

Guardianship Termination and Restoration of Rights

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American Bar Association Commission on Law and Aging

The ABA 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.

Introduction

Adult guardianship is a drastic intervention that transfers most of an individual's fundamental rights to a surrogate and usually lasts a lifetime. Most guardians provide essential care to the people they are appointed to assist and protect. However, an unknown number of individuals languish under overly restrictive or unnecessary guardianships. Every state has statutory provisions for termination of guardianship, but it is rare that a person with a guardian will see their rights restored in court. It is impossible to state how rare, given the scant data on the rates of restoration.¹

A court can terminate a guardianship and restore rights for three reasons: (1) the court finds 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 legally required criteria for the appointment of a guardian.

Key Lessons

1. A growing number of states are adopting statutory language and model practices for increasing the rate of restorations from the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act and the National Probate Court Standards.
2. The right to counsel, and counsel who take on the role of zealous advocate, is a keystone of successful restoration of rights.
3. Some guardians will oppose restoration of rights for a variety of pecuniary and protective reasons. Other guardians will actively support a termination, and in some cases, will petition for restoration.
4. The petitioner for guardianship termination must show evidence that proves the individual has "capacity" and no longer requires a guardian.
5. Courts typically rely on two kinds of evidence when terminating guardianship: clinical statements and in-court observations/statements of the individual. Courts also may use lay evidence to demonstrate what kind of assistance individuals need to carry out daily tasks.

¹ An ABA study of four participating states found a total of only 275 termination cases over a three-year period. Erica Wood, Pamela Teaster, and Jenica Cassidy. *Restoration of Rights in Adult Guardianship*, p. 7, available at americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf. ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology.

6. The concept of “supported decision-making” is gaining recognition as an approach to decision-making that can eliminate the need for a guardian. A restoration proceeding should not only assess an individual’s capacity, but whether the individual has a sufficient supported decision-making network to make their own decisions without a guardian.

Model Laws and Standards Provide Guidance on Best Practices

Advocates and lawyers seeking to learn more about guardianship termination should look first at their state laws, and then at model laws and standards to understand best practices in termination. The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) 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.”² 18 states have adopted similar language, applying the same procedural protections at termination that they require at appointment. States that have not adopted UGCOPAA still have governing language.³ The *National Probate Court Standards* direct probate courts to “periodically consider the necessity for continuing a guardianship or conservatorship.”⁴

The Right to and Role of Counsel Is Essential to the Initiation of a Restoration Petition, as Well as the Successful Termination of a Guardianship

Twelve states and UGCOPAA guarantee the right to court appointed counsel for an individual seeking termination of guardianship. In other jurisdictions, a person seeking to terminate guardianship has no such right and will rarely have the financial resources to find an attorney. Some legal services organizations will provide free legal representation.⁵

Lawyers may be reluctant to represent individuals seeking to terminate guardianship due to legal and ethical concerns. Legal representation presents a quandary to a practitioner: how can someone who has been determined by a court to lack the ability to make their own decisions and engage in legal transactions contract and direct a lawyer to represent them? There is guidance on representing clients with “diminished capacity.”⁶ First, the traditional lawyer-client model—the lawyer takes direction from the client and advocates for the client’s expressed wishes. The second option is a best interests model—the lawyer advocates for what the lawyer believes is best for the client, without considering expressed wishes. The ABA Model Rules of Professional Conduct Rule 1.1.4 on Representing Clients with Diminished Capacity embraces the traditional lawyer-client relationship unless the lawyer reasonably believes the client is at risk of substantial harm, in which case the lawyer may take protective action.⁷

Guardians Can Make or Break a Termination Case

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. A guardian may oppose the petition to ensure the person is protected from exploitation or undue influence. Yet guardians must consider

2 UGCOPAA 319(e).

3 For a state by state comparison see [Restoration in Adult Guardianship \(Statutes\)\(2013\)](#), ABA Commission on Law and Aging.

4 *National Probate Court Standards* #3.3.13E.

5 Legal services attorneys represented the clients described in the case examples below.

6 See Godfrey, D. & Sabatino, C. “Understanding Legal Capacity & Ethics,” National Center on Law and Elder Rights, ncler.acl.gov/pdf/Capacity%20Ethics%20Practice%20Guide.pdf.

7 See 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) for an examination of Rule 1.14’s flaws with respect to termination cases. This landmark article argues under the framework of constitutional, contract, and agency law that such representation is “not merely legally permissible but essential to protect fundamental Constitutional rights.”

carefully whether opposing a termination case will create a conflict of interest with the guardian's duty to help the person develop self-determination. Furthermore, if the case is not successful, the guardian's adversarial role may negatively affect the guardian's relationship with the person.

