration stated that “her previous medications were provided to her, and her previous good mental health has returned.” The court restored her rights.

⁴¹ 2013 NGA *Standards of Practice* #12(I)(H).

⁴² Karp, N. & Wood, E., *Who Is Guarding the Guardians? Promising Practices for Court Monitoring*, AARP Public Policy Institute (2007); Admin. Conference of the U.S., *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices* (2014).

- In Case Profile WA-04, an older man had “meningitis-like symptoms and Alzheimer’s-like symptoms” and was temporarily residing in the psychiatric ward of a hospital when his sister filed for guardianship. The court order included a scheduled review hearing in 15 months. Following the appointment of a guardian, his medications were adjusted and he began to show improvement, eventually moving to assisted living. By the time of the scheduled review, he was living independently in an apartment. The court restored his rights.

Guardian Reports. Guardian reports offer one opportunity for regularly assessing possible modification or termination of the court order. The Uniform Act (UGCOPAA) requires guardians to submit reports at least annually,⁴³ and most states also require annual reports.⁴⁴ The Act requires the guardian’s annual report to include “a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.”⁴⁵ This requirement is in addition to the guardian’s duty to notify the court immediately if the person’s condition changes “so that the adult is capable of exercising rights previously removed. . . .”⁴⁶ According to ABA Commission guardianship statutory charts, some 19 states require the guardian’s report specifically to include a recommendation about the continued need for the guardianship.⁴⁷

The Roundtable discussion noted the importance of this recommendation as an element in every report, and the need for guardian training in what such a recommendation means and how best to respond.

Court Review of Continuing Need. While courts may receive annual reports from the guardian, they may not regularly review the reports for continued need for the guardianship. The *National Probate Court Standards* direct probate courts to “periodically consider the necessity for continuing a guardianship or conservatorship.”⁴⁸

Some states require courts to regularly review the continuing need for the order. The District of Columbia passed a statutory requirement for regular court review of guardianships established on or after January 1, 2015. Every three years a licensed social worker appointed as a “case reviewer” must investigate each case for continued need for the guardianship. The reviewer’s

⁴³ UGCOPAA § 317(a) for guardians; §424(a) for conservators, annually unless the court orders otherwise.

⁴⁴ ABA Commission on Law and Aging & Hurme, S., “Monitoring Following Guardianship Proceedings,” ABA Commission on Law and Aging website, <http://ambar.org/guardianship> .

⁴⁵ UGCOPAA §317(a) for guardians; §424(b)(4) for conservators.

⁴⁶ UGCOPAA §313(f).

⁴⁷ ABA Commission on Law and Aging & Hurme, S., *Monitoring Following Guardianship Proceedings*, <http://ambar.org/guardianship> (2014).

⁴⁸ National College of Probate Judges, Task Force on Revision of National Probate Court Standards, *National Probate Court Standards*, Std. #3.3.13 (E) (2013).

report must include the person’s “expressed preferences” about the scope and duration of the order and any statement by the person or other interested parties concerning continuation, modification or termination. The court must hold a hearing if the reviewer recommends modification or termination, or if the individual requests it or the court determines it is warranted.⁴⁹

In Connecticut, the court must review each case not later than one year after appointment and not less than every three years after the initial one-year review.⁵⁰ In Missouri, at least annually the court must review each case to “determine whether the incapacity may have ceased”⁵¹ In Michigan, the court must review each case not later than one year after the guardian’s appointment and not later than every three years after each review.⁵² In New Mexico, not later than ten years after the initial appointment, and every ten years thereafter, “the court shall hold a status hearing . . . to review the status of the protected person’s capacity and the continued need for a guardian.”⁵³ Ten years appears too lengthy a period to take into account potential changes in circumstances and condition.

A 2015 Texas legislative amendment required the physician’s certificate to state whether improvement in functioning is possible, and if so, to state the period in which the individual should be re-evaluated to determine whether the guardianship order is still needed.

Some courts have dedicated staff or trained volunteers review guardian reports and alert the judge to any action required, including a review of the continuing need for the order. In Massachusetts, some judges have used trained retired lawyers to review reports and flag any that require judicial action.

Roundtable discussion recognized the value of court review of cases for continuing need for the guardianship order – but acknowledged that it is not a cure-all and the barriers to effective review are substantial. Many courts with guardianship jurisdiction are not probate courts with specific standards for guardianship review, and there are huge hurdles in just getting reports filed. Tracking, monitoring, and reviewing reports is costly, yet needs to be conducted not only for review of continuing need, but for identifying guardian malfeasance as well.⁵⁴

⁴⁹ D.C. Code §21-2045.01, Guardianship Amendment Act of 2014.

⁵⁰ Conn. Gen. Stat. Ann. §54a-660(c).

⁵¹ Mo. Stat. Ann. §475.082(1).

⁵² Mich. Comp. Laws Ann. §700.5309.

⁵³ N.M. Stat. Ann. § 45-5-307(G).

⁵⁴ Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute, 2012; Uekert, B., *Adult Guardianship Court Data and Issues: Results from an Online Survey*, Center for Elders and the Courts, National Center for State Courts (March 2010).

Expiration of Guardianship Orders. In a few states, guardianship orders expire after a given number of years. For example, in North Dakota, the order is effective for up to five years. At least 90 days before expiration, the court must request information on whether the need for guardianship continues, and if so, may appoint a visitor or guardian ad litem to investigate, and must hold a hearing on the continuation.⁵⁵ In Kentucky, while the court may appoint a plenary guardian for an unlimited period, a limited guardian may not be appointed for a term greater than five years, but the guardian may petition for an additional appointment.⁵⁶ (However, our case files indicated this Kentucky provision may not be uniformly enforced.)

Roundtable participants discussed the concept of guardianship orders that would “sunset” – would “put a hard deadline on guardianship, so it becomes a way station and not a final destination.” That would change the conversation and the standard of proof required. At the same time, there could be costs to the individual and the court.

A Roundtable consensus was that courts and attorneys should explore the concept of “progressive restoration,” as outlined in the Florida Developmental Disabilities restoration guide.⁵⁷ Such progressive restoration approaches would emphasize the importance of building supports over time. Participants noted that having a gradual restoration “can help to dissipate opposition.” Costs, again, are an issue that should be addressed.

C. Access to Court

Individuals seeking restoration face many barriers. What statutory procedures and what practices can promote access to court for a restoration hearing?

Making Informal Requests. The filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship. The Uniform Act (UGCOPAA) allows for a less formal “communication from the adult, guardian, or person interested in the welfare of the adult” requesting termination or modification of the order.⁵⁸ The ABA Commission research by Cassidy found 20 state statutes that permit an informal request for restoration such as a handwritten note to the judge.⁵⁹

While Roundtable discussion generally favored use of such procedures, there is no research showing the frequency or effectiveness of informal communications to court – nor the

⁵⁵ ABA Commission on Law and Aging, *State Adult Guardianship Legislation: Directions of Reform 2015*, <http://ambar.org/guardianship>

⁵⁶ *Ky. Rev. Stat. Ann.* §387.590(7) & 387.610.

⁵⁷ Florida Developmental Disabilities Council, *Developing Abilities and Restoring Rights: A Guide for Supporting Persons with Disabilities*, Appendix C, “Progressive Rights Restoration Plan,” & *A Manual for Legal Professionals*, Appendix A, “Progressive Rights Restoration Plan,” 2016. Also see IV(F) below, “Focus on Supports.”

⁵⁸ UGCOPAA §319(b)(2) for guardians; §431(d)(2) for conservators.

⁵⁹ Cassidy, p. 99.

response of the judge. Anecdotally, at least one judge treated such informal communication from the individual as an impermissible ex parte communication. Even if allowed by state law, there is no indication that individuals under guardianship are aware that they can file such informal requests. However, our project case profiles and other writings show the practice of sending an informal note to the court or to a specific judge does occur. For example:

- In Case Profile IL-03, a man with a head injury and subsequent brain surgery had a guardian appointed. Later, after his condition improved and stabilized, he wrote a letter to court stating “I’m doing just fine, whereas I can communicate decisions for myself and manage my own financial affairs.” The court interpreted this as a request for restoration.
- In Case Profile MN-03, the individual filed a restoration petition along with a very personal note to the judge explaining that while she wanted her parents/co-guardians to be part of her life, she felt ready to start making her own decisions.
- In a case profiled in *The Texas Observer*,⁶⁰ Rosamond Bradley’s two sons took her from her home in Dallas to a nursing home in Lubbock, and the court appointed one of the sons as guardian. After four years, Rosamond sought to have her rights restored. In a handwritten note to the court, she said “Dear sirs, I feel very competent to take care of myself. I request that all my civil rights be restored.” After a year had passed with no response, she sent another note, “I want my rights restored!” This note came to the attention of a county dispute resolution specialist, who contacted a lawyer who agreed to represent her pro bono in a restoration proceeding.

