Maximizing Autonomy and Ensuring Accountability
Rights-Based Post-Appointment Issues In The "New Normal"

Edwin M. Boyer, Esq.[1] &
Rebecca C. Morgan, Professor of Law[2]

Abstract

Post-appointment rights for an adult under guardianship allow the adult to exercise as much autonomy and independence as possible, while providing the adult with dignity. Although all post-appointment rights are important, this article focuses on four: (1) listing the rights and notifying the adult and their surrogates of these post-appointment rights; (2) the post-appointment rights of the adult to marry and to obtain a divorce; (3) the adult's right of visitation with others; and (4) the adult's right to seek termination of a guardianship. Recommendations from the authors focus on increasing the protections for adults with these post-appointment rights.

Table of Contents

[1] Attorney at Law, Board Certified in Elder Law.

[2] Professor of Law, Boston Asset Management Chair in Elder Law, Stetson College of Law. The authors thank third year Stetson Law students Evangeline Stewart and George Thurlow for their research assistance and Professor Jason Palmer, David Godfrey, David Hutt, Sally Hurme, Charlie Sabatino, and Erica Wood for their feedback.

Introduction
"Keep your feet on the ground and keep reaching for the stars."[3]

[3] Kasey Casem, https://www.brainyquote.com/quotes/casey_kasem_664691 (last visited Jan. 29, 2021).

The establishment of a guardianship for an adult[4] is not supposed to be the end of the world[5] for the adult under guardianship.[6] Instead, guardianship is designed to provide help and support for the adult who is unable to provide it[7] for themselves.[8] However, it can and often is a significant deprivation of rights for the adult.[9]

---

[4] See Uniform Guardianship, Conservator and Other Protective Arrangements Act (UGCOPAA) § 102(9) defining guardian of the person as "a person appointed by the court to make decisions with respect to the personal affairs of an adult. The term includes a co-guardian but does not include a guardian ad litem."

[5] *See, e.g*. FLA. STAT. 744.1012(3) "[b]y recognizing that every adult has unique needs and differing abilities, it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose;" N.Y. Mental Hygiene Law § 81.01 ("make available to [adult] the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable….[with a system that provides for the] personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person and which affords the person the greatest amount of independence and self-determination and participation in all decisions affecting such person's life." *id.*). *See also, In re* Link, 713 S.W.2d 487, 493 (Mo. 1986) ("Primary purpose of guardianship proceeding … is to protect the well-being of adults who are not able to care for themselves.") (citations omitted.)

[6] Despite the fact that the word, "ward" appears in many state guardianship statutes, the authors intentionally chose to not use the word "ward" but instead use adult to refer to the person under guardianship. *See,* THIRD NATIONAL GUARDIANSHIP SUMMIT STANDARDS AND RECOMMENDATIONS, *Definitions for Guardianship Summit Standards/Recommendations,* 2012 UTAH L.REV. 1191, 1192 (2012). *See also*, UGCOPAA, Prefatory Note ("The person-centered approach is evidenced in the act's updated terminology. The terms "ward" and "incapacitated person," which were rejected by the NGS as demeaning and even offensive, are eliminated and the more precise terms "adult subject to guardianship," are used instead."). *See also*, comment to UGCOPAA § 102 explaining further. "The 2017 act replaces the term "ward," which was used in prior versions of the act….This change reflects a modern understanding that the word "ward" has pejorative implications, and implements Recommendation 1.7 of the Third National Guardianship Summit that the term be avoided in favor of person-first language. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012)."

[7] *See, e.g.*, FLA. STAT. § 744.1102(2) "It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed." *See also, e.g. In re* Parker, 275 S.W.3d 623, 631 (Tx. App. 2008) ("In creating a guardianship that gives a guardian limited power or authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person." *citing to* TEX. PROB. CODE § 602); *In re* Guardianship of D.E., 2020 WL 5581738, *16 (N.H. Sept. 18, 2020)("guardian shall act with respect to the ward in a manner which safeguards to the greatest extent possible the civil rights of the ward, and shall restrict the personal freedom of the ward only to the extent necessary" citing to N.H. STAT. ANN. § 464-A-25).