Guardians can and should, if possible, encourage and support a petition for termination. Under 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."⁸ *National Guardianship Association (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."⁹ 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."¹⁰

Types of Evidence Courts Do and Should Consider; Burden of Proof; Evidentiary Standard

Under state law, courts generally have broad discretion to deem what kinds of evidence prove "capacity" and are admissible in a restoration hearing. Courts tend to look at two kinds of evidence: clinical and in-court observations. Clinical evidence tends to be the report of a court appointed clinician or any other individual deemed qualified by the court. In-court observations are based on the testimony of the person challenging their guardianship. Some courts will also accept "lay evidence," or the testimony of supporters, friends, family, and service providers.

Evidentiary standard

Under UGCOPAA the petitioner need only to establish a *prima facie* case. Then the burden shifts to the opposing party to prove by clear and convincing evidence that "the basis for appointment of a guardian ... is satisfied."¹¹ Two states follow UGCOPAA's burden shifting model. Seven states require a preponderance of the evidence, and eight states require the clear and convincing standard.¹²

Identifying Supports Should Be a Critical Part of Restoration

Supported decision-making, a process by which people with disabilities work with supporters to understand their choices and make their own decisions—should be part of any discussion about the possibility of restoration. Guardians and other surrogates can also use the principles of supported decision-making to encourage self-determination. Supported decision-making is a major factor in two of the following case examples.

8 UGCOPAA §313(f).

9 NGA 2013 Standards of Practice #21(III).

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

11 UGCOPAA §319(c)

12 Wood, et al, *Restoration of Rights in Adult Guardianship*, p. 66.

CASE EXAMPLES

Three recent pioneering cases on restoration of rights (For more information about each case, watch the accompanying webinar, Termination of Guardianship and Restoration of Rights. [Visit the NCLER website](#) for the webinar recording). The attorney for each case will discuss the cases in details and offer practice tips.):

Indiana

In a first-of-its-kind case in Indiana, 27-year-old Jamie Beck’s guardianship was successfully terminated in favor of supported decision-making. Through the continued use of supports and services in combination with a supported decision-making agreement, Ms. Beck was able to demonstrate that she no longer met Indiana’s statutory definition of “incompetent.” Jamie was represented by Melissa Keyes, Legal Director of Indiana Disability Rights (IDR). IDR is the designated protection and advocacy organization for Indiana and provides free legal representation to individuals with disabilities across the state.

Washington, DC

In June 2018, for the first time in the District of Columbia, a Superior Court Probate Division judge terminated the guardianship of an older adult in favor of supported decision-making. This case was highlighted by the [Washington Post](#), and the court order and press release can be found [here](#). The older adult was represented by Quality Trust’s [Jenny Hatch Justice Project](#), led by Morgan Whitlatch, Legal Director. The Jenny Hatch Justice Project is funded by the D.C. Bar Foundation to assist low-income District of Columbia residents with disabilities facing or subject to overbroad or undue adult guardianship. [Quality Trust](#) also leads the efforts of the [National Resource Center for Supported Decision-Making](#), which is dedicated to advancing the “Right to Make Choices” of people with disabilities and older adults.

Washington, DC

When a woman in her mid-thirties had a medical crisis and could not consent to life-saving care, a family member was appointed as her guardian to consent to treatment. She survived the immediate crisis and was transferred to a nursing home. Despite her desire to leave the nursing home and apparent ability to live in the community, her guardian would not support and plan with her and the nursing home for discharge. The individual was represented in a successful restoration of rights case by Dari Pogach, then a staff attorney at Disability Rights DC (DRDC) at University Legal Services. DRDC is the federally-designated protection and advocacy program for people with disabilities in the District of Columbia.

Conclusion

Termination of guardianship and restoration of rights is gaining recognition as a legal process and a viable response to unnecessary guardianship. Despite these advances in legislation and professional standards, laws and best practices are meaningless if they are not put into practice. Both guardians and attorneys for individuals under guardianship play a crucial role in ensuring successful terminations. As evidenced by the case examples described in this Issue Brief and webinar, termination of a guardian is possible with the support of zealous representation and sufficient support services and/or a supported decision-making network.

Additional Resources

- [“Restoration of Rights in Adult Guardianship,”](#) the American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology.
- [Uniform Law Commission’s Guardianship, Conservatorship, and other Protective Arrangements Act \(UGOPAA\).](#)
- [Restoration in Adult Guardianship \(Statutes\)\(2013\),](#) the American Bar Association Commission on Law and Aging.

- 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).
- 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).

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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