Targeting Interference. We found that 16 states include a provision prohibiting interference with any communication to court requesting restoration, at the risk of a finding of contempt of court.⁶¹ These statutes generally state that “any person who knowingly interferes with transmission of the request may be adjudged guilty of contempt of court.”⁶² There is no research on the frequency of use or effectiveness of such interference provisions.

Getting Assistance. A notable provision in the Texas bill of rights is the right of the individual subject to guardianship to be informed of the purpose and contact information of Disability Rights Texas, the state protection and advocacy agency – as well as the local independent living center, area agency on aging, aging and disability resource center, and other agencies, and the

⁶⁰ Michels, Patrick, “Who Guards the Guardians,” *The Texas Observer* (July 2016), pp. 12 – 20.

⁶¹ Cassidy, p. 99.

⁶² See for example *Ariz. Rev. Stat. Ann* §14-5307(B).

right to communicate and meet with representatives from these agencies.⁶³ Such agencies may be able to assist with access to court for restoration, as well as the provision of supports.

Complaint Process. State statutes or court rules may establish a guardianship complaint process.⁶⁴ The *National Probate Court Standards* recommend that courts “establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators.”⁶⁵ Washington law provides that if an unrepresented individual subject to guardianship submits a complaint, the court must take listed actions within 14 days.⁶⁶ Wyoming has provisions establishing procedures for complaining to court.⁶⁷ In 2015, Texas enacted a bill of rights giving individuals subject to guardianship the right to have a court investigator, guardian ad litem, or attorney appointed to investigate complaints.⁶⁸ A court rule in Ohio requires local courts to establish a process for receiving and considering complaints.⁶⁹ In Idaho, court rules allow a judge to review ex parte communications regarding complaints about guardians, and the court website includes a complaint form.⁷⁰ The frequency with which these provisions are used -- and their effectiveness in securing court review leading to modification of an order or restoration of rights -- is not known.

Other Provisions Promoting Access. Restoration will be more accessible if a broad range of parties can request it. As with the initial petition for appointment, almost all states permit “any interested party” to petition for restoration on behalf of the individual – thus allowing family members and others who are supportive of and familiar with the individual to initiate the process – as well as the individual himself or herself.⁷¹

Once a request is made or petition filed, another issue is how soon it will be addressed by the court. In line with the theory that “justice delayed is justice denied,” a recent Florida amendment requires the court to give priority to requests for restoration on the court calendar.⁷²

Role of Guardians Ad Litem, Court Visitors. A guardian ad litem may be appointed by the court to investigate the case and inform the court, and to represent the interests of the individual

⁶³ *Tex. Estate Code* §1151.351(b)(20) & (21).

⁶⁴ National Association for Court Management, *Adult Guardianship Guide* (2013 – 2014), p. 24.

⁶⁵ National College of Probate Judges, Task Force on Revision of the National Probate Courts Standards, *National Probate Court Standards* (2013), #3.3.18.

⁶⁶ Washington SB 5607 (2015).

⁶⁷ *Wyo. Stat. Ann.* §3-1-111.

⁶⁸ *Texas Est. Code* §1151.351

⁶⁹ *Rules of Superintendence for the Courts of Ohio*, Sup. R. 66.03(B).

⁷⁰ For complaint form, see <https://isc.idaho.gov/guardianship/complaintprocess>

⁷¹ Cassidy, p. 99.

⁷² *Fla. Stat. Ann.* §744.464(4).

during the proceeding. (A guardian ad litem has no surrogate decision-making role, as would a guardian.) Court-appointed guardians ad litem or court visitors/investigators often are the only ones who see the entire case in depth and must visit the individual and investigate the facts. Guardians ad litem or court visitors/investigators are in a good position to spot cases with restoration potential and promote access of the person to court processes – particularly if they remain assigned to the case following appointment of a guardian or are designated by the court post-appointment to conduct an investigation. They also can be persuasive in opposing the restoration case. For instance, in a 1997 reported appellate case, the court appointed a guardian for a woman based on “mental impairment due to physical illness,” and upon a restoration petition, the court investigator joined the guardian in opposing the petition, stating that guardianship continued to be needed.⁷³ However, in our project case files, the guardian ad litem frequently took actions to promote the restoration process:

- In Case Profile IL-01, a woman who had brain surgery and recovered spoke to the guardian ad litem about getting her rights back. The guardian ad litem included her statement in his report and seems to have taken an active role in initiating and pursuing the restoration.
- In Case Profile IL-03 concerning a man recovering from a head injury and brain surgery, the guardian ad litem contacted the treating physician to ask for an evaluation, resulting in a clinical statement that the individual was “stable and able to function; able to integrate in the community of friends; able to adapt well.”
- In Case Profile MN-03, the guardian ad litem listed all of the individual’s accomplishments in the report to court in support of a restoration request.
- In Case Profile WA-02, a man with autism and epilepsy was subject to guardianship for 28 years. When the individual finally petitioned for restoration, the guardian ad litem met with him at home three times and found that “he feels he can care for himself, that he has worked in the past and will do so again after his recovery. . . . He indicated he is able to cook, clean, bathe, and generally care for himself, and all indications are that he can.” The guardian ad litem discussed with him ways to track income and expenses.

In addition to appointing staff investigators or visitors, or designating an attorney to act as guardian ad litem, some courts have developed volunteer visitor programs in which a cadre of trained and supervised volunteers makes visits to individuals subject to guardianship and reports back to court for possible judicial intervention.⁷⁴ A few other courts have “volunteer

⁷³ *In the Matter of the Guardianship of Smead*, WL 50144 (Ohio App. 12 Dist. 1997).

⁷⁴ American Bar Association Commission on Law and Aging, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community* (2011),

advocate” models in which the court assigns a trained volunteer to relate to and support an individual subject to guardianship over time, similar to the Court-Appointed Special Advocate (CASA) model in child welfare. Such programs offer courts “eyes and ears” in the community to learn more about individuals under their aegis and to locate cases ripe for restoration – but there is no evidence-based research to demonstrate the extent to which this approach actually works.

Roundtable discussion emphasized the important role of guardians ad litem and court visitors in explaining restoration rights and procedures to individuals in modes of communication they can best understand, in spotting possible restoration cases, and in helping to bring those cases to the attention of the court.

Moratoria. While statutory provisions can enhance access to court, they also can create limits. Our statutory research by Cassidy found that 17 states require, or allow courts to establish, a moratorium on requests for restoration. Many provide that “an order adjudicating incapacity may specify a minimum period, not exceeding one year, during which a petition for an adjudication that the ward is no longer incapacitated may not be filed without special leave.”⁷⁵ In other cases, the statute states that if a court denies a petition for restoration, no other petition may be filed for at least six months.⁷⁶

Roundtable discussion acknowledged that such provisions aim to reduce the filing of frivolous requests – “serial filers” who may file every few months even though there has been no change in condition or circumstances, which can drain the estate. Participants pointed out that while often it may be the individual subject to guardianship bringing the petition, sometimes it may be a potential exploiter allegedly filing on behalf of the individual. Thus, statutory moratoria can serve a legitimate purpose – yet at the same time they can have a chilling effect on actions by vulnerable individuals hoping to have rights restored.

D. Right to and Role of Counsel

Individuals subject to guardianship require the assistance of counsel to challenge the continuing need for the order, and to seek modification and restoration. Many such individuals appear to lack counsel, and thus may remain in an unnecessary or overbroad guardianship.

In our court file research, the individual subject to guardianship had no counsel in 42.8% of the cases. These cases were generally uncontested, and the restoration was achieved despite the lack of legal representation. It is notable that in such cases, individuals essentially are acting on

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/court_volunteer_guardianshipmonitoring.html.