[8] The authors are using variants of the singular "they" in this article, to avoid the use of gender-specific pronouns.

[9] *See, e.g*., *In re* Link, 713 S.W.2d 487, 493 (Mo. 1986)("beneficial motives behind guardianship [obscure] the fact that guardianship necessarily entails a deprivation of the fundamental liberty to go unimpeded about one's ordinary affairs.") (citations omitted); Guardianship of Helen F., 60 A.3d 786 (Me. 2013)(discussing "[f]undamental personal liberty interests … at stake in guardianship proceedings.") (citations omitted)

This paper examines some of the more significant post-appointment issues regarding the adult's rights, that have developed since the Third National Guardianship Summit.[10] Recognizing the significant number of post-appointment issues, the authors chose to focus on some of those that can affect the adult frequently and personally.[11] First, to set the stage, this paper will briefly examine examples of statutory statements of basic rights, a "bill of rights," retained by the adult under guardianship statutes. Next this paper will look at the issues of marriage and divorce for adults under guardianship. Third, this paper will examine the issues surrounding visitation, or lack thereof, by adults with others, especially those adults residing within facilities. Fourth, this paper will discuss the process for the adult's right to restoration.[12]

Bill of Rights for Persons Under Guardianship

"[An adult under guardianship] has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United states, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted."[13]

In the guardianship statute, the inclusion of a post-appointment bill of rights[14] for the adult under guardianship is critical to highlight the purpose of guardianship, the role of the guardian, and the rights of the adult under guardianship. These bills of rights emphasize the autonomy of the adult and remind us that despite the existence of a guardianship, the adult still has rights, important rights. These bills of rights fall into two general groups: one is a statement of explicit rights and the other is more a statement of

---

[10] *See, Third National Guardianship Summit Standards And Recommendations*, 2012 UTAH L. REV. 1191 (2012). The authors chose to highlight several of those issues, especially those that have taken increased importance during the pandemic.

[11] The authors recognize that all of the rights are important, but page constraints prohibit us from discussing all post-appointment rights. Our decision was to focus on those that would affect the adult's quality of life on a frequent basis rather than occasionally. For example, although the right to vote is quite significant, and gained attention in the 2020 election, we chose to not discuss that right since it does not affect the adult's quality of life on a regular basis, instead occurring only when there is an election or a vote on a ballot issue. The authors recognize the right to vote is important not only to the adult, but to the political process. As one court noted, "The case before the Court involves one of the most fundamental rights granted to American citizens: the right to vote in government elections. The importance of this right cannot be overstated in a democratic system, where voting is an act of self-definition and an expression of deeply held personal beliefs. It is also not solely a personal right without the potential for great societal consequence: as recent history demonstrates, the votes of a few can change the course of our nation." *In re* the Guardianship of Erickson, 2012 Minn. Dist. LEXIS 193, *1 (Oct. 4, 2012).

[12] More recently, instead of restoration of rights, the statutes frame the issue as termination of guardianship. *See, e.g*., UGCOPAA, § 319.

[13] TEX. EST. CODE § 1151.351(a).

[14] These are distinguished from the due process rights that the adult alleged to be incapacitated has prior to and during the hearing. *See, e.g*., MICH. COMP. LAWS § 700.5306a (pre- and post-due process type of rights); MO. REV. STAT. §§ 475.075(2),(4),(6),(10); *see also generally,* NEV. REV. STAT. §159.328 and Matter of Holmes, 2015 WL 628283 ¶¶ 9, 11 (Oh. App. Feb. 12, 2015) (noting due process requirements for hearing in Ohio statute and burden on adult to request rights).

implicit rights. In some states like Florida[15] and South Carolina,[16] the bill of rights is a statement of explicit rights, in fact a long list. In other states, the bill of rights is a statement of implicit rights, that is, more of a summary statement referencing constitutional and civil rights.[17]

