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Right to Counsel in Restoration of Rights Cases

By [John Pollack](#) and [Megan Rusciano](#)

Discover the pressing issues and importance of defending the rights of individuals under the imposition of a guardianship. As an attorney, what can you do to ensure your own client's protection?

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October 28, 2020

GUARDIANSHIP

Right to Counsel in Restoration of Rights Cases

By John Pollock and Megan Rusciano

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I. Background: Guardianship and the Right to Counsel

A. The Implications of the Restrictive Nature of Guardianship

Even where the imposition of a guardianship is a genuinely benevolent action to protect a person's life and livelihood, it nonetheless results in a profound restriction of fundamental rights. It removes a person's ability to be the author of their own life and make the decisions that compose who they are by placing those decisions in the hands of another. It can impact whether a person marries and forms a family; whether they vote; where they live; what education, job, or training opportunities they may have; and what services they receive.

Guardianship should continue only when absolutely necessary. In practice, an unknown number of people remain under guardianship when it may no longer be necessary. ¹ At Disability Rights Maryland (DRM), we regularly receive calls from people subject to guardianship who ask how they can restore their rights. Their stories vary, but often reference how they have supports that enable them to make their own decisions. Many times, their guardians still do not support restoration.

While DRM receives calls regarding restoration, many people under guardianship may be less likely to find their way to legal services for help, making the need for a right to appointed counsel in restoration proceedings even more critical. Most states require that counsel be appointed in certain adversarial guardianship proceedings, with a number of states explicitly requiring the right to counsel during restoration proceedings. ² Yet, in some of these states counsel may only play the role of a guardian ad litem, acting in the best interest of the person subject to guardianship, not as their zealous advocate. We argue that due process mandates that people subject to guardianship have a right counsel at restoration proceedings and that counsel needs to represent the protected person's stated wishes. ³

B. When Restoration Is Appropriate and Barriers to Restoration

There are a myriad of situations when restoration is appropriate. For example, a person's disability may cease; the person may still have a disability but have access to supports that empower them to make their own decisions; or a less restrictive alternative may become available. DRM is also aware of cases where a person should never have been subject to guardianship, which was imposed due to bias or lack of awareness of available supports or alternatives.

While guardianship may no longer be necessary in these cases, barriers exist to ensuring the matter comes before a court. The National Guardianship Association indicates that guardians should notify the court of the need for restoration when it arises; however, this may not always occur. Indeed, when DRM receives calls about restoration, most guardians have not notified the court that a person might have regained legal capacity and at times their reasoning for failing to do so is not benevolent. Still, a guardian may genuinely believe that the person will not be safe without guardianship or that the person has not regained capacity. Regardless, a guardian's decision not to initiate restoration proceedings has profound implications on whether the proceedings move forward. As an example, in Maryland, restoration proceedings are referenced in the statute that outlines guardians' obligations in filing annual reports. ⁴ This presumes that guardians will indicate the need for restoration in their reports, which may not occur. Often in these cases, the person subject to guardianship must pursue restoration by themselves.

Stereotypes and bias against people with disabilities create additional barriers to restoration. To understand this bias, it is critical to recognize how the class of people subject to guardianship have a long history of discrimination including denial of their basic substantive and procedural due process rights. Historically, we have denied people with disabilities the right to marry, to attend school, to reproduce, and to live among us. Even as recently as the 1960s, it was very easy for people with mental illness and developmental disabilities in the United States to be "committed" to secure facilities with relatively little procedure or focus on their rights or their humanity. This legacy continues to infect our guardianship proceedings by reinforcing the stereotypes and assumptions that people with disabilities are incapable of managing their own lives. ⁵

Moreover, our public benefits system reinforces the need for people with disabilities to adopt narratives that, in turn, can be used to justify subjecting them to guardianship. ⁶ Medicaid Waiver programs may provide access to housing, in-home services, and employment supports, but commonly require medical evidence of how a person cannot live independently and their inability to complete basic activities of daily living. ⁷ Social Security benefits require proving similar impairments. ⁸ Medical professionals are often asked for evaluations that document a person's deficits to support applications for these benefits. This same evidence is used to support the need for guardianship, even though a person who needs these supports may still be able to make their own decisions. Indeed, in Maryland we see that the certificates filled out by medical professionals to determine whether a person has legal capacity require them to indicate whether they think a person cannot complete activities of daily living or whether they need institutionalized care, and if either option is checked, it supports the need for guardianship. Thus, a guardian, attorney, or even a judge, may genuinely believe that restoration is not appropriate because a person needs these supports, without full consideration of whether the person actually can make their own decisions. Bias against people with disabilities forms an invisible, yet pervasive barrier to restoration.

