

# Guardianship Termination and Restoration of Rights

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**August 22, 2018**

# Housekeeping

- All on mute. Use Questions function for substantive questions and technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

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

- Loss of rights in adult guardianship
- State statutory procedures for termination and restoration of rights
- Termination usually due to death
- Restoration of rights for three reasons:
  1. Person regained decisional ability
  2. Person has developed decision-making supports
  3. Additional evidence shows person does not meet criteria for appointment of guardian

# Key Lessons

1. Restoration of rights rare; model practices can increase use.
2. Right to – and advocacy role of – counsel is essential to successful restoration.
3. Guardians can make or break a restoration case.
4. Case must show evidence of “capacity” and meet evidentiary standard.
5. Supported decision-making is key element to restoration. Important to show individual has decisional supports.

# Three Restoration Cases

# Jamie Beck in Indiana

Jamie Beck uses supported decision-making agreement to regain rights:

- [“28-year-old Jamie Beck makes Indiana history as 1st to regain decision-making rights,”](#) PAL Item, 6/13/18
- [“Indiana woman makes judicial history by seeking supported decision-making agreement,”](#) The Indiana Lawyer, 6/12/18
- Wayne County Superior Court terminated guardianship for 27-year-old woman
- Demonstrated use of supports and services, with supported decision-making agreement
- Represented by Melissa Keyes, Indiana Disability Rights



# DC Judge Restores Rights for Older Woman

[“This 87-year-old D.C. woman just made it easier for you to keep your independence,”](#) Washington Post 6/27/18

- 87-year-old first older person in DC to have guardianship terminated and rights restored.
- Showed that with support she could make own decisions and did not need guardian.
- Represented by Morgan Whitlatch, Quality Trust, Jenny Hatch Justice Project

# DC Nursing Home Resident Restores Rights

- Woman in mid-thirties with family guardian sought discharge but guardian did not agree.
- Regained rights, including right to live in community, in restoration case.
- Represented by Dari Pogach, then at Disability Rights DC ([Video](#) will be shared at the end of presentation).

# Barriers to Restoration of Rights

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- Every state guardianship statute provides for restoration of rights
- Yet it is rare in practice

# Barriers to Restoration of Rights

- Obstacles
  - Lack of awareness
  - Lack of regular court review
  - Lack of court access
  - Lack of legal representation
  - Lack of legal & judicial education
  - Guardian opposition in some cases
  - Insufficient clinical evidence
  - Lack of focus on supports



# Practice Tips to Promote Termination or Modification of Order and Restoration of Rights

# New Uniform Act Strengthens Restoration Provisions

- 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) says court “shall follow the same procedures to safeguard the rights of the adult which apply to a petition for guardianship.”
- 18 states have similar language
- UGCOPAA adds other key protections (see following slides)



# Practice Tips to Enhance Awareness & Access

1. Notice of right to restoration.
2. Explanation by court investigators, visitors, Guardian Ad-Litem (GAL).
3. Duty of guardian to notify court if condition changes.
4. Regular review of continued need for guardianship
  - In guardian report
  - By court
5. Informal communication or request; complaint processes.
6. In profiled cases, how did petitioner become aware of and access right to restoration?



# Importance of the Right to & Role of Counsel (pt. 1)

- Frequent lack of legal representation
- Legality & ethics of post-appointment representation
- UGCOPAA – “entitled to be represented by an attorney of the adult’s choosing.”

# Importance of the Right to & Role of Counsel (pt. 2)

- Payment issues; role of legal services and protection & advocacy agencies
- Advocacy role – MRCP Rule 1.14
- Counsel in profiled cases

# Role of Guardians

# Role of Guardians (pt. 1)

- Guardian duties
  - Maximize autonomy, self-determination
  - Protect from abuse, exploitation, undue influence
  - Watch for and notify court of changes
- UGCOPPA provision for guardian notification to court
- [National Guardianship Association Standards](#) requiring guardian to seek restoration in certain instances

# Role of Guardians (pt. 2)

- Effect of guardian opposition
- Fee issues; UGCOPAA provision limiting fee on guardian's time spent in opposition
- Effect on guardian's continuing relationship with person
- Role of guardian in profiled cases

# Evidentiary Issues



- Evidentiary issues upon appointment that pave way for restoration
- Wide judicial discretion in evidence for restoration
  - Clinical evidence
  - Court observation & statement of individual
  - Lay evidence
- Evidentiary standards
  - UGCOPAA requires prima facie case, then burden shifts, opposing party must show clear & convincing evidence of need for guardian
  - 34 states no statutory evidentiary standard

**What evidence turned the tide in the profiled cases?**

# Decisional Supports & Supported Decision-Making

- Case should assess not only condition/capacity, but supports
- Case examples recognizing supports
  - 2012 York Dameris case
  - 2013 Jenny Hatch case
- Statutory guidance on supports – UGCOPAA language on basis for appointment of guardian
- Need for education of judges, GALS, court visitors, clinicians
- Use of progressive guardianship plan with decisional supports
- Use of supported decision-making in profiled cases

# Conclusion

## Video Clip – Disability Rights DC Case

- Practices should actively increase use of restoration procedures
- Counsel is essential to advocate for restoration of rights
- Guardians can make or break restoration case
- Kinds of evidence and evidentiary standards vary
- Supported decision-making should be key component of every restoration case



# Resources

- The ABA Commission/VA Tech 2017 study on [Restoration of Rights](#) includes extensive case law, statutory & reference citations, as well as roundtable recommendations
- 2013 ABA state statutory [chart on restoration provisions](#)
- 2015 [Florida Developmental Disabilities Council & Guardian Trust, Developing Abilities and Restoring Rights: A Manual for Legal Professionals](#)
- Additional resources cited in webinar [Issue Brief](#)
- [National Resource Center for Supported Decision-Making](#)

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