In order for a bill of rights to have significance, the adult, the adult's surrogates, and the guardian need to know and understand the post-appointment rights of the adult. Consider the approach taken in the UGCOPAA, Section 311,[18] which takes an affirmative step to ensure the adult knows their rights, by requiring the court to timely provide a notice to the adult in an easily readable statement that is written in plain language and, when possible, in the adult's most comfortable language.[19] This statement explains the rights of the adult as well as how the adult may pursue relief when those rights are denied.[20]

The bill of rights provision in the guardianship statutes typically give grounds for an adult under guardianship to assert their various rights. The rights contained may vary somewhat, but any statute should include critical and constitutional rights, such as access to the courts, privacy, and dignity.[21]

---

[15] *See, e.g.*, FLA. STAT. § 744.3215(1); NEV. REV. STAT. §159.328.

[16] *See, e.g.*, S.C. CODE ANN. § 62-5-304A.

[17] *See, e.g.*, TEX. EST. CODE § 1151.351.

[18] UGCOPAA § 311(a) provides for the guardian to give notice within 14 days to the adult and others entitled to notice, a copy of the order as well as a notice explaining the right to seek modification or termination. Under § 311(b), the court must give the adult, the guardian and those entitled to notice a "statement of rights" and the process to obtain relief when those rights are denied. The statement in required to be written in plain language, in 16-point font, and as far as reasonably possible, in whatever language in which the adult is fluent.

[19] *Id.*

[20] UGCOPAA § 311(b).

[21] *See, Appendix A* for an illustration of some bills of rights. *See also*, *e.g.,* FLA. STAT. 744.3215(1); MISS. CODE ANN. § 93-20-310(2) and NEV. REV. STAT. §159.328. For example, Arkansas provides that the adult "retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court." ARK. CODE ANN. § 28-65-106(a). Arkansas's statute also specifically states that the adult has the right to visit with those of the adult's choosing and if the adult is unable to provide direct consent because of a cognitive or physical condition, the consent "may be presumed by a guardian or a court based on the [adult's prior relationship[with the person seeking …. Visitation…." ARK. CODE ANN. § 28-65-106(b)(1)-(2). Florida statute's "laundry list" specifically includes the right "[t]o receive visitors and communicate with others." FLA. STAT. § 744.3215(1), (1)(m). In Florida an interested person may file a petition regarding the guardian's denial of the person's visitation with the adult. FLA. STAT. § 744.3215(1).

The bill of rights in the Minnesota guardianship statute is similar to that in Florida and notes that "[t]he person subject to guardianship or person subject to conservatorship retains all rights not restricted by court order and these rights must be enforced by the court." MINN. STAT. § 524.5-120.

Michigan's bill of rights combines pre-appointment due process protections as well as post-appointment rights. MICH. COMP. LAWS § 700.5306a(1). Mississippi's recently added bill of rights is similar to that of Florida and Minnesota; it contains a laundry list of rights, albeit shorter.[21] Nevada has a mix of due process type rights as well as personal rights.[21] Missouri's statute includes a list of pre-appointment due process rights as well as a list of rights the adult retains or loses. MO. REV. STAT. § 475.075.

Oregon's contains a general statement plus a short list, OR. REV. STAT. §§ 125.300(3), 125.082; South Carolina's bill of rights is similar to that of Florida's. S.C. CODE ANN. § 62-5-304A.

Rights of Persons Under Guardianship to Marry and Divorce

As noted, there is considerable variation from state to state on how the rights of an adult under guardianship are to be protected. The right of an adult under guardianship to marry and divorce must be examined keeping this variation in mind, and also recognizing the impact that the changes in society's view of marriage and divorce have on these rights.

There is a growing interest in understanding these changes and the resulting legal framework and addressing its impact on adults under guardianship. The goal is ensure the proper balance between enhancing autonomy and independence and protection.

Demographics and Populations Impacted.