Against this backdrop and without counsel, a person who has been stripped of many of their fundamental rights is forced to navigate a complex legal process to restore their rights alone. Petitions for restoration are complicated and require navigating specific court rules and gathering supportive medical evidence. ⁹ This can be difficult for any *pro se* petitioner, let alone someone who has been branded as incapacitated and legally cannot make their own decisions. As Nina Kohn and Catheryn Koss underscore, "having the right to directly challenge the continued necessity or terms of the guardianship...is virtually meaningless without the accompanying right to legal representation." ¹⁰ Access to counsel affords a zealous advocate who can help a person subject to guardianship bring their claim and meaningfully access the court. As outlined below, the right to counsel must be recognized in restoration proceedings.

II. The Legal Right to Counsel

A. Legal Landscape: Right to Counsel in Restoration Proceedings Status

At least half the states (27 states plus the District of Columbia) require the appointment of counsel at all restoration proceedings.

¹¹ In some of these states, the statute explicitly states that counsel is to be appointed at the restoration hearing, ¹² whereas in others it specifies that the court is to follow the same procedures in the restoration proceeding as in the initial establishment, ¹³

meaning that if counsel was required at the establishment it is also required at the restoration. There are also some states where it is possible that the right to counsel at establishment extends to restoration but where the statutes are somewhat ambiguous. ¹⁴

The majority practice of appointing counsel has long been urged as necessary public policy. As early as 1987, the American Bar Association, recognizing the particular vulnerability of individuals in these circumstances, adopted a policy calling for a right to counsel in guardianship and conservatorship cases. ¹⁵ Additionally, Section 301(g) of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPA) specifies that “an adult subject to guardianship who seeks to terminate or modify the terms of the guardianship has a right to choose an attorney to represent the adult in this matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.] The court shall award reasonable attorney’s fees to the attorney for the adult as provided in Section 119.” While a state can opt not to adopt the bracketed text, the remaining language makes clear that a protected person’s retained attorney is entitled to fees, which makes retaining a private lawyer significantly easier. The comment to section 301(g) quotes from a law review article for the proposition that “having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation.” ¹⁶

On several occasions, courts have construed guardianship statutes to provide a right to appointed counsel in restoration proceedings. In *State of Ohio ex Rel McQueen*, 986 N.E.2d 925 (Ohio 2013), the Supreme Court of Ohio held that as a matter of statutory interpretation, there is a right to counsel for guardianship review proceedings, reversing a contrary decision by the Ohio Court of Appeals. It found that since Ohio Rev. Code Ann. § 2111.49(C) states that guardianship review proceedings must be held “in accordance” with § 2111.02 (the guardianship establishment statute), and since § 2111.02 provides a right to counsel, the right to counsel had to be applied to the review proceedings. The Court also explained that “this construction is consistent with the practice of probate courts from Franklin, Summit, Medina, and Logan Counties. And amici curiae claim that other states with statutes similar to the ones at issue here recognize the right to appointed counsel in guardianship-review hearings.”

Similarly, in *In Re Guardianship of Williams*, 986 A.2d 559, 567 (N.H. 2009) the Supreme Court of New Hampshire examined the state’s termination of guardianship statute (N.H. Rev. Stat. Ann. 464-A:40, II(c)), which provides, “Unless the motion is without merit, the court shall hold a hearing similar to that provided for in N.H. Rev. Stat. Ann. 464-A:8 and N.H. Rev. Stat. Ann. 464-A:9.” While these two statutes, which govern guardianship proceedings generally, did not mention the right to appointed counsel, the Court in dicta interpreted this language to incorporate the right to appointed counsel that is provided by the guardianship establishment statute (N.H. Rev. Stat. Ann. 464-A:6) by stating that, “At the termination hearing, conducted in a manner similar to that of the guardianship hearing and with the ward’s rights protected by counsel, the burden is on the guardian to prove that the grounds for the appointment of the guardian continue to exist.” *Id.* Earlier in the opinion, the Court noted that the overall purpose of the guardianship statutes is “promot[ing] and protect[ing] the well-being of the proposed ward in involuntarily imposed protective proceedings and provid[ing] procedural and substantive safeguards for civil liberties and property rights of a proposed ward.” *Id.* at 564 (citations omitted).

