

RESTORATION OF RIGHTS IN THE TERMINATION OF ADULT GUARDIANSHIP

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From 2013 to 2014, the ABA Commission on Law and Aging undertook a pioneering study on adult guardianship restoration law and practice in the United States. The purpose of the study was to gain a better understanding of the state of restoration through an initial examination of statutes, case law, and stakeholder experiences. Guardianship is the legal means by which the court gives one person the duty and power to make decisions for another. It can be difficult to modify or terminate a guardianship once it is placed. Courts may terminate a guardianship if the individual regains capacity or develops decision-making supports that make the guardianship unnecessary. However, for the majority of protected individuals, there will not be a return to liberty. The study methodology is comprised of four parts: (1) statutory review; (2) case law research and analysis; (3) online questionnaires for attorneys and judges; and (4) stakeholder interviews. Overall, the Commission staff collected 104 cases, dating as far back as the year of 1845.

This study indicates that petitions for restoration are uncommon, but do occur with moderate success. Of the 152 judicial respondents who completed the online questionnaire, 73% have presided over petitions for restoration with 24% presiding over more than 10 petitions. Forty-seven percent of the 412 attorney questionnaire respondents have filed at least one petition for restoration within the last 10 years. Of those, 96% reported having success with at least some of the petitions. The right to petition for guardianship, although available to every protected individual, does not appear to be exercised evenly across disability populations. The study indicates that petitions are more likely to seek restoration for older individuals. Of the collected cases that indicate the disability population of the protected individual, 51% of cases were to restore an older individual.

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I. Introduction to the Study

Guardianship¹ is the legal means by which the court gives one person the duty and power to make decisions for another and to have those decisions honored by third parties.² Guardians manage the financial and personal affairs of adults who have been found by the court to be unable to make decisions for themselves. The goal of guardianship is to protect and assist the individual who has been found to meet the legal standard of incapacity.³

To accomplish the goal of protection, adult guardianship removes fundamental rights and transfers them from the individual to the guardian. It is one of society's most drastic interventions. For the vast majority of individuals under guardianship, there will not be a return to liberty.⁴ Guardianship orders rarely have a definite duration, and often continue until the death of the protected individual or order of the court.⁵ However, a guardianship may be terminated if the individual regains capacity or develops other decision-making supports.⁶ The right to petition for restoration is part of the due-process⁷ protection for individuals under guardianship. Regaining capacity can occur for a variety of reasons. In some cases, the conditions that interfere with capacity are temporary or the individual has responded to a treatment plan.⁸ In other cases additional evidence or the pres-

1. This article focuses on guardianship of adults. Use of the term "guardianship" varies by state. In this article, unless otherwise indicated, the term "guardianship" is synonymous with "conservatorship" and refers to surrogate decision-making for another person through court order.

2. MARY JOY QUINN, *GUARDIANSHIPS OF ADULTS: A HANDBOOK FOR THE REHABILITATION PROFESSIONAL* 5 (2005).

3. Incapacity is both a legal and clinical term. Legal standards by which judges determine incapacity derive from state statutes, court rules, and court decisions. Standards for incapacity in the guardianship context differ by state but are based on medical, functional and cognitive elements, as well as potential harm. JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS, ABA COMM'N ON LAW & AGING & AM. PSYCHOL. ASS'N & NAT'L COLLEGE OF PROBATE JUDGES (2006) [hereinafter *JUDICIAL DETERMINATION OF CAPACITY*].

4. Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, 48 *CLEARINGHOUSE REV.* 17, 17 (2014).

5. See UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 318(a) (1997); See also Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 *STETSON L. REV.* 143, 160–192 (2007).

6. See UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT §§ 318, 431 (1997).

7. A state may not deprive any person of life, liberty, or property without due process of law. U.S. CONST. amend. V, § 1.

8. MASS. GUARDIANSHIP ASSOC., *HANDBOOK FOR MASSACHUSETTS GUARDIANS* 11 (2010).

ence of a supportive environment may demonstrate that the guardianship is no longer necessary.⁹

Once a guardianship is in place, it can be difficult to modify or terminate, even when such guardianship is no longer necessary.¹⁰ Two stories highlight the plight of individuals under unnecessary guardianship who sought to restore their rights. Consider the case of William Berchau, a 100-year-old Florida retiree for whom the court appointed a guardian in January 2011.¹¹ Mr. Berchau was appointed a guardian after trying to sell his home for below-market value. The court-appointed public guardian took control of more than \$500,000 of Mr. Berchau's assets, sold his home for \$65,000 less than the appraised valuation, and moved Mr. Berchau to a locked Alzheimer's unit despite professional opinion that he was not a secured unit candidate.¹² Mr. Berchau and his relatives tried to remove the guardian on several occasions, to no avail.¹³ Finally, in December 2013, the court fully restored Mr. Berchau after a restoration hearing, in which Mr. Berchau proved his capability to exercise rights previously removed by the court.¹⁴

Like Mr. Berchau, Diana Pollock was placed in guardianship with little understanding of her rights.¹⁵ The court appointed a guardian for Ms. Pollock soon after she suffered a traumatic brain injury from a car accident in 2004.¹⁶ Two months later, Ms. Pollock significantly improved and began to realize that she no longer had the same rights she had prior to the accident.¹⁷ Ms. Pollock had no access to her finances or legal documentation and she was placed against her will

9. *How to Modify or Terminate a Guardianship*, DISABILITY RIGHTS WA., <http://www.disabilityrightswa.org/how-to-terminate-or-modify-guardianship> (last updated July 2012).

10. See, e.g., Adam Wasler, *Elderly Pinellas man freed from Alzheimer's unit after I-Team looks at his case*, ABC ACTION NEWS (Sept. 24, 2013), <http://www.abcactionnews.com/news/local-news/i-team-investigates/elderly-pinellas-man-freed-from-alzheimers-unit-after-i-team-looks-at-his-case>.

11. Adam Walsler, *Another Ward Speaks Out After Spending Nine Years in Florida's Professional Guardianship System*, ABC ACTION NEWS (Dec. 15, 2014), available at <http://www.abcactionnews.com/news/local-news/i-team-investigates/another-ward-speaks-out-after-spending-nine-years-in-floridas-professional-guardianship-system>.

12. *Id.*

13. *Id.*

14. *In re Guardianship of Berchau*, No. 10-7844-IN3 (Fla. Cir. Ct. Dec. 4, 2014) (order granting restoration).

15. Telephone Interview with Diana Pollock (Oct. 3, 2014).

16. *Id.*

17. *Id.*

in a rehabilitation home.¹⁸ During the next year and a half, Ms. Pollock hired attorneys, passed multiple psychiatric evaluations, and dedicated countless hours of self-advocacy to terminate her guardianship and restore her rights.¹⁹ In July 2005, Ms. Pollock was fully restored.²⁰

Today, Mr. Berchau and Ms. Pollock are success stories because they were able to navigate the legal process to prove their capacity and regain their rights. Are there others who share the same experience? Are individuals under guardianship aware of their right to restoration; and if so, are they able to pursue it? What barriers stand in the way? This article examines such questions and more.

The American Bar Association (ABA) Commission on Law and Aging undertook a pioneering study on adult guardianship restoration in the United States. The purpose of the study was to gain a better understanding of the state of restoration through an initial examination of statutes and case law, as well as stakeholder experiences. The author, serving as a law graduate fellow, led the project under the supervision of Commission attorneys. This article summarizes the study methodology, findings, and policy and practical issues surrounding the practice of restoration.

II. Methodology

The research methodology is comprised of four elements: (1) statutory review; (2) case law research and analysis; (3) online questionnaires; and (4) stakeholder interviews.

A. Statutory Review

Guardianship is governed by state law.²¹ Each state has a guardianship statute that includes a section on restoration.²² The procedural process and the duties of the court and the guardian vary significantly

18. *Id.*

19. *Id.*

20. *Id.*

21. Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform*, in *FUTURE TRENDS IN STATE COURTS* 2011 107 (2011).

22. *Restoration in Adult Guardianships (Statutes)*, ABA (2013), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_CassidyRestorationofRightsChart7-13.authcheckdam.pdf.

by state and are often unclear and ambiguous.²³ In 2013, the project analyzed restoration statutory provisions in four areas: (1) general procedure; (2) evidentiary standards; (3) procedural barriers and safeguards; and (4) roles of the court and the guardian. An extensive, state-specific examination of the results is available online at the ABA Commission on Law and Aging website.²⁴

B. Case Law Search and Analysis

In 2014, project staff collected case law through the use of Westlaw and FindLaw online database searches and interviews with organizations and attorneys. The goal was to assemble the first-of-its-kind compilation of case law pertaining to petitions for restoration, as well as court proceedings and decisions. This is not an exhaustive collection of all restoration case law. Time and resource restraints, confidentiality demands, and lack of reporting and oversight restricted the search to reported case law and case law of public access. As such, the large majority of the collected case law derives from state appellate courts. In all, 104 cases were collected, dating as far back as the year 1845.²⁵ A chart analyzing the elements of each case is available online at the ABA Commission on Law and Aging's Guardianship Law and Practice Resources website.²⁶

The study is exclusively comprised of petitions for restoration of adults under guardianship and their appeals. It does not include appeals of orders for guardianship, guardianship of minors, or petitions to terminate for reasons other than the regaining of capacity. To maintain a modern concentration, we focused our analysis on the fifty-seven cases dating from 1984 to 2014.²⁷ In this article, the term "collected case law" refers to these fifty-seven modern cases.

23. *Id.*; Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 INT'L J.L. & PSYCHIATRY 350, 350 (2010).

24. Jenica Cassidy, *State Statutory Authority for Restoration of Rights in Termination of Adult Guardianship*, 34 BIFOCAL 123 (2013), available at http://www.americanbar.org/publications/bifocal/vol_34/issue_6_august2013/guardianship_restoration_of_rights.html.

25. Data and related information from the ABA study is on file with the Author [hereinafter Information is on file with the Author].

26. *Guardianship Law & Practice*, ABA COMM'N ON L. & AGING, www.ambar.org/guardianship (last visited Apr. 11, 2015).

27. The section titled, "History and Background" refers to all collected case law regardless of date.

The project identified the following elements of each case: facts, petitioner, grant or denial of the petition, legal authority relied upon by the court, evidence relied upon by the court, guardian's response, location, interesting aspects of the case, and disability type. The disability types are: older individual/dementia,²⁸ mental illness,²⁹ intellectual/developmental disability (ID/DD),³⁰ traumatic brain injury,³¹ and other. A final category, "does not say," includes cases that do not indicate the disability and cases that state only that the individual was "adjudged incompetent" or a "weak-minded person" without additional explanation. At times project staff were forced to use our own judgment, particularly in older cases with antiquated terminology and nonexistent legal standards of capacity.