As the population ages, age dependent illnesses which produce dementia are more likely to occur. Based on an analysis of 2011 to 2015 National Health and Aging Trend Studies about 5% of adults age 70 to 79 had probable dementia in 2015 compared with 16% of adults age 80 to 89 and 31% of adults age 90 and older. The number of adults with dementia is expected to increase sharply.[22]

Persons with diminished capacity over the age of 65 are not the only group who may be in need of some form of fiduciary or other protection and support because they have a cognitive disability. The Center for Disease Control estimates that 10.8% of the population between the age of 15 and 64 suffer from some type of cognitive impairment. [23]

Different populations will most likely be interested if different rights. 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.

There is also an increasing awareness of a small but growing population of adults described as follows:

> "Individuals whose mental condition deprive them of mental competence to initiate a divorce without incapacitating them in other aspects of their lives. In other words, psychiatric conditions such as incipient Dementia, Schizophrenia Paranoid Type, Delusional Disorder, and Affective Disorders that could conceivably create specific incompetence to maintain a divorce action but leave

---

The Texas bill of rights opens with the statement that the adult under guardianship "has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of [Texas] and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted." TEX. EST. CODE §§ 1151.351, 1151.351(a).

[22] Mark Mather, and Paola Scommegna, *The Demography of Dementia and Dementia Caregiving, Population Reference Bureau* (May 28, 2020).

[23] Ctrs. For Disease Control and Prevention https://www.cdc.gov/disability (last visited)

> their sufferers ineligible for civil commitment, able to care for themselves, and capable of managing day to day finances well enough to avoid harm.[24]

These are people who may seek a divorce and who are susceptible to psychiatric impairments that severely distort thinking about their spouse and yet other aspects of their ability to function is intact.[25]

Historical Perspective on Capacity to Marry

Present Legal Standards for determining capacity to marry have been shaped by the historical development of the institution of marriage. It evolved as a religious spiritual institution with formalized rituals, containing civic and public elements with a legal framework. The law views marriage as a contract but it is more. As stated by the United States Supreme Court in Maynard v. Hill in 1888:

> "Marriage is something more than a mere contract, though founded on the agreement of the parties. When once formed, a relation is created between the parties which they cannot change, and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority.[26]

The legal basis for determining capacity to marry is grounded in English Common Law exported to the American Colonies, and ultimately adopted by the states after the revolution. "At common law there was a legal presumption that a marriage was valid. Getting married was easy. Marriage was contractual but it was viewed as a simple contract. The standard for mental capacity to marry was a low standard"[27]. It is primarily State law that regulates marriage. Although states differed widely in marriage laws most have adopted the common law view of marriage.[28]

Changing View of Divorce

There has also been significant change in society's view of divorce since the 1950's. As one author states:

> "For the first time in human history, divorce has replaced death as the most common endpoint of marriage. This unprecedented shift in human coupling and uncoupling requires a new paradigm,

---

[24] Douglas Mossman and Amanda N. Shoemaker, *Incompetence to Maintain a Divorce Action: When Breaking Up is Odd to do*, 84 ST. JOHN'S L. REV. 117, 139 (Winter 2010).
[25] *Id.* at 117.
[26] Maynard v. Hill, 125 U.S. 190 (1888).
[27] ABA Commn. On L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers* 21 (2005).
[28] Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 BOSTON U. L. REV. 1817 (Winter 2012).