⁷⁵ See for example *Ala. Code* §26-2A-110.

⁷⁶ See for example *Iowa Code Ann* §633.680.

their own, sometimes with the support of family. In more challenging, contested cases, the need for legal representation rises.

Our research also found that the court had appointed a lawyer in 46.5% of the cases – but almost half of these appointments were for a lawyer to serve as a guardian ad litem. The role for a guardian ad litem generally is to act in the best interests of the individual – or as the “eyes and ears of the court” in an investigative role -- rather than acceding to the person’s expressed wishes. Thus the guardian ad litem might, or might not, advocate for restoration of rights -- although in our cases many guardians ad litem supported the individual’s wishes for restoration.

According to our research, the individual had retained counsel on his or her own in only 7.6% of the cases. This finding underscores the extreme difficulty of an individual whose rights have been removed by court – and who may be under the thumb of an adverse guardian – in finding, contacting, meeting with, directing, and paying a lawyer, particularly one with the background and skills to secure a restoration.

Reasons for lack of counsel may be related to lawyers’ perceptions of liability and ethical rules, may be statutory, may stem from lack of legal education and training, or may be due to lack of resources.

Legality and Ethics of Representation. A recent landmark article by Kohn & Koss for the first time comprehensively summarizes the status of post-appointment legal representation of individuals subject to guardianship.⁷⁷ The article squarely addresses a classic quandary: Persons subject to guardianship have been determined by a court, depending on the scope of the order, to be unable to make their own decisions and engage in legal transactions, so how can they contract with and direct a lawyer to represent them? How and under what circumstances should a lawyer engage in such representation?

The article posits that lawyers may be reluctant to represent such individuals because the lawyers are unsure whether they may legally and ethically do so. The article then draws on constitutional, contract, and agency law to show that such representation is “not merely legally permissible but essential to protect fundamental Constitutional rights.”⁷⁸ It clearly maintains that individuals subject to guardianship retain certain rights – including rights retained under limited orders, rights retained under statutory provisions, and rights to procedural and substantive due process under the Fourteenth Amendment – including the right to legal representation. The authors explore how the elements of the leading constitutional due

⁷⁷ Kohn, N. & Koss, C., “Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship,” *Washington Law Review*, Vol. 91, No. 2, pp. 581-636 (2016).

⁷⁸ Kohn & Koss, p. 581.

process case of *Mathews v Eldridge* apply to representation of individuals subject to guardianship.⁷⁹

The article examines whether contract law is a bar in representation of individuals subject to guardianship. In *In re Guardianship of Bockmuller*⁸⁰ the court found that even though there was a state statutory right to counsel, the guardian must contract for or the court must appoint counsel because the individual's right to contract was removed upon the court's determination of incapacity and order appointing a guardian. This result appears inconsistent with constitutional due process rights as well as the statutory rights in the state, and would mean that individuals subject to most guardianship orders would be denied the very representation they need to challenge the order. Indeed, as a Virgin Islands case pointed out, an additional requirement that the person "possess the legal capacity to enter into a contract with retained counsel would make it exceedingly difficult for individuals . . . attempting to terminate the existing guardianship."⁸¹ The article further argues that the well-recognized "doctrine of necessities" should apply, allowing for payment for goods and services even if a party lacks the capacity to enter into a valid contract.⁸²

Roundtable discussion supported and endorsed the concepts that constitutional due process protections provide a right to representation for persons subject to guardianship in challenging the guardianship and seeking restoration of rights, and that contract law should not present barriers to such representation.

Role of Counsel. How, then, should a lawyer engage in representing an individual subject to guardianship? Two basic models have long been recognized in representing individuals "with diminished capacity."⁸³ The first is the traditional lawyer-client model in which the lawyer looks to the client for direction and advocates for the client's expressed wishes. The second is the best interests model in which the lawyer advocates for what the lawyer thinks would be best for the individual, regardless of what the client wants.

The American Bar Association *Model Rules of Professional Conduct* Rule 1.14 on Representing Clients with Diminished Capacity embraces the traditional advocacy role, unless the lawyer reasonably believes the client is at risk of substantial harm, in which case the lawyer may take protective action. However, as the Kohn & Koss article points out, neither the Rule nor its

⁷⁹ *Mathews v Eldridge* (424 U.S. 319 (1976)). See Kohn & Koss, 598 – 606.

⁸⁰ 602 So. 2d 608 (Fla. Dist. Ct. App. 1992).

⁸¹ *In Re Guardianship of Smith*, 68 V.I. 446 (2013).

⁸² Kohn & Koss, 592-597.

⁸³ Kohn & Koss, 613 – 614. Also see O'Sullivan, J., "Role of the Attorney for the Alleged Incapacitated Person," 31 *Stetson Law Review*, 687 – 734 (Spring 2002); and Fleischner, R. & Schur, D., "Representing Clients Who Have or May Have "Diminished Capacity": Ethics Issues," *Clearinghouse Review Journal of Poverty Law and Policy*, Vol, 41, NO. 5-6, pp 346 – 357 (September-October 2007).

accompanying Comments offers explicit guidance to lawyers seeking to represent individuals subject to guardianship, such as in petitioning for restoration of rights. Moreover, the Rule's Comments are inconsistent concerning the role of the lawyer when the person has "a legal representative" – as to whether the lawyer looks to the legal representative or is directed by the individual as the client. The article suggests that instead, a new Comment should "explicitly address representation of persons subject to guardianship . . . [clarifying that the Rule] applies to all clients with diminished capacity, whether or not a guardian has been appointed" – thus supporting the traditional advocacy model.

The *Roundtable participants* recommended that such a change be made.

Statutory Right to Counsel. Almost all state guardianship statutes in some form recognize a post-appointment right to counsel for individuals subject to guardianship. The Uniform Act (UGCOPAA) and 18 states require that the same procedural safeguards that apply in the appointment process also apply in a restoration proceeding.⁸⁴ The right to counsel in appointment proceedings varies significantly by state, as does the role of counsel.⁸⁵ Additionally, statutory provisions in almost every state require use of the least restrictive alternative in guardianship proceedings, and many require the court or the guardian to promote independence and self-determination – requirements that could not be effectuated without legal representation.⁸⁶

Some state statutes expressly require the court to appoint counsel for an unrepresented individual subject to guardianship who seeks restoration of rights. Cassidy found 12 such states. The Uniform Act (UGCOPAA) provides that an individual "is entitled to be represented by an attorney of the adult's choosing."⁸⁷

Roundtable discussion highlighted practices in some jurisdictions in which appointed counsel, for various reasons, adopt a "best interest" approach to representation or do not engage in the vigorous advocacy needed in restoration cases, and noted that additional education and action is required to change this approach.

If the court or the guardian selects counsel for a restoration proceeding, and it is not a lawyer of the individual's choosing, is this an erosion of the right? At least two significant cases recognize the importance of choice:

⁸⁴ UGCOPAA, §319(e) for guardians; §431(g) for conservators. See Cassidy, p. 92; Kohn & Koss, pp. 601 & 602.

⁸⁵ See ABA Commission on Law and Aging & Hurme, state-by-state chart on "Representation and Investigation In Guardianship Proceedings," 2014, at <http://ambar.org/guardianship>.

⁸⁶ Kohn & Koss, pp. 606-612.

⁸⁷ Cassidy, p. 100; UGCOPAA §319(f).

- *In re Guardianship of Zaltman*⁸⁸ held that an individual subject to guardianship is entitled to an opportunity to demonstrate that she is capable of selecting and retaining counsel of her own choosing to challenge her guardianship when there is evidence that she may have regained capacity and her interests are adverse to the interests of the guardian. Subsequently, the Massachusetts Uniform Probate Code described circumstances for appointment of counsel, and stated that “This section shall not be interpreted to abridge or limit the right of any ward, incapacitated person or person to be protected to retain counsel of his or her choice and to prosecute or defend a petition under this article.”⁸⁹
- A recent Ohio appellate opinion, *In re Guardianship of Carpenter*,⁹⁰ stated that the Ohio statute provides the individual the right to independent counsel of his or her choice to challenge a guardianship, and that “there is no requirement that a ward has to have his or her choice of independent counsel approved by the guardian. If that were the case, the counsel would not be the choice of the ward, but the choice of the guardian.”