C. Online Questionnaires of Judges and Attorneys

To supplement the case law search and analysis, the project staff disseminated two online questionnaires regarding the practice of restoration: a questionnaire for judges and a questionnaire for attorneys.

1. JUDICIAL QUESTIONNAIRE

In all, 152 judges presiding in courtrooms across the United States completed the restoration questionnaire for judges.³² The questionnaire was distributed through listserv postings of national judicial

28. There is no agreed-upon definition for "older individual." For purposes of this article, this category includes individuals aged seventy and older and individuals with dementia.

29. The mental illness category consists of a broad collection of conditions that includes behavioral and emotional disorders, as well as cognitive and organic disorders related to neurological and medical conditions that affect the brain. JOHN PARRY, CIVIL MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 55-56 (American Bar Association ed. 2010). Many such conditions last a relatively brief period of time, but others can persist. *Id.* at 56. For cases that state the individual was "adjudged insane," "adjudged to be a lunatic," or "admitted to an insane asylum," without further explanation, we recorded the population as "mental illness."

30. Developmental disabilities are pervasive, lifelong disabilities typically identified at birth or during childhood. Intellectual disabilities are characterized by significantly below-average intellectual functioning, with limitations in adaptive skill areas such as self-direction and social skills. PARRY, *supra* note 29, at 56.

31. Traumatic brain injury is "an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects [a person's] . . . performance." PARRY, *supra* note 29, at 60.

32. Information is on file with the Author.

affiliations.³³ Respondents are not a nationally representative sample due to the nature of the distribution. The goal was to examine the practice of restoration from the judicial point of view.

In designing the questionnaire, project staff relied on insight from Colorado and California judges with expertise in adult guardianship who tested the questions³⁴ and provided feedback. The final questionnaire included ten questions concerning topics such as: the number of petitions for restoration over which the judge has presided;³⁵ the identification of the petitioner (i.e. the protected individual, guardian, etc.);³⁶ the frequency of uncontested petitions for restoration;³⁷ the number of cases that resulted in full restoration versus partial restoration;³⁸ the role of the guardian;³⁹ and whether individuals under guardianship are aware of the right to restoration.⁴⁰

2. GEOGRAPHIC DISTRIBUTION

Judicial respondents were asked to identify the state in which their court is located. The 152 respondents were from thirty-five states and the District of Columbia.⁴¹ Ohio had the highest number of respondents with thirteen (8.5%).⁴² Other states with a high number of respondents include: New Mexico with twelve respondents (7.8%) and Washington and Texas with eight respondents each (5%).⁴³ Fourteen states had no respondents.⁴⁴

3. ATTORNEY QUESTIONNAIRE

In total, 412 practicing attorneys nationwide completed the attorney questionnaire.⁴⁵ The goal was to gain insight into the practice and procedure of petitioning for restoration. To maximize the num-

33. The listservs are: the guardianship listserv of Elders and the Courts, National Center for State Courts; the National College of Probate Judges; and Court 2 Court.

34. Information is on file with the Author.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. The states with no respondents are: Arkansas, Delaware, Hawaii, Idaho, Illinois, Kentucky, Maryland, Mississippi, Nebraska, Nevada, Oklahoma, South Dakota, Utah, and Wyoming.

45. Information is on file with the Author.

ber of respondents with relatively strong restoration knowledge and expertise, the questionnaire was distributed via national listservs that cater to elder law and disability law attorneys⁴⁶ and state bar association elder law sections.⁴⁷ Respondents are not a nationally representative sample due to the nature of the distribution.

In designing the questionnaire, project staff relied on the insight and feedback of four licensed attorneys from different states. The final questionnaire contained thirteen questions⁴⁸ including:

- How many petitions for restoration have you filed in the last ten years?⁴⁹
- How many petitions resulted in full or partial restoration of rights?⁵⁰
- Who was the petitioner for restoration?⁵¹
- How many petitions for restoration have you opposed in the last ten years?⁵²
- In your experience, are individuals under guardianship aware of the right to restoration?⁵³

4. GEOGRAPHIC DISTRIBUTION

Attorney respondents were asked to identify the state in which they primarily practice.⁵⁴ The 412 respondents are from thirty states and the District of Columbia.⁵⁵ Ohio had the highest number of respondents with forty-three (11%).⁵⁶ Other states with a high number of respondents include: Georgia with thirty-nine respondents (10%);⁵⁷ Pennsylvania with thirty-eight respondents (10%);⁵⁸ and Maryland

46. The listservs are: National Academy of Elder Law Attorneys; Elderlink, a listserv for ABA members with an interest in law and aging; ElderAbuse, a private listserv operated by the National Center on Elder Abuse; and Elderbar, a listserv operated by the ABA Commission on Law and Aging.

47. Project staff solicited the assistance of each state bar association elder law section chairperson to disseminate the questionnaire among their members.

48. Information is on file with the Author.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

with thirty-two respondents (8%).⁵⁹ Twenty states had no attorney respondents.⁶⁰

5. AREA OF PRACTICE

Respondents were asked to identify one or more areas of law in which they practice.⁶¹ Three hundred seventy-six attorney respondents listed at least one practice area.⁶² Thirty-six did not answer the question.⁶³ The respondents answered as follows:

- 289 respondents (77%) practice elder law;⁶⁴
- 230 (61%) practice trusts and estates;⁶⁵
- 69 respondents (18%) practice disability law;⁶⁶
- 70 respondents (19%) listed general practice;⁶⁷ and
- 104 respondents (28%) listed other areas of law.⁶⁸

D. Practitioner Stakeholder Interviews

The project staff conducted thirty-one in-person, telephone, and electronic interviews of guardianship stakeholders from twelve different states.⁶⁹ Interviewees included social workers, state Protection and Advocacy attorneys and staff, private practice and public interest attorneys, judges, and individuals who have been restored.⁷⁰ The interviews included a variety of questions tailored to the respondent's expertise. The goal of the interviews was to humanize the statutory and case law findings with real life accounts and personal anecdotes.

59. *Id.*

60. The states with no attorney respondents are: Alaska, Arizona, Arkansas, Hawaii, Idaho, Mississippi, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, and Wyoming.

61. Information is on file with the Author.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. The names of interviewees are on file with the Author.

III. Background And History

A. Procedural Process

Although the restoration process varies significantly by state, court, and judge, the process in all jurisdictions begins with a notification to the court of a desire to terminate the guardianship.⁷¹ Most states provide broad permission to the protected individual or any interested party to seek restoration.⁷² Once the petition is filed, the court issues notice to all interested parties, conducts a hearing, and issues a determination regarding capacity and the need for continuation of the guardianship, pursuant to state requirements.⁷³

Capacity is a legal construct that is based on a medical, functional, and cognitive diagnosis of an individual's decision-making ability.⁷⁴ An adjudication of incapacity and appointment of a guardian can occur only after a court hears evidence, often including a clinical assessment.⁷⁵ The manner in which a court determines capacity depends on the jurisdiction and the judge and can vary widely.⁷⁶ Similarly, after the guardianship is in place, an adjudication of capacity for termination and restoration of rights depends on the jurisdiction and the judge.⁷⁷

In eighteen states and the Uniform Guardianship and Protective Proceedings Act (UGPPA),⁷⁸ the statute simply requires that the same procedures apply in a restoration proceeding as the procedures used in an appointment of a guardian.⁷⁹ The evidentiary standard and the evidence considered thus depends upon the particular appointment process in the state. If the court deems restoration to be appropriate, it may restore the individual's rights, thereby terminat-

71. Cassidy, *supra* note 24, at 124.

72. *Id.*

73. *Id.*

74. See generally ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS, ABA COMM'N ON LAW & AGING & AM. PSYCHOL. ASS'N (2008), available at <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>.

75. See generally JUDICIAL DETERMINATION OF CAPACITY, *supra* note 3.

76. *Id.*

77. *Id.*

78. *Id.*

79. UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 318(c) (1997); Cassidy, *supra* note 24, at 124/

ing the guardianship and ending all rights and responsibilities of the guardian beyond those involved in the winding up process.⁸⁰

B. Historical Exploration of Restoration in Practice

Guardianship is rooted in the fourteenth century English principle of *parens patriae*, which is the power and the duty of the state to protect vulnerable citizens.⁸¹ Guardianship laws today reflect this basis in protection.⁸² When states originally codified guardianship in the 1800s, they likely made some provision for restoration in the original enactments. However, for many years, persons with certain mental conditions were presumed to be incompetent.⁸³ In the 1960's, this presumption began to change with the emergence of the self-determination movement.⁸⁴

Reform efforts beginning in the 1980's led to a substantial increase in procedural protections for the individual subject to guardianship.⁸⁵ In response to a 1987 Associated Press (AP) investigation describing guardianship as "a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity,"⁸⁶ state legislatures took steps to beneficially reform guardianship laws and change the system.⁸⁷ The UGPPA was developed in 1982 and updated in 1997,⁸⁸ and provides for the termination or modification of guardianship "if the ward no longer needs the assistance or protection of a guardian."⁸⁹ It also provides for the modification of the powers granted to the guardian if "the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action."⁹⁰ Today, a legal presumption exists that, unless an individual is found to lack capacity for a particular activity, he or she has the ability to act on his or her

80. *Id.*

81. QUINN, *supra* note 2, at 19.

82. *Id.*

83. PARRY, *supra* note 29, at 37.

84. *Id.*

85. QUINN, *supra* note 2, at 22.

86. Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System Part I: Declared Legally Dead' By a Troubled System*, ASSOCIATED PRESS, Sept. 19, 1987, available at <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f>.

87. QUINN, *supra* note 2, at 24.

88. UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT (1997).

89. *Id.* at § 318(b).