> that is, a more humane approach for social policy, family law, and marital therapy "[29]

This sentiment is certainly applicable to guardianship law and adjudication of adults under guardianship and their right to marry and divorce. It is reflected in the Trends discussed in this paper such as the movement toward person centered guardianship, a bill of rights for adults under guardianship, less restrictive alternatives to guardianship, limited guardianships and supported decision making,

Before the 1950's divorce was fault based and stigmatized. Going back to the industrial revolution the divorce rate was just below 10%. [30] Things began to change in the 1960's. Between 1970 and 1985, beginning with California, almost every jurisdiction moved from a fault-based model to no-fault divorce statutes. Most jurisdictions however retained fault or no-fault options.[31] The no-fault-based models were meant to eliminate the hostile and embarrassing need to prove the narrow fault grounds for divorce. 1974 was the point when the 50% mark for marriages ending in divorce was reached. By 1985 it was 55%. [32] It remained steady until the beginning of the 21st Century. Since then it has declined slightly but remains between 40% to 50%.[33]

Common Law Situation Specific Standards For Capacity

Our legal system has historically recognized situation specific standards of capacity such as testamentary capacity, capacity to make a gift, capacity to contract, etc. Some of these such as testamentary capacity are fairly well established. Each test could vary depending on the specific situation or task and jurisdiction, but fundamentally each common law test was concerned with whether a person understood in broad terms what they were doing, and the likely effect it had on their actions.[34]

This tended to provide flexibility for the courts in applying the tests but it frequently resulted in very fact specific cases with the emphasis on doing justice in a particular case. This result was overall uncertainty and unpredictability[35]

In these situation specific tests to determine capacity to perform the function or exercise the right, particularly the test for capacity to marry or divorce, there are often two competing goals. On the one hand there is a desire to protect the individual with diminished capacity. On the other hand, there is a goal to enhance and support decision

---

[29] James P. Cunningham, *Marriage in the 21st Century*, 83 MICH. B. J. 16, 19 (January 2004).
[30] *Id.*
[31] Terri Dobbins Baxtera, *Marriage on Our Own Terms*, 1 N.Y.U. REV. L. & SOC. CHANGE (2017).
[32] Cunningham, *supra* n. 29 at 19.
[33] American Psychological Association, https://apa.org/topics/divorce-child-custody (last visited)
[34] American Bar Association, *supra* note 27.
[35] The British Columbia Law Institute Common-Law Tests of Capacity Project Committee, *Report on Common Law Tests of Capacity*, BCLI Report no. 73, (September 2013).

making autonomy, independence, and self-determination of the adult with diminished capacity.[36]

Further, the situation specific standards for capacity are typically ranked in a hierarchy of those decisions requiring a higher degree of mental capacity being at the top, and the lowest, such as capacity to marry being at the bottom.[37]

It is in this context that the common law test for capacity to marry and divorce evolved.

Capacity Under State Guardianship Statutes

In addition to situation specific capacities, the law has long recognized the authority of the state to adjudicate an adult to be incapacitated and remove their rights. Determinations of incapacity under state guardianship law historically were global, and generally based upon an underlying medical or other condition.[38]

During the last half of the 20th century, guardianship laws began to focus less on the medical diagnosis or condition and moved toward applying one or a combination of the following component's for determining legal capacity under guardianship law:

(1) A medical condition
(2) A functional component based upon the adult's ability to function in society and care for themselves
(3) A cognitive component which focuses on the adult's decision making ability, or ability to receive and evaluate information, and communicate decisions.
(4) Necessity and risk of harm which focuses on whether the adult needs protections and is at risk or if there are alternatives or supports available that will avoid a guardianship.[39]

For example, Florida's guardianship statute changed significantly in 1989 from a strictly all or nothing diagnostic model to a model where an adult's ability to exercise numerous specific rights including the right to marry were assessed. The statutory definition of legal incapacity used only component 2 and 4. The ability to exercise the specific rights or perform the functions were independently assessed, and either retained or removed. Diagnosis alone was not a basis for finding an adult to be incapacitated and in need of a guardian.[40]

---

[36] *Id.*
[37] Emily Clough and Michael Larsen, The (Not so) Simple Contract: Mental Capacity & the Act of Marriage, unpublished paper at 7.
[38] American Bar Association, *supra* n. 27 at 8.
[39] *Id*.
[40] FLA. STAT. § 744.102(12).