A few state statutes have recognized the importance of having counsel of the person’s choice in restoration proceedings. Vermont provides that an individual has “the right to be represented by counsel of his or her own choosing at any stage of a guardianship proceeding.”⁹¹ Recent Washington legislation requires that the individual be given notice of the right to be represented by counsel of his or her own choosing at the restoration hearing.⁹²

Roundtable participants recommended enactment of state statutes providing an explicit right to counsel of the person’s choosing in restoration proceedings. They discussed challenging issues in implementing such a right.

First, who will pay? Payment may come from the individual’s estate, or from state funds if the individual is indigent – or there may be pro bono representation available. Even if payment theoretically is available from the estate, lawyers may have no practical way of recovering fees and costs. Cassidy cites the uncertainty of collecting a fee as a disincentive for lawyers in the ABA legal research she conducted.

⁸⁸ 65 Mass. App. Ct. 678, 685 (2006).

⁸⁹ *Massachusetts Uniform Probate Code*, M.G.L. c. 190B, §5-106(a).

⁹⁰ *In re Guardianship of Carpenter*, 66 N.E.3d 272 (Ohio Ct. App. 2016). See summary of this case in Fleming, R., “Subject of Guardianship Allowed to Hire Own Attorney,” *Fleming & Curti Legal Issues Newsletter*, Vol. 23, No. 25, July 4, 2016.

⁹¹ *Vt. Stat. Ann. Tit. 14, §3065(a)(1)*.

⁹² *Wash. Rev. Code Ann. §11.88.120(1)*.

Second, in some rural areas there are simply no lawyers available for such representation. Courts often are not able to provide help to pro se litigants – and self-representation would be especially challenging for an individual subject to guardianship.

Third, as noted above, in some cases individuals file frequent requests for restoration when there has been no change in condition or circumstances. Where is the line between a “frivolous” request, and one that merits legal representation?

Roundtable comments emphasized that the state should have a “duty to provide access to justice to persons who want to challenge or end a guardianship.”

Public Legal Representation. In our case file research, a legal services attorney represented the individual in only 0.7% of the cases (a grand total of two cases) – prompting a question as to why there is not greater legal services involvement in these compelling and needy situations. It would likely be difficult for the individual to identify and contact a legal services program. Legal services offices may not conduct sufficient outreach in institutions where people subject to guardianship may live – and would have no way to find individuals in their own or a relative’s home. Finally, legal services programs may not target representation of people either alleged to need guardians or wishing to challenge an existing guardianship and seek restoration, given the many equally pressing issues they confront.

State federally-funded protection and advocacy agencies also offer an important resource. The Protection and Advocacy (P&A) System is the nation’s largest provider of legally based advocacy services for individuals with disabilities. P&A agencies exist in every state and territory, and for a Native American consortium in the four corners region, and receive federal funds to protect the rights of people with disabilities under a variety of federal programs. The mission of the 57 P&A agencies is to defend individual rights, preserve equal opportunities, promote choice and self-determination, and prevent abuse and neglect of vulnerable members of society. Each P&A establishes annual priorities to focus its advocacy and case work given limited funding and resources.

P&A agencies were not clearly involved in any of the cases researched. However, P&A agencies do assist and represent individuals with disabilities in guardianship issues. Representation could include petitioning for restoration of rights. A 2017 report by the National Disability Rights Network⁹³ found that 84% of the 50 P&A agencies responding to a survey currently represent or could represent individuals with disabilities in guardianship issues. The report stated:

⁹³ Hutt. D., National Disability Rights Network, *Report on Survey of the Protection and Advocacy Network on Involvement in Guardianship and Conservatorship Issues*, January 2017.

“The two largest areas for which the P&As reported involvement in representing individuals with guardianship concerns are working to terminate an existing guardianship and restore full rights to the individual (36 of the 42 P&As responding to the question, or 86%); followed by representation to achieve partial restoration of the rights of the individual (33 of the 42 P&As responding to the question or 78.5%).”

Roundtable participants recommended that legal services programs and P&As continue or begin work on restoration issues, including those involving older people with dementia or age-related conditions.

Education and Training of Counsel. Cassidy’s research points to additional factors that may discourage legal representation. Aside from the ethical and liability uncertainty profiled by Kohn and Koss, she cites a lawyer’s possible inability to effectively communicate with the individual. Moreover, lawyers may feel that restoration is unlikely and not worth the time and effort of pursuing, as explained by one attorney questionnaire respondent:

“I have personally refused at least three requests to petition for restoration, and I don’t think that number is uncommon among elder law attorneys In many such cases, the petitioner may have regained capacity, but we sense that the chance of a ward’s full freedom being restored is slim to none.”⁹⁴

Education and training for lawyers targeted specifically at restoration proceedings could help change practices and attitudes.

- The Florida Developmental Disabilities Council study produced a manual for legal professionals on *Developing Abilities and Restoring Rights*.⁹⁵ It outlines best practices for lawyers in handling a restoration case – including the interview with the individual, accommodations, working with interested persons and professionals, evaluating the case, preparing for the hearing, and hearing strategies. It appears to be a first, and adaptation by other states could begin to address the need for lawyer knowledge, skills, and experience in restoration.
- The ABA Commission, in conjunction with three other ABA entities,⁹⁶ produced a tool for lawyers to identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship. “PRACTICAL” is an acronym for

⁹⁴ Cassidy, p. 102.

⁹⁵ Florida Developmental Disabilities Council & Guardian Trust, *Developing Abilities and Restoring Rights: A Manual for Legal Professionals*, 2015.

⁹⁶ The Commission on Disability Rights, Section on Civil Rights and Social Justice, and Section on Real Property, Trust and Estate Law, with assistance from the National Resource Center for Supported Decision-Making. See <http://www.ambar.org/practicaltool>.

nine steps for lawyers to identify these options. The lawyer can use the PRACTICAL checklist of steps during the client interview and immediately after to assist in case analysis. Lawyers serving in different roles may use the steps differently – including lawyers representing an individual in a restoration proceeding.

Roundtable comments reinforced the critical need for education and training of both public and private lawyers in representing individuals in restoration of rights.

E. Role of Guardians

Some guardians oppose restoration of rights – for a variety of protective and pecuniary reasons. In such cases, an individual subject to guardianship faces a very heavy burden in mounting a contested case – a next to impossible uphill battle. Conversely, other guardians actively support the individual’s self-determination and may be the one petitioning for the restoration. What is and should be the guardian’s role?

In our court file research of 275 cases, only 12 restoration cases were contested, and only three of these by the guardian. Thus, in our “typical” restoration case from the four states examined, the guardian either petitioned for the restoration, or did not oppose it – suggesting that guardian support or at least neutrality was an important factor in the success of the case.

In the reported case law collected by Cassidy on behalf of the ABA Commission, guardians opposed the restoration petition in at least 30 of the 57 cases examined, and an additional 20 cases were unclear.⁹⁷ In these reported cases, it appears that the guardian’s opposition may have negatively affected the disposition, as only 33% of petitions were successful when the guardian opposed the petition, but 50% were successful when the guardian was in support.⁹⁸

Guardian Duties to Notify Court and Seek Restoration. Under the Uniform Act (UGCOPAA), a guardian must “immediately notify the court if the condition of the adult subject to guardianship has changed so that the adult is capable of exercising rights previously removed.”⁹⁹ Colorado and possibly other states have enacted this or a similar requirement.¹⁰⁰ Recent legislation in Florida requires the guardian to help the individual develop or regain

⁹⁷ Cassidy, p. 107.

⁹⁸ Cassidy, p. 107. Additionally, Cassidy noted that the ABA attorney and judicial questionnaires showed significant guardian opposition to restoration – 29 attorney questionnaire respondents said they had been contacted by a guardian to contest a restoration petition, and six judges reported that in the majority of their restoration cases, the guardian opposed the petition. The questionnaire collection was a convenience sample, not a random or scientific sample.

⁹⁹ UGCOPAA §313(f).

¹⁰⁰ *Colo. Rev. Stat. Ann.*, §15-14-318.

capacity and notify the court if he or she thinks the individual can exercise any of the removed rights.¹⁰¹

Roundtable participants supported such statutory duties and their implementation in practice.