90. *Id.*

own behalf.⁹¹ Unfortunately, a disparity remains in many jurisdictions between what the law says and how it is implemented.⁹²

Case law reveals the evolution of guardianship terminology⁹³ and attitudes over the last century. Restoration case law has evolved from an overtly paternalistic and protective approach to a more person-centered focus on the protected individual's ability to make and communicate decisions. Near the turn of the last century, courts denied restoration for reasons such as inability to manage a profitable business or lack of occupational experience.⁹⁴ In 1939, an Iowa court denied restoration to an individual based on his failed attempt to operate a restaurant and the belief that a guardian could better manage his estate.⁹⁵ Around the same time, the Supreme Court of Michigan denied restoration for an individual who was "adjudicated sane" two years prior, holding that an adjudication of sanity does not equate to a finding of competency to manage one's property.⁹⁶

However, some pioneering courts at that time used different reasoning to come to different conclusions. In 1891, the Supreme Court of New York restored an individual because, "the test of a man's right to be restored . . . is not his competency to manage his particular estate, be it great or small, but his restoration to mental health and his consequent fitness for the management of the common and ordinary affairs of life."⁹⁷ Such courts recognized that not every mental capacity concern justifies the appointment of a guardian.⁹⁸

Fifty years later there existed similar variances in reasoning and judicial attitude towards the purpose and intent of guardianship and restoration. Some courts firmly held to the notion of "dignity of risk" to make one's own decisions.⁹⁹ In 1950, a New York court granted restoration despite the chance of a future recurrence of incapacity and physician testimony that continuation of guardianship was neces-

91. PARRY, *supra* note 29, at 38.

92. *Id.*

93. The changes reflect "people first" language promoting individual self-determination and rights. For example, the pejorative term "insane" has been replaced with "lacking capacity;" the terms "idiot" and "lunatic" have been replaced with "ward" and "protected individual."

94. *See, e.g.,* Perry v. Roberts, 220 N.W. 85 (Iowa 1928) (denying restoration in spite of physician's testimony that the ward is "not insane" because the ward proved unable to manage his farm).

95. Hawk v. Russell, 227 Iowa 232 (1939).

96. *In re Minock's Estate*, 218 Mich 97, 99 (1922).

97. *In re Bruch*, 16 N.Y.S. 551, 554 (N.Y. 1891).

98. Cochran v. Amsden, 104 Ind. 282 (1885).

99. *Id.*

sary to protect the individual from potential but unidentified harm.¹⁰⁰

The court reasoned that the individual “should be given the encouragement and opportunity that recognition of competency and enlarged responsibility for herself would give,”¹⁰¹ and that her mental health “might be well served by giving her the measure of self-dependence which she appears capable of assuming.”¹⁰² Yet elsewhere, courts denied restoration despite evidence of capacity, for the purpose of preventing the individual from making potentially harmful decisions.¹⁰³

C. The Current State of Restoration

Modern guardianship law emphasizes individualized decision-making. In most respects, judges are required to make decisions based on the individual’s abilities and behaviors, not on broad and vague disability characteristics and assumptions.¹⁰⁴ At least some modern day courts appear less inclined to take a paternalistic approach to guardianship and restoration of rights. In a 1999 restoration proceeding, a Florida court reiterated the caution that “[i]n our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.”¹⁰⁵

Today there are an estimated 1.5 million active pending adult guardianship cases in the United States.¹⁰⁶ Due to a grave lack of adult guardianship data, it is unknown how many petitions for restoration are filed, how many are granted, and why.¹⁰⁷ In practice, implementation of statutory procedures for restoration remains unclear, ambiguous, and appears to vary significantly by state, court, and judge.¹⁰⁸

While there has been extensive legislation and reform of procedural protections for initially pursuing a guardianship, restoration of rights once the guardianship is in place “is surprisingly under-

100. *In re Partridge*, 98 N.Y.S.2d 301, 303 (1950).

101. *Id.* at 866.

102. *Id.*

103. See *In re Guardianship of Stark*, 254 Iowa 598, 600-601 (1962) (denying restoration because, due to the ward’s generosity, termination would possibly result in dissipation by her alcoholic son).

104. PARRY, *supra* note 29, at 35.

105. *In re Maynes-Turner*, 746 So.2d 564, 567 (Fla. Dist. Ct. App. 1999) (citing *In re McDonnell*, 266 So.2d 87, 88 (Fla. Dist. Ct. App. 1972)).

106. Uekert & Duizend, *supra* note 21, at 109.

107. *Id.* at 111.

108. Cassidy, *supra* note 24, at 123.

utilized and, at least with regard to reported decisions, underlitigated.”¹⁰⁹ Advocates argue for the development of less restrictive alternatives before a guardianship is imposed and restoration strategies for people already under guardianship.¹¹⁰

IV. Findings

This section will describe and expound upon the research findings regarding the frequency of restoration petitions, variances among disability populations, the success of restoration petitions, access to the courts, access to counsel, the evidence that courts use in restoration proceedings, and the role of the guardian.

A. The Frequency and Success of Restoration Petitions

The study indicates that petitions for restoration are uncommon but do occur and have moderate success. Of the judicial respondents who completed the online questionnaire, seventy-three percent have presided over petitions for restoration with twenty-four percent presiding over more than ten petitions.¹¹¹ Success rates varied. Fifteen percent of judicial respondents reported that *all* of the petitions resulted in full restoration of rights.¹¹² Thirty-nine percent reported that *most* of the petitions resulted in full restoration of rights.¹¹³ Forty-one percent reported that *some* resulted in full restoration; and five percent reported that *none* resulted in full restoration of rights.¹¹⁴

Forty-seven percent of attorney questionnaire respondents have filed at least one petition for restoration within the last ten years.¹¹⁵ Of those, ninety-six percent reported having success with at least some of the petitions.¹¹⁶

109. Glen, *supra* note 4, at 10.

110. See, e.g., ABA COMM'N ON DISABILITY RIGHTS ET AL., BEYOND GUARDIANSHIP: SUPPORTED DECISION-MAKING BY INDIVIDUALS WITH INTELLECTUAL DISABILITIES 15 (2012) (unpublished), available at http://www.nlrc.aoa.gov/legal-issues/guardianship/docs/kris_glen_paper_final_10-12.pdf.

111. Information is on file with the Author.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

1. DISABILITY POPULATION PETITIONING VARIANCES

The right to petition for guardianship, although available to every protected individual, does not appear to be exercised evenly across disability populations. The study indicates that petitions are more likely to seek restoration for older individuals.

Of the collected cases that indicate the protected individual was of the disability population, fifty-one percent of petitions were to restore an older individual.¹¹⁷ Nineteen percent¹¹⁸ sought to restore an individual who suffered a traumatic brain injury. Sixteen percent¹¹⁹ sought to restore an individual with mental illness, and fourteen percent¹²⁰ sought to restore an individual with intellectual or developmental disabilities.¹²¹ Thus, in the cases, petitions for older persons were markedly more frequent.

The difference is less telling in the questionnaire results. Of the attorney questionnaire respondents who have petitioned for restoration, forty-seven percent reported to have petitioned to restore an older individual.¹²² Thirty-six percent have petitioned to restore an individual with mental illness.¹²³ Thirty-one percent have pursued restoration for an individual who suffered a traumatic brain injury.¹²⁴ Twenty-eight percent have pursued restoration for an individual with intellectual or developmental disabilities, and twenty-five percent of respondents have petitioned to restore an individual under guardianship due to substance abuse or addiction.¹²⁵

The seemingly disproportionate number of restorations for older individuals is counterintuitive. Considering that this was merely a probe and not a representative sample, the finding may be due to the limited nature of the methodology. Other explanations include the possibility that a disproportionately greater number of individuals under guardianship are older, or that restoration petitions for older

117. Nineteen out of thirty-seven cases. Information is on file with the Author.

118. Seven out of thirty-seven cases. Information is on file with the Author.

119. Six out of thirty-seven cases. Information is on file with the Author.

120. Five out of thirty-seven cases. Information is on file with the Author.

121. Of the fifty-seven "modern" cases, thirty-seven indicate the disability population of the individual under guardianship. Therefore, these numbers are based on a percentage of thirty-seven cases, not fifty-seven. Information is on file with the Author.

122. We asked attorney questionnaire respondents to identify the disability population of the protected individual in their restoration case(s). Respondents were asked to select all answers that apply. Information is on file with the Author.

123. Information is on file with the Author.

124. *Id.*

125. *Id.*

individuals are more likely to be contested and thus wind up in the appellate level of the judicial system. Without empirical data on guardianships, there is no explanation, only speculation.

2. SUCCESS VARIANCES

In the collected case law, the success of restoration petitions appears to vary depending on the type of disability of the protected individual. In forty percent of cases,¹²⁶ petitions successfully resulted in restoration of rights, whether at the trial level or on appeal. Restoration petitions for individuals who suffered a traumatic brain injury and for persons with an intellectual or developmental disability were successful about forty-one percent of the time.¹²⁷ Petitions for restoration of an older person, often with dementia, were successful forty-seven percent of the time.¹²⁸ For persons with mental illness, sixteen percent of petitions successfully resulted in restoration.¹²⁹

The rationale for the relatively low success rate of restoration petitions for persons with mental illness is unknown. One could speculate that it is due to the cyclical nature of many types of mental illness and the periodic reappearance of behavior and attributes that create the need for guardianship.¹³⁰ Or perhaps courts deny restoration to maintain the medical regimen and structured environment that help the individual to remain stable and "present well."¹³¹ It should be noted that the number of cases identified in this category was very small, making any conclusions tentative at best.

B. Access to the Courts

The process of filing a petition for restoration requires an awareness of the right to restoration, an understanding of the procedural process, and access to the judicial system. In the questionnaire, forty-four percent of attorneys polled believe that individuals under guardianship and/or their family members are aware of the right to restoration, whereas eighty-four percent of judges polled believe that indi-

126. Twenty-three out of fifty-seven cases. *Id.*

127. Five out of twelve petitions. *Id.*

128. Nine out of nineteen petitions. *Id.*

129. One out of six petitions. *Id.*

130. Frederick E. Miller, *Grief Therapy for Relatives of Persons with Serious Mental Illness*, FAMILIES AND MENTAL HEALTH TREATMENT 17 (Am. Psychiatric Ass'n ed. 1998).

131. *See infra* pp. 22-23.

viduals and/or their family members are at least somewhat aware of the right.¹³² One could speculate that the discrepancy is due to the limited exposure of judges to individuals under guardianship in comparison to attorneys who consult on many more issues than those that wind up in the courtroom.

State legislatures have taken efforts to expand access to the court system in two significant ways. First, twenty states statutorily permit an informal request for restoration, such as a hand-written letter.¹³³ Second, almost all states broadly permit any interested party to petition for restoration on behalf of the protected individual.¹³⁴ Despite these statutory provisions, the question remains as to whether individuals under guardianship have adequate access to the judicial process necessary to pursue restoration. The collected case law provides some insight. In seventy-eight percent¹³⁵ of cases, the petition was filed by or in the name of the protected individual.¹³⁶ In thirteen percent¹³⁷ of cases, a friend or family member of the protected individual filed the petition, and in nine percent¹³⁸ of cases the guardian filed the petition.¹³⁹ The disproportionately high number of cases filed by or in the name of the protected individual suggests that protected individuals have at least some reasonable access to the judicial process. But this does not account for the unknown number of protected individuals who have regained capacity but have not pursued restoration.