B. Due Process Requires the Right to Counsel in Restoration Proceedings

Due process protections under the 14th Amendment safeguard people subject to guardianship’s right to counsel in restoration proceedings. To determine whether a due process violation arises, a court balances: (1) the private interest affected; (2) the risk of its erroneous deprivation; and (3) the government’s interest. ¹⁷ With respect to right to counsel, these factors are then balanced against the presumption that counsel is not required where physical liberty is not at stake. ¹⁸ Physical liberty interests are at issue in guardianship proceedings: a guardianship may restrict a person’s freedom of movement, confine them in a facility or hospital for treatment, or place limits on who they may associate with.

Denying a right to counsel in restoration proceedings affects a fundamental liberty interest in a manner that also engenders adverse social stigma. ¹⁹ Guardianship proceedings invoke fundamental liberty interests since guardianship can result in loss of association, self-determination, and institutionalization. As stated, guardianship can limit a person from making critical decisions that shape who they are and how they see themselves, from who they marry or partner with, where they live and work, and whether they

can vote. This deprivation of self-determination is nothing if not a severe loss of personal liberty. The branding of guardianship triggers a heightened liberty interest.

Further, failing to provide counsel in restoration proceedings will likely result in the erroneous and potentially permanent deprivation of liberty. As we have discussed, prejudice against people with disabilities “provokes stereotypes of incompetence and dependency.” ²⁰ These stereotypes about [incapacity](#) can lead to unnecessary guardianships. If a guardian contests restoration and the person under guardianship cannot access counsel, protected persons must navigate court processes *pro se* while adjudicated incapacitated. They would need to ensure their petition adheres to court rules that may require attaching medical evaluations, even though they may not have the right to make medical decisions or obtain their own records. A protected person that could not understand and effectively challenge such evidence during the initial hearing may be no better suited to find and present evidence of his or her alleged restored competence later. ²¹ Additionally, the person will need to navigate rules of evidence and prove they have regained capacity, which is often defined ambiguously in statute. Access to counsel affords a zealous advocate who can help a person subject to guardianship bring the claim and meaningfully access the court. Given the lack of oversight of private guardianships and the findings of incapacity of those individuals under guardianship, the risk of erroneous deprivation of liberty is high if access to counsel is not provided in restoration proceedings.

Lastly, the protection of a person’s liberty is always in the state’s interest. The state has an interest in protecting and restoring the liberty of people under guardianship, who may no longer meet the statutory criteria to be placed in guardianship. Appointing counsel for them in restoration proceedings ensures that they have a fair opportunity to preserve this liberty interest. Furthermore, the state also has an interest in improved judicial economy and the efficient administration of its guardianship program. If guardianship is no longer needed, the state does not have an interest in devoting court resources to oversee it. Appointing counsel in restoration proceedings also makes the process more expedient and thus uses fewer judicial resources. Finally, the state has an interest in preventing widespread abuse and neglect in guardianship, since this undermines the purpose of the guardianship program, which is to protect people who are unable to make decisions for themselves. Opportunities for abuse can be reduced by giving people subject to guardianship a voice in restoration proceedings.

D. The Need for Counsel to be Zealous Advocates

As a final note, it is important to reinforce the finding that in restoration proceedings, the right to counsel must invoke the right to a zealous advocate. In their critical article, Nina Koss and Catheryn Kohn outline how attorneys may face ethical concerns about representing clients who are subject to guardianship. However, as they delineate, attorneys who adopt a best interest approach or defer to the preferences of a guardian place an additional barrier to restoration for people subject to guardianship. Bolstered by laws of agency, contract, constitutional principles, and model rules of conduct, they provide a framework for attorneys representing people subject to guardianship in restoration proceedings. They conclude that, “attorneys legally may and ethically adopt an express interest or normal relationship model of representation when representing persons subject to guardianship who seek to challenge the existence, terms of conditions of their guardianship or who seek legal advice about their rights in this regard.” ²² This model, in congruence with attorneys’ responsibilities, creates a path forward for attorneys to represent clients subject to guardianship as zealous advocates. In recognition of the wisdom of this model, courts have consistently held that an attorney representing a protected person must argue for the person’s wishes and not their best interests. ²³

Conclusion

The interests at stake in guardianship proceedings, and at restoration, underscore the need for people subject to guardianship to have a right to counsel, and thus, a zealous advocate in these proceedings. This right is encapsulated in due process protections and proves integral to combatting the ongoing discrimination and bias that people with disabilities face.