The NGA *Standards* require that guardians seek termination or limitation of the order in five circumstances: “when the person has developed or regained capacity in areas in which he or she was found incapacitated by the court,” when less restrictive alternatives exist, when “the person expresses the desire to challenge the necessity of all or part of the guardianship,” when the person has died, and when “the guardianship no longer benefits the person.”¹⁰²

Additionally the guardian must “petition the court for limitation or termination of the guardianship when the person no longer meets the standard pursuant to which the guardianship was imposed, or when there is an effective alternative available.”¹⁰³

Prohibiting Guardian Opposition. An important Colorado appellate case in 2011 dealt directly with a guardian or conservator’s role when an individual files for restoration. In *Estate of Keenan v. Colorado State Bank & Trust*,¹⁰⁴ the court found that a guardian or conservator (in *Keenan*, the Bank was serving as conservator) may in good faith oppose a motion by a person subject to conservatorship and may be paid from the individual’s funds for doing so.

The court rejected the argument that opposing a motion to terminate creates a conflict of interest between the individual and the conservator or guardian, noting that it depends on the facts of the case. The court stated that “to discourage or prohibit a guardian from opposing a motion to restore capacity in every instance could ‘allow the petition for restoration to be considered without the presentation of all of the facts’ [citing earlier case law]. Such lack of evidence would prejudice protected persons where their interests ‘require that the guardianship should continue unrevoked’ [citing earlier case].”

In response to the *Keenan* case, in 2011, the Colorado legislature revised the statute to preclude guardians or conservators from opposing or interfering with a proceeding for restoration initiated by the individual. However, the law provides that the guardian or conservator may file a motion for instructions “regarding whether an attorney, guardian ad litem or visitor should be appointed, whether further investigation or evaluation should be conducted, and whether the guardian is to be involved in the termination proceedings and, if so, to what extent.”¹⁰⁵

¹⁰¹ Fla. Stat. Ann. §744.361.

¹⁰² NGA 2013 *Standards of Practice* #21(III).

¹⁰³ NGA Standard #12(I)(H).

¹⁰⁴ *Estate of Keenan v. Colorado State Bank*, 252 P.3d 539 (Colo. Ct. App. 2011).

¹⁰⁵ Colo. Rev. Stat. Ann. §15-14-318(3.5)(c).

Roundtable discussion on the role of the guardian reflected varying perspectives. Some participants said the guardian should never oppose a restoration petition, as it is a conflict of interest with the duty to help the person develop or regain self-determination. Moreover, if the guardianship continues, it is difficult for the guardian to step back from an adversarial role to a supportive role – and it may be necessary to seek a new guardian in such cases. Others pointed out that a guardian may need to oppose the petition because continuing protection is needed against exploitation or undue influence.

Roundtable comments addressed whether, short of opposing the restoration, the guardian should be able to provide information to the judge. The guardian may have “a wealth of information, especially on exploitation, that should be presented to the judge.” But the distinction between opposing the petition and providing information “may not mean much” since the guardian may give the judge information on “a list of bad decisions the person has made.” On the other hand, the distinction may be real, because if the guardian actively opposes the petition, the guardian could seek payment for costs from the person’s estate. Perhaps the guardian should be prohibited from “interfering” with the restoration petition.

Effect of Fees. Inherent in the question of the guardian’s role is the issue of attorneys’ fees for guardians who oppose the restoration. Cassidy found case law, including the *Keenan* case, ordering the payment of such attorneys’ fees from the individual’s estate, noting that the expenses were reasonable and incurred in good faith.¹⁰⁶ Thus, it appears that an individual subject to guardianship may need to not only battle the fiduciary who is appointed to act on the person’s behalf, but also to pay steeply for it.

Roundtable discussion noted a distinction between prohibiting guardian interference with or opposing the restoration petition, and prohibiting payment for costs of doing so from the estate. Some favored the position that a guardian who opposes a restoration petition should not be paid for the costs of doing so from the person’s estate.¹⁰⁷

Possible Use of Mediation. If the guardian opposes the restoration, one strategy in some cases may be mediation. Mediation allows for structured, facilitated discussion between the parties and development of constructive and in some cases imaginative solutions. It has long been recognized as a useful approach specifically for resolving issues in adult guardianship,

¹⁰⁶ *Estate of Keenan v Colorado State Bank & Trust*, 252 P.3d 539 (Colo. Ct. App. 2011); *Brown v Haffey*, 96 Ohio App. 3d 724 (1994).

¹⁰⁷ This distinction is reflected in the Uniform Act (UGCOPAA), which states that the guardian would be compensated for time spent opposing the petition “only to the extent that the court has determined that the involvement or opposition is or was reasonably necessary to protect the interests of the individual subject to guardianship or conservatorship.” See §120(e).

particularly with complex issues of family dynamics.¹⁰⁸ There appears to be little experience in use of mediation in the restoration context.

Guardian’s Role in Decision Support. In addition to making surrogate decisions, often without input from the individual, guardians can exert continuing “subtle pressure,” eroding individual choice. Generally, in many statutory provisions and often in practice, the guardian’s role is still seen primarily as protective – or at least as walking a fine line between protection and autonomy.

Roundtable participants recommended approaches that would change the perception of the guardian’s role toward being a “supporter” – and would apply the principles of supported decision-making in the guardianship. The guardian should be guided by the person’s expressed wishes, and support the person in moving toward restoration if possible. Such a posture would be a marked change in mindset – a paradigm shift from surrogate to supporter. According to one participant, the message to guardian should be “Your role is to get the person out of the guardianship” -- a role that should start with ensuring the guardian identifies and acts on the individual’s values and preferences. Development of practical tools to help guardians in this mission is critical.

F. Focus on Supports

Under the principles of the “least restrictive alternative” and “supported decision-making,” a restoration proceeding should assess not only the individual’s abilities and improved condition but also whether an individual has *supports* sufficient to make decisions and to manage affairs without a guardian. Such supports might include, for instance, help from family members or friends, less restrictive decision-making tools such as powers of attorney or advance directives, care managers, occupational therapy, appropriate medications that could boost cognition and functioning, health and community-based services, and money management or payee services. The question is how courts and lawyers can be encouraged to identify and take into account such supports in making determinations about restoration of rights.

Cases Recognizing Supports. The extent to which in practice judges and lawyers focus on identifying supports to enable decision-making is not known. We found documentation of available support in 16% of our 275 court file cases, or 44 cases. Our case profiles included several instances describing family, circles of friends and professionals, or community supports as essential factors in the restoration determination:

¹⁰⁸ The Center for Social Gerontology, Elder Mediation, <http://www.tcsg.org>; also see Hartman, S., The Center for Social Gerontology, *Adult Guardianship Mediation Manual*, 2002.

- In Case Profile IL-03 the individual appeared and informed the court of his plan to live with his sister and apply for her to be the Social Security representative payee.
- In Case Profile MN-03 a young woman who had been prenatally exposed to drugs and alcohol and had been in foster care for most of her childhood was able to show that she had support and future plans. She had graduated from high school, was employed as a sales associate, had plans for continued employment, and was living in a group home.
- In Case Profile WA-02 an individual with autism and epilepsy was subject to guardianship for 29 years before his rights were restored. The petition and guardian ad litem report named supports envisioned after termination of the guardianship, including appointment of an agent under a power of attorney, continued family support, support from his employer, money management, and software technology.
- In Case Profile WA-04 all rights were restored except the rights to marry, divorce, make a will, contract, sue, buy or sell property, and appoint someone to act on the person's behalf. Four months later, presumably after the individual had demonstrated his abilities to act with available supports, all rights were restored at the request of the guardian.
- The Center for Public Representation was involved in a 2015 restoration case in which a reluctant family had been encouraged by school and state agencies to be guardians when an individual turned 18. Five years later, the individual had supportive services and had executed a power of attorney for finances and a health care advance directive, as well as a supported decision-making agreement. The court terminated the guardianship, finding that with support the individual could make his own decisions.¹⁰⁹
- Quality Trust for Individuals with Disabilities and the Burton Blatt Institute at Syracuse University were involved in a recent successful restoration case that demonstrates the importance of supports. When RK turned 18, his parents were told they had to become his guardians to access adult services. They reluctantly petitioned and were appointed in 2003. Four years later, they asked the court to restore his rights, as they had provided him with support to make his own decisions, but the court denied their request. In 2016, RK and his family renewed the request, with an attorney of RK's own choosing. They presented evidence of RK's history of making decisions and directing his