132. Information is on file with the Author.

133. These twenty jurisdictions are: Alabama, Alaska, Arizona, District of Columbia, Idaho, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, South Carolina, Tennessee, Texas, and Utah. ALA. CODE § 26-2A-110 (2015); ALASKA STAT. ANN. §§ 13.26.120, 13.26.125 (2015); ARIZ. REV. STAT. ANN. § 14-5306- 14-5307 (2015); § D.C. CODE § 21-2049 (2015); IDAHO CODE ANN. § 15-5-307; 755 ILL. COMP. STAT. § 5/11a-20 (2014); IND. CODE ANN. § 29-3-12-1 (2015); KY. REV. STAT. ANN. § 387.620 (2015); ME. REV. STAT. tit. 18-A, § 5-307(d) (2014); MASS. GEN. LAWS ANN. ch. 190B, § 5-311 (2014); MICH. COMP. LAWS ANN. § 700.5309 (2014); MONT. CODE ANN. § 72-5-325 (2014); NEB. REV. STAT. § 30-2622-§30-2623 (2014); N.H. REV. STAT. ANN. § 464-A:40 (2015); N.M. STAT. ANN. § 45-5-307 (2015); N.D. CENT. CODE ANN. § 30.1-28-07. (5-307); S.C. CODE ANN. § 62-5-306 (2015); TENN. CODE ANN. § 34-3-108 (2015); TEX. PROB. CODE ANN. § 694 (2015); UTAH CODE ANN. § 75-5-306- 75-5-307 (2015); UNIF. GUARDIANSHIP AND PROT. PROCEEDINGS ACT § 318 cmt. (1997); Cassidy, *supra* note 24, at 124.

134. Cassidy, *supra* note 24, at 124.

135. Forty-three out of fifty-five cases. Information is on file with the Author.

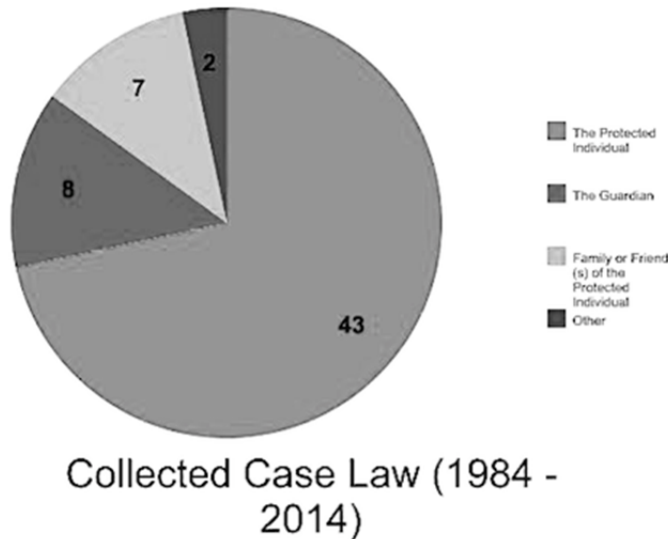
136. Except for a few cases that mention hired counsel, the cases do not indicate whether the protected individual received assistance in filing the petition.

137. Seven out of fifty-five cases. *Id.*

138. Five out of fifty-five cases. *Id.*

139. Fifty-five of the fifty-seven “modern” cases identify the petitioner. Therefore, these numbers are based on a percentage of fifty-five cases. *Id.*

FIGURE 1
Who Petitioned for Restoration



C. The Protected Individual's Access to Counsel

Even in states that permit an informal request for restoration, it is critical for the protected individual to secure counsel should the petition proceed beyond the initial communication to the court.¹⁴⁰ Twelve jurisdictions including the District of Columbia, statutorily require the court to appoint counsel for an unrepresented protected individual in a restoration proceeding.¹⁴¹ Other states may provide the protected individual with the right to counsel or permit the court to appoint counsel in its discretion, but there is no statutory protection ensuring that every individual who petitions for restoration has ade-

140. See Patricia M. Cavey, *Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths*, 2 MARQ. ELDER'S ADVISOR 26, 28 (2000).

141. These twelve jurisdictions are: Alabama, Alaska, Arizona, District of Columbia, Idaho, Louisiana, Minnesota, New Mexico, North Dakota, Florida, Missouri, and Texas. ALA. CODE §26-2A-135(b) (2014); ALASKA STAT. §13.26.106(b) (2014); D.C. CODE §21-2041(h) (2015); IDAHO CODE ANN. §15-5-303(b) (2015); LA. CODE. CIV. PROC. ANN. art. 4544 (2014); MINN. STAT. §524.5-304(b) (2015); N.M. STAT. ANN. §45-5-309(c) (2014); N.D. CENT. CODE §30.1-28-03 (2013); FLA. STAT. ANN. § 744.331(2)(a), 744.3215(1) (2015); MO. REV. STAT. §524.5-304(b), 406(b) (2014); TEX. ESTATE CODE ANN. § 1054.001 (2013).

quate representation.¹⁴² This leads to the question of whether an individual under guardianship has the ability to independently hire counsel to petition for restoration, beyond the obvious financial burden of doing so.

At least one case asserts that in a jurisdiction that statutorily provides the protected individual a right to counsel, the guardian must contract for or the court must appoint counsel because the protected individual's right to contract was removed by the order determining his or her incapacity.¹⁴³ In other cases, judicial opinion varies. Some courts conclude that the individual's right to contract, whether with an attorney or otherwise, was removed by the order issuing guardianship.¹⁴⁴ Other courts hold that denying an individual the right to hire counsel in a petition for restoration effectively denies the individual the opportunity to prove capacity.¹⁴⁵ Such courts believe that an adjudication of incapacity in the guardianship proceeding does not automatically result in the conclusion that the individual presently lacks the capacity necessary to hire counsel for restoration.¹⁴⁶

In 2006, the Appeals Court of Massachusetts held that an individual under 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.¹⁴⁷ Similarly, in a footnote in an earlier case, a court stated that "inasmuch as the statute allows a ward to seek removal of his or her guardian, there should at least be a presumption that the ward has the capability to retain counsel for that purpose."¹⁴⁸ These courts recognize that securing counsel is critical for restoration, and perhaps also that a person's ability to seek counsel may indicate a certain amount of capacity.

142. U.S. SENATE SPECIAL COMM. ON AGING, 110TH CONG., GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY 19 (2007), available at http://www.guardianship.org/reports/Guardianship_Report.pdf [hereinafter GUARDIANSHIP FOR THE ELDERLY].

143. *In re* Guardianship of Bockmuller, 602 So.2d 608, 609 (Fla. Dist. Ct. App. 1992).

144. *Id.*

145. *In re* Guardianship of Zaltman, 65 Mass. App. Ct. 678,685 (2006).

146. *Id.* at 687.

147. *Id.* at 692.

148. *In re* Guardianship of Hocker, 439 Mass. 709, 716 (2003) (citing J.H. Cross, et al., Elder, Guardian and Conservatorship in Massachusetts § 3.18A (Supp. 2002)).

Regardless of the ability to hire counsel, the expense of pursuing restoration can be prohibitive. Individuals under guardianship often lack access to and control over their own finances. When the guardian has financial control, the protected individual may have little or no means to pay for attorney fees, psychological evaluations, and court costs.¹⁴⁹ Legal services organizations and state Protection and Advocacy Systems provide legal assistance in some instances but the extent of these services is not known.¹⁵⁰

The ability of the protected individual to secure counsel may also be impacted by attorney unwillingness to represent the individual. For clients with mental capacity concerns, the traditional client-lawyer model—the client dictates the ends and the lawyer controls the means—may not work.¹⁵¹ Attorneys may deny representation due to a number of reasons, including ethical concerns regarding the client's capacity,¹⁵² an inability to effectively communicate with the client,¹⁵³ and the uncertainty of collecting a fee. Attorneys often lack a practical mechanism for recovering such fees and costs.¹⁵⁴

In addition, attorneys may turn down representation out of the belief that restoration is unlikely and thus not worth the extensive time, effort and expense of pursuing. One attorney questionnaire respondent stated:

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 [attorneys] sense that the chance of a ward's full freedom being restored is slim to none.¹⁵⁵

D. The Evidence Courts Use To Determine Restoration

In restoration proceedings, the primary question before the court is whether the protected individual has regained capacity sufficient to manage his or her affairs.¹⁵⁶ Some states statutorily mandate the evidence that the court must consider, often requiring a physician's examination of capacity.¹⁵⁷ But most often, courts have wide discretion

149. GUARDIANSHIP FOR THE ELDERLY, *supra* note 142, at 10.

150. PARRY, *supra* note 29, at 69.

151. *Id.* at 86.

152. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

153. PARRY, *supra* note 29, at 86.

154. *Id.* at 70.

155. Information is on file with the Author.

156. See 755 ILL. COMP. STAT. 5/11a-20 (2014).

157. See, e.g., FLA. STAT. § 744.464(b) (2014).

to determine the evidence upon which to grant or deny the petition.¹⁵⁸ Most statutes offer little guidance, stating something akin to: “upon adjudication by the court that the protected person is no longer incapacitated, the court shall terminate the guardianship.”¹⁵⁹ Thus, courts are left with broad discretion on the appropriate methods and sufficient evidence to determine capacity and restoration.

The collected case law indicates that courts generally rely on two primary kinds of evidence: a medical examination of capacity and in-court observation of the protected individual.¹⁶⁰ Lay witnesses can affect the judge’s decision but the court may view such testimony as secondary.¹⁶¹ Some courts have even refused to allow lay witness testimony where the party did not also provide an expert evaluation showing that the individual had regained capacity.¹⁶²

Courts commonly require that the medical expert base his or her testimony on a recent examination of the individual.¹⁶³ The intent is to ensure that the testimony is based on the protected individual’s present condition because capacity can change over time.¹⁶⁴ The length of time varies and is not always clearly defined. At least one court discredited the testimony of a physician who examined the individual eight months prior to the restoration proceeding.¹⁶⁵

In the case law, the examining physician’s expertise varies, as does the expected amount of interaction with and knowledge of the protected individual. Some courts rely on a court-appointed physician¹⁶⁶ and others prefer testimony from the protected individual’s primary physician.¹⁶⁷ One approach is to rely on testimony from the individual’s primary physician but appoint a specialized physician in

158. See 755 ILL. COMP. STAT. 5/11a-20 (2014).

159. IND. CODE ANN. § 29-3-12-1 (West 2014).

160. See, e.g., *In re Penson*, 735 N.Y.S. 2d 51 (N.Y. App. Div. 2001); *In re Guardianship of Smead*, No. CA 96-07-067, 1997 WL 50144 (Ohio Ct. App. Feb 10, 1997).