Endnotes



1. ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology, "Restoration of Rights in Adult Guardianship: Research & Recommendations", 2017, pg. 6, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf.
2. Jenica Cassidy, Restoration of Rights in the Termination of Adult Guardianship, 23 Elder L. J. 83, 92 (2015); Nina Kohn and Catheryn Koss, Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship, 91 Wash. L. Rev. 582, 602-604 (2016). See also National Civil Right to Counsel: <http://www.civilrighttocounsel.org/map>.
3. In some states, counsel is not required at the initial proceeding. We would argue, and some courts have found, that due process requires the appointment of counsel for the imposition of a guardianship. See e.g. *Gore v. Barrow*, 68 So. 625 (La. 1915); *In re St. Luke's-Roosevelt Hosp. Ctr.*, 607 N.Y.S.2d 574, 580 (Sup. Ct. 1993); *Matter of Leon*, 2016 N.Y. Misc. LEXIS 3493, *1, 2016 NY Slip Op 51393(U), 1 (N.Y. Surr. Ct. 2016),
4. Md. Ann. Code Est. & Trusts § 13-708(b)(8).
5. See A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 Elder L.J. 33, 52-58 (1999).
6. Robert Dinerstein, "Every Picture Tells a Story, Don't It?": The Complex Role of Narratives in Disability Cases" Narrative 15, no. 1 (2007): 40-57.
7. Md. Code, Health General Art. § 7-101(f).
8. 42 CFR §404.1505. Basic definition of disability.
9. ABA, supra note 1.
10. Nina Kohn and Catheryn Koss, Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship, 91 Wash. L. Rev. 582, 602 (2016).
11. Ala. Code 26-2A-110 ; Cal. Prob. Code 1471(a)(2); Conn. Stat. 45a-660; D.C. Code 21-2049 ; Fla. Stat. 744.464; Ga. Code 29-4-42; Hi. Stat. 560:5-318; 755 ILCS 5/11a-21; La. Code Civ. Proc. Ann. art. 4554; Me. Rev. Stat. Ann. tit. 18-A, § 5-307; *Guardianship of Lander*, 697 A.2d 1298 (Me 1977) ("same procedures" language means all procedures from guardianship establishment proceeding); Md. Code Ann. Fam. Law § 14-404 (public guardianship); M.G.L.A. 190 B § 5-311; Mich. Probate Rule 5.408 / M.C.L.A 700.5310; Minn. Stat. § 524.5-317; *Greer v. Prof'l Fiduciary, Inc.*, 792 N.W.2d 120, 127-28 (Minn. Ct. App. 2011) (construing "same procedures" statutory language to include right to counsel); Mo. Stat. 475.083; Nev. Stat. 159.1905; N.H. Stat. 464-A:40 ; N.M. Code 45-5-307 ; N.Y. Mental Hyg. Law § 81.10; R.C. 2111.49(C); 20 Pa. Stat. Ann. § 5512.2 (but only if protected person in mental hospital); Tenn. Code 34-3-108; Tex. Estates Code Ann. § § 1202.101; Utah. Code 75-5-307 ; Vt. St. T. 14 § 3065(a)(1)(B); Va. Code 64.2-2012 (attorney ad litem); W.Va. Code 44A-4-6; Wis. Stat. 54.64.
12. See e.g. Cal. Prob. Code 1471(a)(2); Conn. Stat. 45a-660.
13. See e.g. Ala. Code 26-2A-110; Hi. Stat. 560:5-318.
14. For instance, Ky. Stat. 387.620 states that the ward is "entitled to counsel" but it is unclear whether this includes appointment of counsel given that other guardianship provisions specifically refer to appointment of counsel.
15. American Bar Association Commission on Legal Problems of the Elderly, 112 No. 2 Annu. Rep. A.B.A. 31 (1987).
- 16.