¹⁰⁹ Fleischner, R., The Center for Public Representation, presentation in ABA Commission on Law and Aging webinar on "Ending Guardianship: Handling Termination of Adult Guardianship & Restoration of Rights," March 2016.

life with the support of his family, as well as an assessment of his functional abilities. The court terminated the guardianship in favor of “supported decision-making.”¹¹⁰

Several key reported case law decisions emphasize that courts must consider evidence of supports in making decisions about termination of guardianship orders:¹¹¹

- A 1995 Iowa case, *Hedin v. Gonzalez*, found that “in making a determination as to whether a guardianship should be established, modified, or terminated, the court must consider the availability of third-party assistance to meet a ward’s or proposed ward’s need for such necessities, if credible evidence of such assistance is adduced from any source.”¹¹²
- The 2012 New York case, *In the Matter of the Guardianship of Dameris L.*, described earlier, stated that the court must consider the availability of “other resources. . . including a support network of family, friends and professionals before the drastic judicial intervention of guardianship can be imposed.”¹¹³
- A 2012 Iowa case, *In the Matter of the Guardianship and Conservatorship of F.W. JR*, concerned a man in his 70s recovering from a fall and acute intoxication. The court terminated the guardianship, finding that “although there are many things [he] can no longer do for himself, he is financially able and personally willing to secure third party assistance when needed.”¹¹⁴
- A 2013 Virginia case, *Ross v. Hatch*, ordered that a guardianship for a young woman with an intellectual disability be of limited powers and limited duration, “with the ultimate goal of transitioning to the supportive decision making model. It is the intent of the Court that the Guardians shall assist Respondent in making and implementing decisions we have heard termed ‘supported decision making.’” The court ordered that the

¹¹⁰ Quality Trust for Individuals with Disabilities and the Burton Blatt Institute, *Press Release: Freedom for Ryan King*, Dec. 12, 2016, available at <http://www.supporteddecisionmaking.org/impact-stories/freedom-ryan-king>. Note that Ryan King and his mother Susie King made a compelling presentation to the 2016 Roundtable on Restoration of Rights.

¹¹¹ Also see *In re Peery*, 727 A.2d 539 (Pa. 1999) which concerned the need for appointment of a guardian rather than restoration of rights. The trial court found that the proper inquiry as to need for a guardian was “whether Ms. Peery has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety.” On appeal, the Superior Court reversed, but the Supreme Court reinstated the trial court order.

¹¹² *Hedin v. Gonzalez*, 528 N.W.2d 567 (Iowa 1995).

¹¹³ *In the Matter of the Guardianship of Dameris L.*, 956 N.Y.S. 2d 848 (Sup. Ct. 2012).

¹¹⁴ *In the Matter of the Guardianship and Conservatorship of F.W. JR*, 824 N.W.2d 561, 824 N.W.2d 561 (Iowa Ct. App. 2012).

guardianship would terminate in one year, during which supported decision-making would be developed.¹¹⁵

Cassidy points to case law language showing the importance of evidence of supports. She states that “an individual wishing to prove his or her regained capacity to a judge would be wise to acknowledge personal limitations and the need for third-party assistance to make or communicate some decisions. Courts appear less inclined to restore an individual who is unable to comprehend certain limitations and willingly accept the help of others.”¹¹⁶ Indeed, in the *Maxwell* case cited earlier, in granting the restoration the court noted that “She knew she would be needing some help, and she was aware of the resources that were available to her. . . . She also knew that her nieces and nephews were willing to keep tabs on her, and would fill in if her sitters didn’t come.”¹¹⁷

Ironically, some cases have found—in a misunderstanding of the supported decision-making concept – that the very existence of a support network demonstrates that the person continues to need help and thus reinforces the need for guardianship. For example, in a 2004 Missouri case, even though the individual was living in her own apartment, working, and meeting her food and clothing needs, the court concluded that this was not sufficient to establish that she “could continue to do so without the court-ordered assistance that she had been receiving.”¹¹⁸ In a 2014 Texas case, the court stated that “no one has testified that [the individual] could make any life decisions of importance without the support or guidance of his caretakers or medical or mental health professionals.”¹¹⁹ There is a petition for review pending.

Statutory Guidance on Supports. The Uniform Act (UGCOPAA) references the concept of supports. For example, a court visitor must summarize functions the person could manage “without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage.”¹²⁰ To appoint a guardian for an adult, the court must find by clear and convincing evidence that the person “is unable to receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making.”¹²¹ Thus, the question for judges would not be “does the person lack capacity” but “does the person lack capacity even with supports” such that protection by a

¹¹⁵ *Ross v. Hatch*, Case No CWF120000426P-03, Circuit Court for the City of Newport News, Virginia (2013).

¹¹⁶ Cassidy at 115.

¹¹⁷ *In re Maxwell*, 2003 WL 22209378 (Tenn. Ct. App.).

¹¹⁸ *In re Estate of Werner*, 133 S.W. 3d 108 (Mo. Ct. App. 2004).

¹¹⁹ *In re Guardianship of Tonner*, 514 S.W.3d 242 (Tex. App. 2014). Petition for Review pending.

¹²⁰ UGCOPAA §304(d)(2).

¹²¹ UGCOPAA §301(a)(1)(A).

guardian would be needed.¹²² Such wording would better align with the principles of supported decision-making in Article 12 of the U.N. Convention on the Rights of Persons with Disabilities.

Texas law emphasizes that the court's finding on supports is critical. A petition for restoration is to request a court finding that the person has "sufficient capacity with supports and services" to care for self and/or manage property. The court is to hear evidence on the specific powers and duties of the guardian that should be limited "if the person receives supports and services." A guardianship must be modified or terminated if the court finds that the person's condition "with supports and services" warrants a modification or restoration. Finally, the court order must state any necessary supports and services needed.¹²³

Roundtable participants recommended that state law require that a judge's finding on "capacity" take into account and make a finding on the availability and use of supports. They further recommended that laws and practice guidance clarify what is meant by supports and give examples – that is, support could be legal decision-making tools, family supports, technological supports such as software or electronic medication reminders, or community supports such as in-home care or home-delivered meals that might bolster functional abilities. Supports could be "whatever is needed to understand the decisions at hand." They noted that for older persons, the Older Americans Act provides a range of community supports that courts should be aware of and should recognize. Additionally, Medicaid waiver services include important supports, and there is a requirement for "person-centered planning" in the provision of the services.¹²⁴ Finally, they said clinical and functional assessments should incorporate the concept of supports.

Guardianship Plans. The Uniform Act (UGCOPAA),¹²⁵ and a growing number of states require the guardian to submit a forward-looking guardianship plan to guide the guardian's actions in the year ahead. Such a plan might include steps the guardian will take to support self-determination, and a timeline or goal for seeking restoration, perhaps progressively over time. The NGA *Standards* require the guardian to "develop and implement a written guardianship plan setting forth short-term and long-term objectives for meeting the goals, needs and preferences of the person."¹²⁶

In Florida, each guardianship plan must address the issue of restoration and include a summary of activities undertaken in the past year to enhance decision-making abilities, as well as a

¹²² This concept parallels the concept of reasonable accommodation in the Americans with Disabilities Act, in which a "qualified individual" for employment coverage is an individual who "with or without reasonable accommodation, can perform the essential functions of the employment position . . ." 42.U.S.C. §12111(8).

¹²³ *Texas Estate Code* §1202.051(3).

¹²⁴ See Medicaid Home and Community-Based Waiver regulations, CFR 441.301(c)(1).

¹²⁵ UGCOPAA §316 for guardians; §419 for conservators.

¹²⁶ National Guardianship Association *Standards of Practice*, #13(III), 2013.

statement as to whether any rights should be restored.¹²⁷ Such a plan also should include steps the guardian will take going forward in the coming year. A guardianship plan should relate to – but is not the same as – a care management plan or a nursing home or assisted living plan. All of these plans should consider supports, but the guardianship plan is the blueprint for action by the guardian.

Roundtable participants recommended the use of guardianship plans to outline supports for which the guardian aims to arrange. They recognized that supports could be provided progressively over time, gradually limiting the perceived need for a guardian.