161. See *In re Guardianship of DiCillo*, No. 2006-G-2718, 2007 WL 1113964 (Ohio Ct. App. Apr. 13, 2007).

162. *In re Guardianship of Poulos*, No. 96366, 2011 WL 6317373 (Ohio Ct. App. Dec. 15, 2011).

163. *In re Guardianship of Smead*, No. CA 96-07-067, 1997 WL 50144, at *1 (Ohio Ct. App. Feb 10, 1997).

164. *Id.* (discounting medical testimony from a doctor who treated the protected individual one year prior to the hearing for restoration and stated that he did not know her present condition).

165. *In re Guardianship of Michael*, No. 07AP-264, 2007 WL 3293364, at *2-3 (Ohio Ct. App. Nov. 8, 2007).

166. E.g., *Connell v. Guardianship of Connell*, 10 Fla. L. Weekly 2401 (1985).

167. E.g., *Old Phoenix Nat’l Bank of Medina v. Oenslager*, No. 1586, 1987 WL 18683 (Ohio Ct. App. Oct. 14, 1987).

very questionable cases.¹⁶⁸ Some courts require the physician to have psychiatric expertise¹⁶⁹ while others do not.¹⁷⁰ The collected case law does not indicate a pattern or preference. However, courts have given greater weight to testimony of a physician who initially found the individual to lack capacity at the guardianship hearing and later found the individual to have regained capacity at the restoration hearing.¹⁷¹

While reliance on a medical examination of capacity is common, the trial court must be the ultimate arbiter in granting or denying restoration. At least one case was reversed on appeal because the trial court relied entirely on a physician who recommended only partial restoration despite finding that the individual regained full capacity because he feared that the individual might make future harmful decisions.¹⁷² In reversing and ordering a full restoration, the appellate court warned against such paternalistic notions and advised the trial court to consider the expert testimony within the confines of the law, which calls for full restoration where one is found to have regained capacity.¹⁷³

The other common evidence in a restoration proceeding upon which courts rely heavily is the in-court testimony of the protected individual. Some judges will not make a determination as to restoration without observing the individual in court.¹⁷⁴ The collected case law does not indicate whether the court is more or less likely to grant the petition where the protected individual testifies at trial.¹⁷⁵ Out of the sixteen cases that say that the protected individual testified, seven resulted in restoration and nine did not.¹⁷⁶

168. Telephone Interview with Guardianship Coordinator (Nov. 14, 2014) (notes on file with the author).

169. *E.g.*, *In re Guardianship and Conservatorship of G.L.*, 793 N.W.2d 192, 193 (N.D. 2011). A publication by the American Bar Association and the American Psychological Association states that "Perhaps the most critical question [in identifying a clinician] is to ascertain how much experience the professional has in the assessment of capacity of older adults, or of clients with the type of presenting problem at hand." ABA COMM'N ON LAW & AGING & AM. PSYCHOL. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005) [hereinafter A HANDBOOK FOR LAWYERS].

170. *E.g.*, *Connell*, 476 So.2d at 1382.

171. *In re Guardianship of Zaltman*, 65 Mass.App.Ct. 678, 688, (Mass. App. Ct. 2006).

172. *In re Maynes-Turner*, 24 Fla L. Weekly D2795 (Fla. Dist. Ct. App. 1999).

173. *Id.*

174. *E.g.*, Telephone Interview with attorney respondent (Nov. 19, 2014) (notes on file with the author).

175. Cassidy, *supra* note 24, at 123-28.

176. Information is on file with the Author.

The cases indicate that restoration is more likely if the protected individual communicates to the court an understanding of personal circumstances and limitations and offers a plan for managing his or her affairs without guardianship.¹⁷⁷ For example, one court granted restoration, stating:

[the protected individual's] testimony demonstrated a realistic understanding of her own limitations. She knew she would be needing some help, and she was aware of the resources that were available to her. She testified that her financial assets were sufficient to enable her to hire sitters to stay with her around the clock.¹⁷⁸

However, if the individual's testimony is less than satisfactory, it can backfire as it did in an Ohio case where the court denied restoration in spite of a favorable medical report, stating: "The most telling evidence is [the protected individual's] own testimony wherein she calls her guardian a crook and states that the trial court should go down on his knees at church and ask for forgiveness for what he has done to her."¹⁷⁹ Another Ohio court denied restoration based on "the fact that [the protected individual] could not identify her family members or express any ability to manage funds or have any understanding as to the value of her funds and who paid her bills for years."¹⁸⁰

E. The Role of the Guardian

1. THE GUARDIAN'S AUTHORITY TO CONTEST THE PETITION

Guardians have a fiduciary duty to protect and act in the best interests of the protected individuals, but also under many state statutes guardians must take into consideration the individual's values and

177. Compare *In re Penson*, 735 N.Y.S.2d 51, 52 (N.Y. App. Div. 2001) (affirming decision terminating guardianship based on the individual's testimony showing that he understood his environment and limitations and was capable of managing his finances), with *In re Guardianship of Bostrom*, No. A13-0826, 2014 WL 801776, *3 (Minn. Ct. App. March 3, 2014) (denying restoration because of the individual's in-court demeanor and testimony that she wouldn't take necessary medications if the guardianship was terminated).

178. *In re Maxwell*, No. M2002-01654-COA-R3-CV, 2003 WL 22209378 (Tenn. Ct. App. Sept. 25, 2003).

179. *In re Anderson*, No. 93 AP 050035, 1993 WL 544419 (Ohio Ct. App. Dec. 23, 1993).

180. *In re Guardianship of Michael*, No. 07AP-264, 2007 WL 3293364, at *3 (Ohio Ct. App. Nov. 8, 2007).

preferences.¹⁸¹ According to the UGPPA, the guardian should always be cognizant of the protected individual's progress and should notify the court if the individual's condition has improved so that he or she is capable of exercising rights previously removed.¹⁸² The National Guardianship Association *Standards of Practice* require the guardian to seek termination or limitation of the guardianship "when the person has developed or regained capacity in areas in which he or she was found incapacitated by the court,"¹⁸³ or "when the person expresses the desire to challenge the necessity of all or part of the guardianship."¹⁸⁴

However, according to a key Colorado case, guardians are not explicitly obligated to assist the protected individual in seeking restoration.¹⁸⁵ Further, this case found that common law impliedly permits a guardian to oppose a petition for restoration so long as the guardian acts reasonably and in good faith.¹⁸⁶ The Court recognized that opposing a restoration petition does not necessarily create a conflict of interest.¹⁸⁷ It stated that the guardian's general duty of loyalty to the protected individual may require the guardian to oppose such a petition where there is no evidence that the individual has regained capacity.¹⁸⁸ An earlier case found that prohibiting a guardian from opposing a restoration petition in every instance could "allow the petition for restoration to be considered without the presentation of all of the facts."¹⁸⁹

To end a guardianship without support from the guardian, an individual must initiate a contested court proceeding—a very heavy burden for a person virtually without rights or access to funds.¹⁹⁰ Thus, in 2011, the Colorado legislature strongly reacted to the Court of Appeals ruling that a conservator can reasonably and in good faith oppose the protected individual's petition to terminate the conserva-

181. UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 314(a) (1997); FLA. STAT. § 744.3215(c) (2008).

182. UNIF. GUARDIANSHIP & PROT. PROCEEDINGS ACT § 314(b)(5) (1997).

183. NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE 21 §III(A) (Nat'l Guardianship Assoc. 2013).

184. *Id.* at §III(C).

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

186. *Id.* at 542-43.

187. *Id.* at 543.

188. *See id.*

189. *In re Guardianship of Cookingham*, 45 Cal.2d 367, 372 (Cal. 1955).

190. *See, e.g., In re Guardianship of Claus*, 172 N.W.2d 643 (Wis. 1962); *In re Warner's Guardianship*, 287 N.W. 803 (Wis. 1939).

torship.¹⁹¹ The legislature revised the statute to specifically preclude a fiduciary from taking an active role in opposing or interfering with a proceeding for restoration initiated by the protected individual.¹⁹² However, according to the new law, the guardian may file a motion for instructions regarding the extent of his or her involvement in the termination proceedings.¹⁹³

The study found that guardian opposition to restoration petitions does occur. Twenty-nine attorney questionnaire respondents reported that they have been contacted by a guardian to contest or oppose a restoration petition.¹⁹⁴ Six judicial questionnaire respondents reported that in the majority of their restoration cases, the guardian opposed the restoration.¹⁹⁵ Within the collected case law, guardians opposed the restoration petition in at least thirty cases.¹⁹⁶

The guardian's opposition to restoration may impact the outcome of the petition. Only thirty-three percent¹⁹⁷ of petitions were successful when the guardian opposed, whereas fifty percent¹⁹⁸ of petitions were successful when the guardian supported the restoration.

191. Estate of Keenan v. Colorado State Bank & Trust, 252 P.3d 539 (Colo. App. 2011).

192. COLO. REV. STAT. ANN. § 15-14-318(3.5)(c) (2015).

193. *Id.*

194. Information is on file with the Author.

195. *Id.*

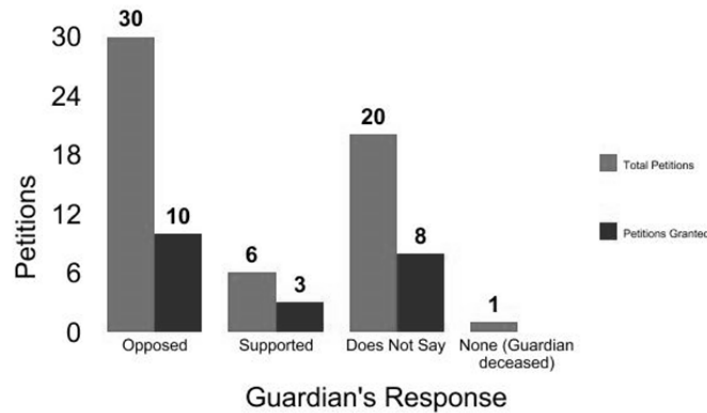
196. Thirty out of fifty-seven petitions. In twenty cases, it was not clear whether the guardian opposed or supported the petition. In these cases, the guardian may have opposed the petition but we do not know. *Id.*

197. Ten out of thirty petitions. *Id.*

198. Three out of six petitions. *Id.*

FIGURE 2

Impact of Guardian's Response on Success of Petition for Restoration



Collected Case Law (1984 - 2014)

2. THE GUARDIAN'S STANDING TO APPEAL

One question that arises is whether a former guardian has standing to appeal an order of restoration. At least one case has answered no, reasoning that the guardian lacks a legally sufficient interest in the protected individual's restoration.¹⁹⁹ The guardian has no remaining interest because the obligation to protect the individual ceases once the court declares the individual to have regained capacity.²⁰⁰ However, there is a public policy argument that guardians should maintain standing to appeal because "trial courts can be wrong,"²⁰¹ and "the only way to protect the estate and to remedy the situation would be to afford the discharged guardian a right to appeal"²⁰² as otherwise there would be no appeal "since no one else is in a position to bring it."²⁰³

199. *In re Estate of Wellman*, 174 Ill. 2d. 335, 347-348 (1996) (citing *In re Guardianship of Love*, 19 Ohio St.2d 111 (1969); *Cobb v. South Carolina National Bank*, 210 S.C. 533 (1947)).

