

## **Issue Brief for Working Group #1**

### **Post-Adjudication Rights of Persons Subject to Guardianship**

#### Commissioned Paper:

Maximizing Autonomy and Ensuring Accountability: Rights-Based Post-Appointment Issues in the “New Normal,” by Morgan & Boyer

#### **Statement of Issue:**

Despite the existence of a guardianship, adults under guardianship retain many important human and constitutional rights. What law, policy, and practice steps are needed to honor and protect their rights, thereby enhancing autonomy and self-determination?

#### **Background:**

Human Rights Perspective. The United Nations Convention on the Rights of Persons with Disabilities in Article 12 calls for all persons with disabilities to have full enjoyment of human rights and equality under the law. It “reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law.” It calls for States Parties to “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Finally, it requires States Parties to provide appropriate safeguards to prevent abuse in accordance with international human rights law. The U.S. has signed but not ratified the Convention. Nonetheless, it has had a compelling effect on perceptions of guardianship and disability law.

Many advocates interpret the Convention’s Article 12 to include the right of persons with disabilities to be free of any court-imposed restrictions on their autonomy and their ability to make their own decisions, with support when necessary. One of the other Summit Working Groups (Group #2) will be discussing in detail the parameters of supported decision making as an alternative to court-imposed guardianship, as well as its use within the confines of guardianships.

Overview of Post-Appointment Rights: With the stroke of a judge's pen appointing a guardian, adults subject to guardianship lose basic rights in the name of protection. Yet some rights are retained, some are lost and transferred to the guardian, and others are lost but cannot be transferred. Within the existing framework of our state guardianship statutes, there are both explicit enumerations of post-appointment rights and implicit recognition of some of the rights adults retain. Notable in those statutes that specify the rights that are retained is Florida's comprehensive list of fifteen rights found in Appendix A of the Morgan/Boyer paper. Just three other states, Minnesota, Mississippi, and South Carolina, have a similar explicit listing in a "bill of rights." Eight other states have a less specific, but important, statutory statement that persons under guardianship retain all constitutional and civil rights not restricted by court order.

Left open are questions, most likely for subsequent court interpretation, as to which rights are implicitly included, the extent to which those rights will be honored, and what rights the court can restrict. Among those rights that may be included are access to the courts, fair adjudication, competent representation, qualified guardians, and prudent financial management. The National Guardianship Association lists twenty-two rights including, among many others, dignity, respect, privacy, confidentiality, religious expression, procreation, and protection against discrimination, abuse, neglect, or exploitation.

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) provides that not later than 30 days after appointment, the court must give the adult subject to guardianship a statement of rights and procedures to seek relief if the adult is denied those rights. The Act sets out seven specific rights to be included.

### **Where We Stand on Specific Post-Adjudication Rights:**

Suffrage: In addition to the constitutionally recognized procedural and civil rights that all persons enjoy is a group of rights that can be removed. Prominent among those rights is the right to vote. In some states that right is automatically removed in a guardianship proceeding, while in others the judge can determine whether that right is retained. Obviously, it is a right that cannot be delegated to the guardian. UGCOPAA provides that an adult retains the right to vote unless the

court orders otherwise with specific findings showing that the adult “cannot communicate, with or without support, a specific desire to participate in the voting process.”

Marriage and Divorce: The rights to marry or to initiate a divorce are personal rights that may or may not be retained or delegated to a guardian. Younger adults with intellectual disabilities might be more interested in the right to marry, whereas a guardian for an adult who is in an abusive marriage might be more interested in the right to divorce. Family members who disapprove of the adult’s choice of a mate may seek guardianship to block or annul the marriage. A psychotic episode on the part of either spouse may be the impetuous to seek a divorce.

- Marriage: Guardians are confronted with capacity to marry issues under two sets of circumstances. The first is where the person gets married prior to adjudication. The second is when after adjudication the adult under guardianship gets married or asks the guardian if they can get married. The issues in both situations are what is the jurisdiction’s legal test to determine the capacity to marry, and whether and how the state’s guardianship statute addresses the right to marry. In some states, the right to marry is retained. It is not a right that can be delegated to the guardian. Just because an order has been entered adjudicating an adult to be incapacitated does not necessarily bar contracting a valid marriage. UGCOPAA provides that an adult retains the right to marry, unless the court orders otherwise with specific findings required.
- Divorce: The right to initiate a divorce is rarely mentioned in any statutory listing of retained or delegated rights, and case law on the capacity to divorce is sparse. When a person under guardianship is a respondent in a divorce, the case law will typically not prohibit the divorce. However, in states that have statutes addressing this issue they usually require that the respondent have legal representation through either an attorney or a guardian ad litem and have a waiting period before permitting the divorce to be finalized.