Legal and Judicial Tools Highlighting Supports. Several tools are available for judges, lawyers, and guardians in focusing on supports:

- (1) Florida Guide for Legal Professionals. The 2015 Florida Developmental Disabilities Council Manual for Legal Professionals¹²⁸ highlights the concept of a “progressive restoration plan” that would emphasize the building of supports. “A progressive restoration plan can be used if the court denies restoration of some or all of the rights. The court can initiate the use of a progressive rights restoration plan on its own initiative. The court can also provide instructions to the guardian to engage in capacity building activities.”

The Manual includes an example of a “progressive rights restoration plan” for the right to manage money. It shows how the individual, the guardian, the attorney, and a supportive living coach can work together to set out and follow concrete steps to gradually transfer management of money from the guardian to the individual. (The idea of progressive or gradual restoration also was highlighted by the Center for Public Representation, commenting that “if the guardianship has been in place for a while, full restoration may be a gradual process”¹²⁹)

- (2) ABA-APA Handbook for Judges. In 2006, the American Bar Association Commission on Law and Aging and the American Psychological Association, with the National College of Probate Judges, published the widely recognized *Handbook for Judges: Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*.¹³⁰ The

¹²⁷ Fla. Stat. Ann. §744.3675(3).

¹²⁸ Florida Developmental Disabilities Council & Florida Guardian Trust, *Developing Abilities and Restoring Rights: A Manual for Legal Professionals*, 2015.

¹²⁹ Fleischner, R., The Center for Public Representation, presentation in ABA Commission on Law and Aging webinar on “Ending Guardianship: Handling Termination of Adult Guardianship & Restoration of Rights,” March 2016.

¹³⁰ American Bar Association Commission on Law and Aging, American Psychological Association & National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*, 2006.

handbook is based on a conceptual framework of “six pillars” of capacity – one of which is “means to enhance capacity.” The handbook directs judges to “be vigilant for means to enhance capacity through practical accommodations and medical, psychosocial or educational interventions” – in other words, to consider supports in assessing abilities.

- (3) ABA Tools for Lawyers. In 2016, four American Bar Association entities developed the PRACTICAL Tool¹³¹ for lawyers setting out nine steps for supporting individuals in making decisions and identifying approaches less restrictive than guardianship. The Tool suggests asking “what would it take” to enable an individual to make the needed decisions – including both supporters and supportive community resources.

Guardian Role Concerning Decision Supports. The guardian’s role in enhancing and arranging for supports, and in acting as a “supporter” was a theme throughout the Roundtable.

Roundtable participants recommended that all guardians should make it a primary role to identify supports and sort out any administrative or practical barriers in their use. Guardians should *become* “supporters.”

In an interesting 2013 Wyoming case, *In re Guardianship of Sands*, the court appointed a guardian for a 70-year-old man with dementia who lived in unsafe conditions and made questionable financial decisions. Soon after appointment, the individual filed for restoration, which was denied. On appeal, the decision was affirmed, but the court found that the individual had supports in place, and the guardian’s role was thus reduced to that of a “standby guardian” with no active involvement unless necessary, and then only after consultation with the individual’s support system. The order was to expire in one year.¹³²

Roundtable discussion was mixed on the merits of the *Sands* case. While it allowed the support system to be used in place of guardian decisions unless necessary, participants pointed out that “standby guardian” usually has a different legal meaning (a substitute for a guardian no longer able to serve), and that a guardian should not be appointed on the basis of some possible future need. Discussion suggested another possible strategy – in which a supported decision-making agreement could provide that if the supporter is appointed as guardian, he or she will continue to provide support and will seek regular court review to determine if a guardianship order is needed.

¹³¹ American Bar Association Commission on Law and Aging, Commission on Disability Rights, Section on Civil Rights and Social Justice, and Section on Real Property, Trust and Estate Law, *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making* <http://www.ambar.org/practicaltool>, 2016.

¹³² *In re Guardianship of Sands*, 301 P.3d 128 (Wyo. 2013).

Post-Restoration Need for Supports. Restoration of rights is not the “end of the story” – but rather the beginning of the rest of the individual’s life. The court may have granted restoration based on a finding of supports in place, but it is critical to ensure that the person continues to have the supports needed over time. Deterioration in supports may land the person back in a guardianship setting with loss of the very rights won in the restoration proceeding. In other words, there is a need to avoid “restoration recidivism.” An Ohio court project recently funded by the U.S. Administration on Community Living features court “tracking of elders whose guardianship has been terminated and collecting data on the elder’s supports in the community to ensure the elder’s needs continue to be met.”¹³³

G. Kinds of Evidence and Evidentiary Standards

In proving a restoration case, (1) what kinds of evidence do and should courts consider; (2) where should the burden of proof lie; and (3) what should be the evidentiary standard?

Kinds of Evidence. Two recent legislative provisions are examples of evidentiary requirements *up front upon appointment of a guardian that lay the groundwork* for possible later restoration. Texas legislation in 2015 required that a physician’s certificate must address whether improvement in functioning is possible and if so, state the period in which the person should be re-evaluated to determine whether guardianship is still needed.¹³⁴ Florida legislation passed in 2015 required the court to make specific findings of capacity when a guardian is appointed, thus paving the way for a focus on these specific findings in a later restoration petition.¹³⁵

Once a restoration petition is filed, how much discretion do courts have in the kinds of evidence needed? State statutes generally afford the court wide latitude. However, at least one state makes specific requirements. Georgia law states that a petition for restoration must be accompanied by “the affidavits of two persons who have knowledge of the ward, one of whom may be the petitioner, or of a physician licensed to practice medicine . . . , a psychologist licensed to practice . . . or a licensed clinical social worker.”¹³⁶

Clinical Evidence. The reported case law collected by Cassidy for the ABA Commission shows that courts generally rely on two primary kinds of evidence – clinical statements and in-court observation of the individual. The clinical evidence generally must be recent. Cases vary as to reliance on the individual’s physician, court-appointed clinician, or both. Cases also vary as to the clinician’s capacity assessment background and experience.¹³⁷ The collected case law did

¹³³ Administration on Community Living, Elder Justice Innovation Grant, “Stark County Probate Court Elder Justice Innovation Project,” 2016.

¹³⁴ *Texas Estates Code*, §1101.103(b)(3-a).

¹³⁵ *Fla. Stat. Ann.* § 744.331(6)(a).

¹³⁶ *Ga. Code Ann.* §29-4-42(b).

¹³⁷ Cassidy at 103-104.

not address the kind or extent of the clinical evaluation, or whether any particular assessment instruments were used.

Our court file research found significant use of clinical evidence in proving restoration cases. Clinical evidence was referenced in the files in 139 cases or 50.6% of the cases. In 78 cases (28.4%) the file included a clinical statement; in 47 cases (17.1%) it included reference to a clinical test; and in 14 cases (5.1%) there was in-court clinical testimony. A number of cases showed more than one kind of clinical evidence. However, it seems surprising, given the emphasis in the reported case law, that only half of our researched cases showed use of clinical evidence.

In the 13 cases we profiled, eight included or referenced clinical evidence – usually a physician’s statement, but in some cases, a psychological or psychiatric assessment – although in general they seemed to place an equal or greater weight on the guardian ad litem report. In a number of cases, there was no clinical evidence referenced or included in the file, and in a couple of cases the file indicated that the clinical evidence was sealed. It was not possible to determine from the case records whether the court considered lay evidence, nor (except in one case) whether the individual testified at the hearing.

- In Case Profile IL-01 a physician’s report was included but was handwritten and somewhat illegible. It stated a conclusion that the person was capable of making personal and financial decisions for herself but recommended she live in a nursing home.
- In Case Profile IL-02, the individual lived in a nursing home and was regularly seen by a physician. The physician prepared a report stating that she was able to make personal and financial decisions and that she was “alert, oriented X3, and shows no evidence of cognitive impairment.” Based on this report, the individual petitioned for restoration.
- In Case Profile WA-04, an older man had shown signs of confusion and mental illness but had recovered, and his sister filed for restoration, supported by two psychiatric evaluations that were not included in the file.