200. *Brown v. Haffey*, 96 Ohio App. 3d 724, 728-729 (1994).

201. *Wellman*, 673 N.E.2d at 281 (Heiple, J., dissenting).

202. *Id.*

203. *Id.*

3. THE PROTECTED INDIVIDUAL'S OBLIGATION TO PAY GUARDIAN'S ATTORNEY FEES

The collected case law indicates that the protected individual is obligated to pay attorney fees for a guardian who contests the restoration petition.²⁰⁴ One case found that guardians are entitled to reasonable compensation and reimbursement from the estate or assets of the protected individual for expenses incurred in the restoration.²⁰⁵ In the case, the judge noted that the protected individual is protected by the court's discretionary power to determine that expenses are reasonable, necessary, beneficial, and incurred in good faith.²⁰⁶

In 1994, the Court of Appeals of Ohio affirmed the trial court's decision to order payment from the protected person's estate for attorney fees incurred by a guardian contesting a restoration petition.²⁰⁷ The court reasoned that the expenses were reasonable, necessary, and incurred in good faith, but noted that a more appropriate response by the guardian would have been to order a psychiatric examination upon receipt of notice of the petition²⁰⁸ rather than immediately contest it.²⁰⁹ In another case, a Delaware court ordered attorney fees incurred by the guardian in contesting a restoration petition to be paid from the funds of the protected individual even though a family member, not the protected individual, was the petitioner for restoration.²¹⁰ The court denied the guardian's request that attorney fees be shifted to the petitioner, based on the reasoning that the family member's petition was not filed in bad faith.²¹¹ These holdings affirm the harsh financial burdens an individual faces in pursuing restoration.

204. *Estate of Keenan v. Colorado State Bank & Trust*, 252 P.3d 539, 544, 548 (Colo. Ct. App. 2011).

205. *Id.*

206. *Brown*, 94 Ohio App. 3d at 729–730.

207. *Id.*

208. *Id.*

209. The guardian in this case was an attorney and therefore needed to withdraw as counsel when he became a witness in pending litigation concerning his client. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-102(A) (1980). Therefore an attorney/guardian seeking to contest a motion to terminate has no choice but to retain counsel to do so. *Brown*, 96 Ohio App. 3d at 728.

210. *In re Watson*, No. C.M. 2680-S, 2000 WL 713772, at *2 (Del. Ch. April 26, 2000).

211. *Id.*

V. Policy And Practice Issues

This section will illustrate the following policy and practice issues concerning restoration: monitoring of the guardianship, the burden of proof and the rebuttable presumption in a restoration proceeding, the difficulty of determining whether capacity has been regained, barriers to restoration, and restoration in the context of supported decision-making.

A. Monitoring Following the Guardianship Proceeding

Following the appointment of a guardian, courts have an ongoing responsibility to ensure that the terms of the guardianship order remain consistent with the protected individual's needs and condition.²¹² The National Probate Court Standards recommend that courts "monitor the well-being of the respondent and the status of the estate on an on-going basis" to determine "whether a less intrusive alternative may suffice."²¹³ Judicial review to determine whether an individual remains incapacitated could sever unnecessary guardianships because the conditions and circumstances of capacity can change over time.

An important element of judicial review is the submission of periodic reports to the court by the guardian, as mandated by state statutes.²¹⁴ Periodic reports are the court's primary means to stay informed of the protected individual's status.²¹⁵ They help to ensure that the guardianship remains in effect for only as long as it is necessary and in the best interest of the protected individual. However, in practice, court monitoring and guardian status report filing practices have faced scrutiny.²¹⁶ Not all courts consistently enforce their jurisdiction's mandates and not all status reports require evidence of continued incapacity and the ongoing need for guardianship.²¹⁷ In addition, few, if any states, require the guardian to report on their efforts to help restore the protected individual's capacity.²¹⁸ If such a requirement did

212. NAT'L PROBATE COURT STANDARDS § 3.3.17 (Nat'l Ctr. for State Cts. 2013).

213. *Id.*

214. *Monitoring Following Guardianship Proceedings*, ABA COMM'N ON LAW & AGING (2015), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_CHARTMonitoring.authcheckdam.pdf

215. Karp & Wood, *supra* note 5, at 160.

216. *See id.* at 162-63.

217. *Id.* at 161.

218. *Monitoring Following Guardianship Proceedings*, *supra* note 214.

exist, it would give the guardian and the court an opportunity to consider the individual's current capacity and the appropriateness of the guardianship.

Finally, guardian reports are of little importance without consistent court oversight to ensure accurate and complete review of the need to continue guardianship. A 2005 survey found that a significant portion of guardian reports are not independently verified, thus forcing the court to rely on the good faith of the guardian.²¹⁹ In a growing number of courts, staff or trained volunteers perform check-ins and report issues to the court.²²⁰ However, visitors may not report on capacity changes, and judges may not necessarily act on the visitor reports.

The court is unlikely to conduct a capacity redetermination unless the issue is called to its attention.²²¹ Therefore, in jurisdictions where court oversight of guardianships is less than adequate, if no one petitions for restoration, the court may not otherwise become aware of capacity improvements.

B. Determining the Burden of Proof and Overcoming the Rebuttable Presumption

State statutes vary as to who carries the burden of proof in restoration proceedings, what evidentiary standard applies, and whether those decisions are made by the legislature or the courts. Thirty-three jurisdictions do not provide an evidentiary standard in the statute,²²²

219. Karp & Wood, *supra* note 5.

220. *Id.*

221. *E.g.*, Telephone interview with Guardianship Coordinator (Nov. 14, 2014) (notes on file with the Author).

222. The thirty-three jurisdictions that do not state an evidentiary standard are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. ALA. CODE § 26-2A-110 (2014); ALASKA STAT. ANN. § 13.26.120 (2014), § 13.26.125 (2014); ARIZ. REV. STAT. ANN. § 14-5306-07 (2014); ARK. CODE ANN. § 28-65-401-02 (2014); CAL. PROB. CODE § 1863(b) (2014); COLO. REV. STAT. ANN. §15-14-318 (2014); DEL. CODE ANN. tit. 12 § 3908 (2014); D.C. CODE § 21-2049 (2015); FLA. STAT. ANN. § 744.464(3) (2014), § 744.521 (2014); IDAHO CODE ANN. § 15-5-307 (2014); IND. CODE ANN. § 29-3-12-1 (2014); KY. REV. STAT. ANN. § 387.620 (2014); MD. CODE ANN., EST. & TRUSTS § 13-220 (2014); MASS. GEN. LAWS ANN. ch. 190B, § 5-311 (2014); MICH. COMP. LAWS ANN. § 700.5309 (2014); MONT. CODE ANN. § 72-5-325 (2014); NEB. REV. STAT. § 30-2622-23 (2014); N.H. REV. STAT. ANN. § 464-A:40 (2002); N.J. STAT. ANN. § 3B:12-28 (2013); N.M. STAT. ANN. § 45-5-307 (2013); N.Y. MENTAL HYG. LAW § 81.36

leaving courts to determine the adequacy of evidence and the appropriate bars to restoration. Seven states statutorily require the petitioner to prove by a preponderance of the evidence that the individual has sufficient capacity.²²³ Eight states use the higher standard of clear and convincing evidence,²²⁴ and two states require the relatively low standard of *prima facie* evidence,²²⁵ making restoration easier for the petitioner.

There is a divergence of views as to whether, in a petition to terminate or modify the guardianship, the burden of proof should be on the party seeking to reverse the court's prior order or on the guardian to reaffirm the necessity of the guardianship.²²⁶ Four states statutorily place the burden upon the petitioner to show that the necessity for the guardianship no longer exists.²²⁷ One rationale is to protect opposing parties from the time and expense of defending repeated and frivolous petitions for termination by individuals who have no burden beyond an allegation in the petition,²²⁸ and to conserve court time and resources. Four states statutorily place the burden on the person objecting to the termination to establish that the guardian's authority should not be terminated.²²⁹ Iowa is unique in statutorily mandating that once the petitioner satisfies the burden, it shifts to the party op-

(2014); N.D. CENT. CODE ANN. § 30.1-28-07. (5-307) (2014); OKLA. STAT. ANN. tit. 30, § 3-116 (2014); R.I. GEN. LAWS ANN. § 33-15-18 (2014); S.C. CODE ANN. § 62-5-306 (2014); S.D. CODIFIED LAWS § 29A-5-508-09 (2014); TENN. CODE ANN. § 34-3-108 (2014); UTAH CODE ANN. § 75-5-306-07 (2014); VT. STAT. ANN. tit. 14, § 3077 (2014); WASH. REV. CODE ANN. § 11.88.120 (2014); W. VA. CODE ANN. § 44A-4-7 (2014); WIS. STAT. ANN. § 54.64 (2013); WYO. STAT. ANN. § 3-3-1101 (2014).

223. These six states are: Connecticut, Georgia, Louisiana, Missouri, North Carolina, and Virginia. CONN. GEN. STAT. ANN. § 45a-660 (2014); GA. CODE ANN. § 29-4-42 (2010); LA. CODE CIV. PROC. ANN. art. 4554 (2014); MO. ANN. STAT. § 475.083 (2014); N.C. GEN. STAT. ANN. § 35A-1130 (2014); VA. CODE ANN. § 64.2-2012 (2012).

224. These eight states are: Hawaii, Illinois, Iowa, Kansas, Nevada, Ohio, Oregon, and Pennsylvania. HAW. REV. STAT. §§ 560:5-112 (2013), 560:5-318 (2013); 755 ILL. COMP. STAT. § 5/11a-20 (2013); IOWA CODE ANN. § 633.675 (2013); KAN. STAT. ANN. § 59-3090-59-3091 (2013); NEV. REV. STAT. ANN. §§ 159.1905, 159.191 (2013); OHIO REV. CODE ANN. § 2111.47 (2014); OR. REV. STAT. ANN. § 125.090 (2014); 20 PA. CONS. STAT. ANN. § 5517 (2014).