The majority rule is that courts would not permit a fiduciary for the incapacitated spouse to bring an action for divorce, reasoning that divorce is simply too personal a decision to

permit a fiduciary to pursue on behalf of the person under guardianship. This majority rule has had the unintended consequences of trapping the incapacitated spouse in a marriage unless the divorce is initiated by the other spouse, the incapacitated spouse regains capacity, or dies. This is particularly tragic if the incapacitated spouse is in an abusive relationship. The fundamental unfairness of the majority rule is starting to be recognized in some jurisdictions, with courts finding that the general powers of guardians are broad enough to encompass the power to initiate a divorce proceeding.

Association: The COVID-19 pandemic has demonstrated the potentially devastating effects of isolation. The loss of ties to friends, family, and social networks can have a negative effect on anyone's physical and mental health. The right of a person under guardianship to associate with whomever they wish and the concordant authority of the guardian to place any restrictions on that right has been the source of much recent debate and various legislative enactments to set the parameters of any restrictions. The limitation on the guardian's ability to restrict visitation responds to growing concerns about guardians improperly isolating adults subject to guardianship and estranging them from family members or friends who are important to them.

The guiding principle is that the right of association or visitation belongs to the adult, not the would-be visitor. However, there are circumstances in which the guardian finds it necessary for the protection of the adult to place limits on visitation.

The UGCOPAA addresses the ability of the guardian to restrict visitation either when (1) the court entered an order that specifically limits visits, (2) there is in place an active protective order or a protective arrangement which places restrictions on interaction between the adult and others, or (3) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult and the restriction is for a period of not more than seven business days if the person has a family or pre-existing social relationship with the adult. Courts should be hesitant to deny visitation, especially when the adult wishes to visit or when the person seeking visitation has a prior close

relationship. The NGA Standards direct guardians to encourage social relationships and to undertake reasonable efforts to keep the adult's existing social and support networks in place.

Restoration: An adult under guardianship with an intellectual disability, whose condition is static may be able to receive needed assistance in a far less intrusive way, such as supported decision-making, restricted accounts, or other tools to provide the necessary supports. Some older adults under guardianship, others with conditions with the potential for improvement, or those for whom supports are now available that weren't available when the guardianship was established, may no longer need a guardian. Moreover, new evidence may become available attesting to the person's capacities.

In keeping with due process protections for the adult, every guardianship statute must allow the adult, or their surrogate or another interested person, to access the court to request restoration of some or all of the adult's rights. The modification or restoration process should include, at a minimum, notice of the right to restoration and an opportunity to be heard.

For this right to be meaningful, the person holding the right must know they have the right. UGCOPAA requires that, within 14 days of appointment, the guardian give the adult, as well as those provided notice, a copy of the court's order as well as notice of the right to request restoration or termination. Initiation of the request for termination or modification should not be so cumbersome as to present a barrier to the adult. Some states allow a request for restoration to be an informal communication to the court, without need for a formal motion.

The guardian's annual report should include a detailed and thoughtful analysis of the adult's capability for restoration and the court should closely review the guardian's analysis and proactively determine that the guardianship continues to be necessary. Finally, the termination of guardianship and restoration of rights process must include the adult's right to representation. UGCOPAA provides that the adult has the right to choose an attorney. If the adult is not represented, the court may or shall appoint one, depending on state law. The court must award reasonable attorney fees. Such compensation is essential for those seeking restoration of rights.

## Discussion Prompts:

1. What are the rights of a person under guardianship?
2. Should state statutes enumerate those rights all adults under guardianship retain?
3. What rights should a court delegate to a guardian?
4. What assistance/information/evidence does a court need to be able to craft an order tailored to the individual's needs and abilities so that as many rights as possible are retained?
5. What should be the statutory test for capacity to contract for marriage? Is it the same as the capacity to contract? What should be the limits on the right to marry?
6. What should be the statutory test for capacity to initiate a divorce? What should the limits on the right to obtain a divorce? Should a guardian have the authority to initiate a divorce?
7. Under what circumstances should a guardian have the authority to limit the adult's association with others? What statutory provisions should be in place to ensure a guardian does not unnecessarily isolate the adult from those the adult wishes to associate?
8. What procedures need to be in place to ensure that adults under guardianship have the right to access the court and to receive meaningful review of the full or partial restoration of their rights?
9. How proactive should the guardian be in supporting the adult's desire to have rights restored?
10. Should states require a notice of rights such as provided in UGCOPAA? How can such notices be most effective in prompting action to protect rights?
11. What judicial, legal, guardian, and public education is needed to spur a higher level of attention to exercise retained rights and to expand the scope of those rights?