Court Observation and Statements of Individual. As to in-court observation of the individual, the reported case law does not indicate the extent to which it influences the judge’s determination. Of the 16 reported cases in which the individual subject to guardianship testified at trial, seven resulted in restoration, and nine did not.¹³⁸ In the *Maxwell* case cited earlier, the court cited the clinical evidence but noted that “the most useful evidence comes

¹³⁸ Cassidy at 104.

from the testimony of Martha Maxwell herself, and of [the director of nursing at the assisted living residence].”¹³⁹

The case files we researched included use of the individual’s own testimony in 39 cases (14.2%). This data consisted of 37 cases of in-court testimony and two cases in which the individual gave a deposition. The Center for Public Representation notes that restoration cases are strengthened by “testimony from the person, examples of decision-making on a day-to-day basis; use of or ability to use bank accounts, pay rent, make health decisions.”¹⁴⁰

While not mentioned, additional factors related to in-court testimony could be courthouse and courtroom accessibility. In-court testimony might be more likely in courts that are not only ADA-compliant but readily accessible and welcoming to individuals with disabilities. Moreover, judicial training on communicating with individuals with disabilities might bring out salient statements by individuals describing their life and abilities. Judges also might benefit from guidance in interpreting their observations of individuals in the courtroom setting or in chambers.

Lay Evidence. In examining the case law, Cassidy found that some courts may view lay testimony as “secondary” and that in one case the court would not allow lay testimony unless it was accompanied by an expert evaluation¹⁴¹ – which would discourage key comments by those who see the individual regularly and know his or her abilities and supports well.

The cases we researched, unlike some of the reported case law, showed significant reliance on lay evidence. In total, 140 cases or 50.1% used lay evidence – consisting (with multiple counts) of unspecified lay evidence in general (81 cases or 29.5%); lay depositions (29 cases or 10.5%); and in-court lay testimony (30 cases or 10.1%). Use of lay evidence seems in tune with supported decision-making, allowing supporters or potential supporters to detail what the individual can do on a day-to-day basis and how the supporters and supports can help. Testimony from friends, service providers, and family is essential in making the case for restoration.¹⁴²

Roundtable participants recognized that while clinical evidence may be useful, it should not be required. In-court testimony by the individual or by lay witnesses can offer crucial perspectives on day-to-day abilities, strengths and limitations. They noted that the question should not be

¹³⁹ *In re Maxwell*, 2003 WL 22209378 (Tenn. Ct. App.).

¹⁴⁰ Fleischner, March 2016.

¹⁴¹ Cassidy at 103. See *In re Guardianship of DiCillo*, No. 2006-G-2718, 2007, WL 1113964 (Ohio Ct. App. Apr. 13, 2007); and *In re Guardianship of Poulos*, No. 96366, 2011 WL 6317373 (Ohio Ct. App. Dec. 15, 2011).

¹⁴² Fleischner, March 2016.

phrased so much as “does the person have capacity” as “does the person continue to need the protection of the state through guardianship.”

Evidentiary Standards. In theory, if restoration is to be accessible to an individual already under the severe disadvantage of a determination of incapacity and often without assistance, the evidentiary standard needed should be less than that required to prove initial incapacity. The Uniform Law (UGCOPAA) requires that the petitioner for restoration need only establish a *prima facie* case, and then the burden shifts to the party opposing the restoration to establish by clear and convincing evidence that “the basis for appointment of a guardian . . . is satisfied.”¹⁴³

Cassidy found that 34 jurisdictions do not statutorily provide an evidentiary standard, leaving wide discretion for courts and uncertainty for litigants. Only two states follow the UGCOPAA in requiring only a *prima facie* showing by the petitioner, upon which the burden shifts. Seven states require a preponderance of the evidence; and eight states use the higher standard of clear and convincing evidence – the same standard as generally required to prove initial need for appointment of a guardian.¹⁴⁴ (Since Cassidy’s analysis, Florida in 2015 enacted a provision requiring a preponderance of the evidence.¹⁴⁵)

Roundtable participants generally endorsed the UGCOPAA approach requiring establishment of a *prima facie* case, at which time the burden shifts to the party opposing the restoration to establish by clear and convincing evidence that the guardianship should be continued. However, some participants noted that there may be differences by population – for instance, people with psychosocial needs may have significant fluctuations, making a clear-cut case difficult to prove. Others said restoration should not really be an adversarial proceeding – and thus instead of an “opposing party” proving the continuing need using evidentiary standards, it should be seen simply as a court determination of the continuing need.

Burden of Proof. As stated above, the UGCOPAA provides that once the petitioner for restoration makes out a *prima facie* case, the burden of proof shifts to the opposing party. Cassidy’s legal research shows that four states place the burden of proof on the restoration petitioner to show that there is no longer a need for a guardian, and four states place the burden on the party contesting the restoration.¹⁴⁶

Where the statute does not specify who has the burden, the courts appear divided. Some courts place the burden on the petitioner. In at least two of the reported cases, the court noted

¹⁴³ UGCOPAA §319(c).

¹⁴⁴ Cassidy at 111-112.

¹⁴⁵ Fla. Stat. Ann. §744.464(3)(a).

¹⁴⁶ Cassidy at 112-113. Iowa provides that the burden shifts to the party opposing the petition once a case has been made.

a “rebuttable presumption” that the need for guardianship continues.¹⁴⁷ However, in other cases, the court recognized that restoration should be encouraged and that placing the burden on the petitioner – often the individual subject to guardianship – would be unfair. In one instance, the court found that the guardianship had been established at the individual’s “lowest state of cognitive functioning following an injury that left him without nourishment and delirious” and that a permanent guardianship should not have been established.¹⁴⁸

H. Court Data and Research

Our empirical research was constrained by a widespread lack of data on restoration of rights. Reforms promoting restoration and assessing its use should be supported by sound statistics and research. How can this be encouraged?

While we did not conduct a state-by-state survey, with significant outreach, we could locate only three state courts that track restoration data – Washington and Minnesota, which participated in the study, and North Carolina, which we discovered toward the end of the study. Additionally, we found at least two statewide public guardianship programs that tracked restorations.

Moreover, we found that data on the number of successful restorations was more available and easier to access than data on the number and disposition of restoration requests, leaving questions about what happened to the unsuccessful requests.

It appears there are no outcome studies that have assessed the effects of restoration on the lives of individuals, or whether any have subsequently returned to guardianship. The Ohio project referenced above¹⁴⁹ tracking for needed supports following restoration could be a good beginning.

Roundtable participants supported tracking of data on restoration of rights as well as research on the outcome of judicial restoration proceedings.

One specific issue that has emerged in discussions about voting rights of individuals with disabilities is the extent to which information on court-ordered restorations regularly is transferred in a timely way to the state elections officials so the individuals can be registered. California law states that if the individual has been disqualified from voting under a conservatorship, upon termination of the conservatorship “the court shall notify the county

¹⁴⁷ Cassidy at 113, citing Ohio and New Mexico cases that recognize a rebuttable presumption.

¹⁴⁸ *In re Estate of Fallos*, 386 Ill. App. 3d 831, 842 (Ill. App. Ct. 2008).

¹⁴⁹ See Focus on Supports section above, referencing ACL Elder Justice Innovation Grant in Stark County, OH.

elections official of the county of residence of the former conservatee that the . . . right to register to vote is restored.¹⁵⁰

¹⁵⁰ *Cal. Probate Code* §1865.

IV. Conclusion

The time is ripe for restoration of rights to become a viable option for people subject to guardianship. In the context of the emergent paradigm of supported decision-making, restoration can be a path to self-determination and choice. For courts, attention to restoration can weed out unnecessary cases from dockets, allowing a stronger focus on problems needing judicial intervention, and saving administrative costs of carrying unnecessary cases.

To make restoration work:

- *State legislation* must ensure sufficient notice that the option exists, provide for regular court review of the continuing need for guardianship, afford the right to counsel, and set workable evidentiary standards.
- *Courts* must assess cases for possible restoration, find ways to make individuals and families more aware of the option, make the process more accessible, take into account available supports in making determinations, and track data on restoration.
- *Guardians* must perceive their role as enhancing self-determination and working toward termination of guardianship with sufficient support – more as “supporters” guided by the person’s expressed wishes if possible. There must be sufficient legal decision-making tools, family supports, technological supports, and community supports readily available to bolster functional abilities.
- *Lawyers* must recognize and act on the potential of restoration in guardianship cases.

This study has set the stage for such actions, bringing to life the possibility that guardianship is not automatically an end but can be “a way station and not a final destination.”