225. Minn. Stat. Ann. § 524.5-317 (2009); Me. Rev. Stat. tit. 18-A, § 5-307(d) (2009).

226. Nat'l Probate Court Standards § 3.3.13, cmt. (Nat'l Ctr. for State Cts. 2013).

227. The four states are: Georgia, Missouri, Nevada, and Texas. GA. CODE ANN. § 29-4-42 (2015); MO. ANN. STAT. § 475.083 (2015); NEV. REV. STAT. ANN. §§ 159.1905, 159.191 (2013); TEX. PROB. CODE ANN. § 694 (2013).

228. See *In re Guardianship of Lander*, 697 A.2d 1298, 1300 (Me. 1997).

229. The four states are: New York, Ohio, Oregon, Pennsylvania, N.Y. Mental Hyg. Law § 81.36 (2014). OHIO REV. CODE ANN. § 2111.49(C) (2014); OR. REV. STAT. ANN. § 125.090 (2014); 20 PA. CONS. STAT. ANN. § 5517 (2014).

posing the petition to prove by clear and convincing evidence that the guardianship should continue.²³⁰

In states where the legislature has not allocated the burden of proof, the determination is left to the courts. Not surprisingly, the collected case law indicates inconsistencies. Some courts place the burden on the moving party based on the general rule that “plaintiffs bear the risk of failing to prove their claim”²³¹ or based on the prior adjudication of incapacity.²³² Ohio and New Mexico case law expressly recognize a rebuttable presumption of continued incapacity.²³³ Attorney questionnaire respondents from Michigan, Indiana, and Tennessee indicated a perceived presumption against restoration within their jurisdiction.²³⁴

In contrast, some cases argue that the petitioner should not carry the burden of proof but rather should be encouraged to seek restoration due to the substantial restriction of liberty of individuals under guardianship.²³⁵ In one instance, the appellate court noted that it was almost unfair to place the burden on the petitioner to demonstrate the need to terminate the guardianship because the guardianship was ordered during the protected individual’s “lowest state of cognitive functioning following an injury that left him without nourishment and delirious.”²³⁶ The court determined that the individual, who fell and suffered a brain injury, should have had a temporary guardian appointed rather than a permanent plenary guardianship.²³⁷ A 2013 Maryland case mimicked Iowa’s statute in placing the burden first on the petitioner and then shifting to the guardian, and reasoned that although the Maryland statute does not specify who bears the burden of proof, the burden shifting requirement is appropriate given the substantial interference with the protected individual’s liberty interest.²³⁸

230. IOWA CODE § 633.675(3) (1997).

231. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (holding that when the “plain text” of a statute “is silent on the allocation of the burden of persuasion,” the ordinary default rule that plaintiffs bear the risk of failing to prove their claims” applies).

232. *In re Sanders*, 108 N.M. 434, 437 (N.M. Ct. App. 1989).

233. *In re Guardianship of Breece*, 173 Ohio St. 542, 553, (Ohio 1962); *In re In the Matter of Sanders*, 773 P.2d 1241, 1244 (N.M. Ct. App. 1989).

234. Information is on file with the Author.

235. *E.g.*, *Guardianship of Lander*, 697 A.2d 1298, 1300 (Me. 1997).

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

237. *Id.*

238. *In re Rosenberg*, 211 Md.App. 305, 320 (2010).

The trial court has discretion to determine whether the evidence presented is sufficient to meet the evidentiary standard required to satisfy the burden of proof. Local precedents and practices vary.

C. Court Determination of the Individual's Improvement and Support

When the court is presented with evidence of improved capacity at a restoration proceeding, it must determine if the improvement is due to the regaining of capacity or due to the support of the guardianship. Courts warn against making an unfounded leap from observing an individual's improved condition while under a guardian's care to asserting that the individual is capable of maintaining that improved condition without the guardian's support.²³⁹ Courts have denied restoration where the protected individual has improved based on evidence that terminating the guardianship would cause the individual's condition to decline.²⁴⁰

The issue is most evident in cases where the protected individual has schizophrenia and has improved due to regimented medical treatment. Courts must take on the difficult task of interpreting a history of mental illness when the individual "presents well" and is currently stable on medications.²⁴¹ Courts have denied restoration to individuals who express the intent to cease taking prescribed anti-psychotic medication if the guardianship terminates, based on the rationale that it would likely cause decompensation and a threat to themselves and to others.²⁴²

It is important to distinguish these cases from other cases denying restoration because of the perceived superior ability of the guardian to better manage the affairs of the protected individual, and cases that seek to avoid potential risk of abuse or exploitation of the individual upon restoration. Appellate courts have overturned decisions denying restoration because the individual would be at risk of exploitation without guardianship.²⁴³ Mere evidence that a person has made

239. *In re Guardianship of Renz*, 507 N.W.2d 76, 77 (N.D. 1993).

240. *In re Guardianship of Bostrom*, No. A13-0826, 2014 WL 801776 (Minn. Ct. App. 2014); *In re Guardianship of E.L.*, 911 A.2d 35, 42 (N.H. 2006); *In re Guardianship of Stiver*, No. CA89-12-017, 1990 WL 94245 (Ohio Ct. App. 1990).

241. Attorney Questionnaire Respondent (notes on file with the Author).

242. *In re Sanders*, 108 N.M. 434, 437 (N.M. Ct. App. 1989); *E.L.*, 911 A.2d. at 40.

243. *In re Guardianship of Estate of Strickland*, 50 Ark. App. 7, 10 (Ark. Ct. App. 1995); *Brown v. MacDonald and Associates*, 260 Or.App. 275, 283 (Or. Ct. App. 2013).

poor financial decisions or is at risk of exploitation does not support a determination that an individual lacks capacity unless there is also evidence that the risk of exploitation or bad financial management was caused by the individual's lack of capacity.²⁴⁴

There is evidence within the collected case law 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.²⁴⁵

D. Roadblocks and High Hurdles

Restoration is an uphill battle. There are numerous barriers to restoration that can prolong the guardianship long after the regaining of capacity. Due to the state-specific nature of guardianship law, some barriers vary from state to state while others span across all jurisdictions.

1. ESTABLISHING AWARENESS OF A RIGHT TO RESTORATION

One barrier is the simple lack of awareness of the right to pursue restoration.²⁴⁶ There is no universal requirement for courts or guardians to inform the individual of the right.²⁴⁷ Individuals who lack suitable resources like social services and dedicated family members may never learn of their right to seek restoration.²⁴⁸

2. OVERCOMING NEGATIVE SOCIETAL ATTITUDES

Adults seeking restoration must overcome negative societal attitudes about mental disability and about age.²⁴⁹ Judges understandably may be concerned with prematurely terminating a guardianship and

244. *Brown*, 260 Or. App. at 283.

245. *See Stiver*, 1990 WL 94245.

246. Telephone Interview with Staff Attorney, Legal Services of South Central Michigan (Sept. 22, 2014).

247. *Id.*

248. *Id.*

249. WHO, WORLD REPORT ON DISABILITY, 1, 6 (2011), available at http://www.who.int/disabilities/world_report/2011/chapter1.pdf ("Raising awareness and challenging negative attitudes are often first steps towards creating more accessible environments for persons with disabilities. Negative imagery and language, stereotypes, and stigma—with deep historic roots—persist for people with disabilities around the world.")

causing harm that may not have occurred within the “safe” parameter of a guardianship.²⁵⁰ However, societal stigmas can bias judges and other courtroom participants towards enforcing the protectionisms of guardianship.²⁵¹ Judges may base their opinion more on their own values or experiences rather than on the law itself, to the detriment of a restoration petitioner.²⁵²

3. BURDEN OF PROVING AUTHORITY

In jurisdictions where the individual as the petitioner bears the burden of proof to show he or she no longer needs guardianship, s/he may struggle to meet that burden because s/he may not have been given the opportunity to exercise self-determination while under the guardianship, so there is little history of successful or reasonable decision-making.²⁵³ Therefore, as an attorney questionnaire respondent stated, “the outcome often hinges on the results of a psychological evaluation based on factors that may have little to do with life skills and the ability to self-determine.”²⁵⁴

4. PROVING CAPACITY

There is concern over the heavy reliance of courts on the psychological assessment, given the difficult nature of determining capacity—both for the initial appointment and upon a restoration petition. Capacity is situational and transient²⁵⁵ and can be influenced by external factors such as lack of sleep or medication.²⁵⁶ According to some experts,²⁵⁷ the medical assessment is not a complete account of capaci-

250. E.g. Telephone Interview with Nicole Shannon, Staff Attorney, Legal Services of South Central Michigan (Sept. 22, 2014).

251. PARRY, *supra* note 29, at 38; Robin Talbert et al., “Is Justice Blind? Stereotypes of Older Persons and Persons with Disabilities in the Judicial System,” *Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future*, ABA COMM’N ON LEGAL PROBLEMS OF THE ELDERLY, COMM’N ON THE MENTALLY DISABLED & NAT’L JUDICIAL COLLEGE (1991).

252. See PARRY, *supra* note 29, at 38.

253. Cassidy, *supra* note 24. See generally Jonathan G. Martinis, One Person, Many Choices: Using Special Education Transition Services to Increase Self-Direction and Decision-Making and Decrease Overbroad or Undue Guardianship (Draft), available at http://jennyhatchjusticecenter.org/docs/publications/ihjp_publications_draft_article_guardianship.pdf (discussing the importance of self-determination).

254. Information is on file with the Author.

255. JUDICIAL DETERMINATION OF CAPACITY, *supra* note 3.

256. *Id.*

257. See Raphael J. Leo, *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, J. CLIN. PSYCHIATRY 131 (1999).

ty but rather is simply the physician's opinion based on medical findings.²⁵⁸ Thus, experts argue, a more complete capacity assessment should include in-depth conversations about the issues and may require multiple days and attempts to complete.²⁵⁹

In addition, clinical evaluations are often conducted by medical professionals who lack specialized training assessing capacity.²⁶⁰ Advocates voice frustration with the court's heavy reliance on clinicians not sufficiently versed in the complex nature of capacity.²⁶¹ Courts have wide discretion in determining the evidence upon which to rely, and an expert with only general experience related to capacity is not prohibited from conducting the medical assessment and testifying.²⁶²

5. INSUFFICIENT EVIDENCE FOR RESTORATION PETITIONS

A deficient capacity assessment in the original proceeding may be one reason for a restoration petition. There is reason to believe that some guardianships are ordered without sufficient evidence of the individual's decision-making incapacity.²⁶³ Therefore, rather than showing that the person's condition has improved, the issue may be an inadequate assessment up front, which becomes a huge impediment to overcome.²⁶⁴

E. Restoration as a Critical Component of Supported Decision-Making

The current understanding of guardianship—to protect a vulnerable person by giving another legal decision-making power—is now challenged, as a matter of human rights law, by Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations in 2008.²⁶⁵ Article 12 of the CRPD states that:

258. See Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency Dealing with the Incompetent Client*, 1 J. HEALTH CARE L. & POL'Y 202 (1998).