Id (quoting Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016).

17. *Mathews v. Eldridge* 424 U.S. 319, 365 (1976).
18. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).
19. *See Vitek v. Jones*, 445 U.S. 480, 492 (1980).
20. Michelle R. Nario-Redmond, *Ableism: The Causes and Consequences of Disability Prejudice* 3 (2020); see also The American Bar Association Commission on Disability Rights, "Implicit Biases & People with Disabilities" (January 2019) available at https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/ (finding pervasive implicit bias against people with disabilities) (last accessed December 11, 2019).
21. See Craig Hopper, *Guardianship, Chapter 10, Modification and Restoration of Guardianships* 1 (2003) (describing cases that illustrate the struggles and legal complications for wards who want to restore or modify their rights after being subject to guardianships).
22. Kohn and Koss, *supra*, note 1, pg. 630.
23. See e.g. *Gross v. Rell*, 40 A.3d 240, 258-259 (Conn. 2012) (noting that American Bar Association adopted position that "a lawyer ... should not ... seek to have himself appointed guardian except in the most exigent of circumstances" and concluding that "[W]ith respect to attorneys for respondents in conservatorship proceedings, the primary function of such attorneys under rule 1.14 of the Rules of Professional Conduct is to advocate for the client's express wishes. Although an attorney might be required in an exceptional case to act as the client's de facto guardian, that is not the attorney's primary role"); *Estate of Leonard, ex rel., Palmer v. Swift*, 656 N.W.2d 132, 139 (Iowa 2003) (counsel must represent protected person's wishes); *In re Guardianship & Conservatorship of Robert Kenneth Fagan*, 909 N.W.2d 443 (Iowa App. 2017) ("This court has recognized counsel's failure to act as counsel for the proposed ward constitutes reversible error"); *In re Lee*, 754 A.2d 426, 438-40 (Md. Ct. Spec. App. 2000) (observing that proper role of attorney in guardianship case "has been shrouded in ambiguity" but that "The duty to maintain 'as far as reasonably possible . . . a normal client-lawyer relationship' precludes an attorney from acting solely as an arm of the court, somewhat in the nature of a special master, and using his assessment of the 'best interests' of the client to justify waiving the client's rights without consultation, divulging the client's confidences, disregarding the client's wishes, and even presenting evidence against him or her ..."); *In re Link*, 713 S.W.2d 487, 496 (Mo. 1986) (interpreting statutory language to require that "to the extent an affected individual appropriately understands what is at stake and expresses a desire to waive or exercise a particular right, that desire must be honored, even if counsel disagrees with the wisdom of the choice"); *In re M.R.*, 638 A.2d 1274, 1285 (N.J. 1994) (concluding that attorney should generally advocate for the protected person's wishes; "Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system ... if counsel has already concluded that his client needs 'help,' he is more likely to provide only procedural formality, rather than vigorous representation ... Finally, the attorney who undertakes to act according to a best-interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make"); *In re Guardianship & Conservatorship of Nicole Trina Stevenson*, 825 N.W.2d 911, 915 (S.D. 2013) ("[A] court should be clear what role it intends the appointed advocate to assume, keeping in mind that the attorney's role is not to determine the protected person's best interests, but, after advice and assistance, to advocate a decision that the client desires. Indeed, the role of an attorney for a protected person should be no different than that of an attorney representing any other client, 'as far as reasonably possible.'")

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John Pollock is a Staff Attorney for the Public Justice Center who has served for the past eleven years as the Coordinator of the National Coalition for the Civil Right to Counsel (NCCRC). The NCCRC works to establish the right to counsel for low-income individuals in civil cases involving basic human needs such as child custody, housing, safety, and public benefits. He is the recipient of the 2018 Innovations Award from the National Legal Aid and Defender Association (NLADA). Previously, John worked for the Central Alabama Fair Housing Center and the Southern Poverty Law Center. He graduated from Northeastern University School of Law. He is the author of many law review articles, including Appointment of Counsel for Civil Litigants: A Judicial Path to Ensuring the Fair and Ethical Administration of Justice, Court Review, Vol. 56 Issue 1 (2020).

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