259. A HANDBOOK FOR LAWYERS, *supra* note 169.

260. *Id.*

261. *E.g.*, Interview with Phoebe Ball, Legislative Affairs Specialist, National Council on Disability (Sept. 11, 2014).

262. SYDNEY BECKMAN ET AL., EVIDENCE: A CONTEMPORARY APPROACH (West, 2d ed. 2012).

263. See PAMELA B. TEASTER ET AL., WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP 15-16 (2005).

264. *Id.*

265. Convention on the Rights of Persons with Disabilities, Dec. 13, 2007, U.N.T. 53, available at <http://www.un.org/disabilities/default.asp?id=259>.

"all persons have full legal capacity, regardless of their disability."²⁶⁶ It requires states to provide the support necessary for persons with disabilities to make their own decisions.²⁶⁷ This is the emergent concept of "supported decision-making."²⁶⁸

Supported decision-making is a process in which people with disabilities are able to understand choices and make decisions for themselves with the assistance of a support network.²⁶⁹ It is based on the assumption that everyone has the ability and right to make their own decisions. There is no one method of supported decision-making, but all models are based on the idea of promoting self-determination.²⁷⁰ Its advocates believe it to be an empowering alternative to guardianship.²⁷¹

Supported decision-making is built on the belief that individuals under guardianship lose decision-making power, which thus reduces opportunities to make choices, take risks, and develop decision-making skills. If an individual is denied the right to take risks, he or she is denied the opportunity to learn and grow from those risks.²⁷² Guardianship, of course, is intended to protect the individual. Well-meaning family members, guardians, and courts look to guardianship as the best way to ensure the safety of the individual. However, proponents of supported decision-making argue that the security of guardianship is often overestimated and other forms of support may provide better protection of both safety and rights.²⁷³

Restoration is closely connected to supported decision-making because both concepts share the central focus of ending the depriva-

266. *Id.*

267. *Id.*

268. Susan Mizner, *Disability is no Excuse to Deprive One of Civil Liberties*, ACLU (Aug. 5, 2013), <http://www.aclu.org/blog/human-rights/disability-is-no-excuse-deprive-one-civil-liberties>.

269. In 2014, the United States Administration on Community Living awarded funding to Quality Trust for Individuals with Disabilities to establish a National Resource Center for Supported Decision-Making.

270. ABA COMM'N ON DISABILITY RTS. ET AL., *BEYOND GUARDIANSHIP: SUPPORTED DECISION-MAKING BY INDIVIDUALS WITH INTELLECTUAL DISABILITIES* (2012), available at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/SDMRoundtable_Summary.authcheckdam.pdf.

271. Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1157 (2013).

272. DIV. OF LONG TERM CARE, DEP'T OF HEALTH SERVS. FOR THE STATE OF WISCONSIN 12 (2010), available at <https://www.dhs.wisconsin.gov/publications/p2/p20460.pdf>.

273. *Id.*

tion of rights imposed by guardianship where the individual can make or express his or her own decisions, with or without support, and thus exercise autonomy to the fullest extent possible. Restoration is appropriate where the protected individual regains capacity and also where the individual has developed a supportive environment such that guardianship is unnecessary.

The United States has signed the CRPD but the Senate has not yet ratified it.²⁷⁴ Despite this, public and private stakeholders in the United States are beginning to recognize supported decision-making.²⁷⁵ There are an increasing number of stories of individuals who have supportive networks of families, friends, and communities that allow them to live a productive and fulfilling life without guardianship.²⁷⁶ Advocates argue that, “litigation can push courts to incorporate supported decision-making into existing statutory schemes as an alternative, where feasible, for persons facing guardianship.”²⁷⁷

Supported decision-making appears throughout the collected case law. As early as 1891, courts hinted at the (then-unnamed) concept as an alternative to guardianship.²⁷⁸ In restoring a woman previously declared to be “insane,” the court asked: “why should the hypothesis be indulged that [the protected individual] will be compelled, or will attempt, to manage her estate without advice or assistance?”²⁷⁹ The court added: “When the occasion arises, [the individual] will be at liberty to choose her own advisers and assistants.”²⁸⁰

In 2012, a New York court restored the rights of a young woman after it found that guardianship was no longer warranted due to a support network of family members that formed after the guardianship was ordered.²⁸¹ The support network helped the individual make and communicate her own decisions.²⁸² The court found that under New York law, “proof that a person with an intellectual disability

274. Convention on the Rights of Persons with Disabilities, UN, <http://www.un.org/disabilities/Convention/Conventionfall.shtml> (last visited Feb. 9, 2015).

275. *In re Maxwell*, No. M2002-01654-COA-R3-CV, 2003 WL 22209378 (Tenn. Ct. App. Sept. 25, 2003).

276. *Stories of Supported Decision-Making*, NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://supporteddecisionmaking.org/impact> (last visited Feb. 9, 2015).

277. Glen, *supra* note 4, at 8.

278. *In re Brugh*, 16 N.Y.S. 551 (N.Y. Gen. Term 1891).

279. *Id.* at 554.

280. *Id.*

281. *Id.*

282. *In re Guardianship of Dameris*, 956 N.Y.S.2d 848, 851 (N.Y. Sur. Ct. 2012).

needs a guardian must exclude the possibility of that person's ability to live safely in the community supported by family, friends and mental health professionals.²⁸³ That same year, an Iowa court restored a man in his seventies upon finding that he had regained capacity and had developed a working network of third parties to help him care for himself and his estate.²⁸⁴ In making its decision, the court stated: "Although there are many things [the protected individual] can no longer do for himself, he is financially able and personally willing to secure third party assistance when needed."²⁸⁵ A 2004 Missouri court granted a restoration petition, stating: "Even if [a ward] still suffers the [physical or mental] condition that prohibits his meeting essential requirements, but can, without court-ordered support, receive and evaluate information or communicate decisions to such an extent that he or she can fully meet essential requirements, the guardianship is no longer appropriate."²⁸⁶

Advocates maintain that judges need additional education on supported decision-making and its use as an option less restrictive than guardianship.²⁸⁷ They question whether judges may dismiss the existence of support networks for fear that they are not adequate.²⁸⁸ For example, an Ohio court in 2007 denied restoration for an elderly woman even though her daughter offered to provide adequate support if the guardianship was terminated.²⁸⁹ In 2014, a Texas court denied the restoration petition of a developmentally disabled man due to the lack of evidence that he could make important life decisions without the support or guidance of caretakers and medical professionals.²⁹⁰ Supported decision-making embraces the idea that everyone, regardless of their level of capacity, relies on the advice and assistance of others in making important decisions.

283. *Id.* at 854.

284. *In re* Guardianship and Conservatorship of F.W. Jr., No. 11-1574, 2012 WL 5355801, at *1-7 (Iowa Ct. App. Oct. 31, 2012).

285. *Id.* at 4.

286. *In re* Estate of Werner, 133 S.W.3d 108, 110 (Mo. Ct. App. 2004).

287. See generally FLA. DEVELOPMENTAL DISABILITIES COUNCIL, LIGHTING THE WAY TO GUARDIANSHIP AND OTHER DECISION-MAKING ALTERNATIVES: A MANUAL FOR INDIVIDUALS AND FAMILIES (2010), available at http://card-usf.fmhi.usf.edu/docs/Guardianship%20Family%20Manual_0.pdf.

288. *Id.*

289. *In re* Guardianship of DiCillo, No. 2006-G-2718, 2007 WL 1113964 (Ohio App. Ct. Apr. 13, 2007).

290. *In re* Guardianship of Tonner, No. 07-13-00308-CV (Tex. App. Sept. 15, 2014).

VI. Looking Ahead: Considerations And Questions

This article is an initial examination of the current nature and practice of restoration of rights in adult guardianships. There remain many unknowns but the 2013-2014 ABA Commission study has uncovered some preliminary findings:

1. Petitions for restoration are uncommon but do occur and can result in moderate success.
2. Judicial and societal attitudes and approach towards restoration have evolved to focus more on the autonomy of the individual, but paternalistic notions remain.
3. Courts generally rely on two kinds of evidence in restoration proceedings: a clinical assessment and in-court observation of the individual. Individuals who testify at the proceeding may fare better if they acknowledge their limitations and articulate a plan for managing their affairs without the support of the guardianship.
4. In the great majority of cases that end up in the appellate level of the judicial system, the petition was filed by or in the name of the individual, not the guardian, family member, friend, or a professional agency.
5. And finally, one of the greatest barriers to restoration is the ability of the protected individual to hire counsel.

Questions remain as to how many petitions are filed and how many result in full or partial restoration. An additional question is how many individuals under guardianship have regained capacity but have not sought restoration. As court information systems evolve, it will be important to build elements about restoration petitions and proceedings into judicial databases. Further remaining questions focus on the extent to which individuals, as well as family, friends, other supporters, and professionals are aware of the right to restoration and how to pursue it. The study produced mixed results as to the answer. Are there ways of raising awareness of restoration—for instance through inclusion of the right in the court order appointing the guardian, through educational materials presented along with the order, through court staff or on court websites?

Finally, the judge's considerations in the initial determination of whether to appoint a guardian, including a thorough evaluation of cognitive and functional abilities and the scope of the guardianship

order, may altogether help reduce the need to pursue restoration.²⁹¹ Careful assessments up front may find capacity with support, suggest less restrictive decision-making options, and avoid imposition of a guardianship in the first place. But if a guardian is appointed and an individual under guardianship regains capacity, due process protections and the foundations of liberty require that the individual have access to pursue restoration. This includes clear rules and guidelines, an unambiguous streamlined procedural process, access to support and assistance, and prompt evaluation of requests for review of the need to continue the guardianship.²⁹²

291. JUDICIAL DETERMINATION OF CAPACITY, *supra* note 3.

292. NAT'L PROBATE COURT STANDARDS § 3.3.16, 3.3.18 (Nat'l Ctr. for State Cts. 2013).