Even though all state guardianship statutes use one or a combination of the above components to determine legal capacity under guardianship law, they vary widely in the extent to which they focus on the needs of the adult, provide for limited guardianships, or consider less restrictive alternatives to guardianship. They also vary widely in the extent to which they required that there be findings to support orders removing the adults rights or granting plenary powers to the guardian.

Whatever the jurisdiction, you need to consider both the situation specific legal standard for the right to marry and divorce as well as how the state guardianship statute addresses the right to marry and divorce.

The Common Law Standard for Capacity to Marry

The English Common Law standard for capacity to Marry is stated in the frequently cited 1855 English probate case, Durahm v. Durahm. [41] "It appears to me that the contract of marriage is a very simple one, which it does not require a high degree of intelligence to comprehend. It is an engagement by a man and a woman to live together and love each other as husband and wife to the exclusion of others". I accept for the purpose of definition (of soundness of mind) which has been substantially agreed to by counsel, viz, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates."[42]

State Standards For Capacity to Marry

Most states have adopted some form of the Common Law standard for capacity to marry. In Johnson v. Johnson,[43] the court stated "The best accepted test as to whether there is a mental capacity sufficient to contract a valid marriage is whether there is capacity to understand the nature of the contract and the duties and responsibilities which it creates"[44] The court went on to state that the issue must be resolved by the ascertained and established facts in each case and on grounds existing at the time of the marriage. American Law Reports at 82 ALR 2d, 1040 cites cases in twenty-four states that support the standard adopted in the Johnson case. [45]

Right to Marry Issues in the Guardianship Practice

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 where the adult under guardianship gets married or asks the guardian if they can get married after adjudication.

Marriage Before Adjudication

---

[41] Durham v. Durham, 10 P.D. 80 (1855).
[42] *Id.* at 82.
[43] Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960).
[44] *Id.*
[45] Uniform Law Reports, 82 A.L.R.2d 1040.

Where marriage occurs before adjudication, in addition to having to establish the elements of the legal test for capacity to marry adopted by the particular jurisdiction, it must be determined whether the jurisdiction permits the guardian to either annul the marriage or bring an action for divorce. This is addressed more completely in the following section covering right of an adult under guardianship to divorce.

Frequently a person with diminished capacity will marry and the family will initiate a guardianship proceeding to annul or set aside the marriage. These "Guardian driven" divorce or annulment actions are filled with challenges such as the interests of heirs trying to protect their inheritance, the guardians bias against the new spouse, Professional or public guardians being appointed who do not know the adult and may have no appreciation for the aims and values of the adult under guardianship.[46] Again, it is a balance between enhancing and preserving the autonomy and independence of the adult under guardianship with the need to protect them.

Based upon practice experience in these cases, the outcome for the adult under guardianship and whether the proper balance is achieved depends upon the quality of due process and other protections found in the state guardianship statute, and the comprehensiveness of the examination process.

Marriage After Adjudication

Although the criteria may differ among states, all state guardianship statutes presume capacity.[47] Just because an order has been entered adjudicating an adult to be incapacitated does not bar contracting a valid marriage. As stated in American Law Reports review of American cases where there was a marriage after adjudication:

> "Later cases also support the earlier statement that where one has been adjudged of unsound mind, and afterward, while under guardianship contracts a marriage, it does not seem, independently of statute, that this is conclusive proof of a want of mental capacity to contract marriage".[48]

The issue then becomes what is the legal test adopted in the jurisdiction to determine the legal capacity to marry and how does the states guardianship statute address the right to marry?

Guardianship statutes in only nine states make specific reference to the right to marry. Five of these states, Florida, Minnesota, Missouri, Oklahoma, and New Hampshire, include the right to marry and other multiple specific rights that are assessed

---

[46] Diane Snow Mills *"But I Love What's His Name": Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents*, 16 J. AM. ACAD. MATRIM. LAW. 527 (2000).
[47] American Bar Association *supra* n. 27, at 7; *See also* 52 Am. Jur. 2d Marriage, §25.
[48] Uniform Law Reports, 82 A.L.R.2d 1040§7(b).

and either retained or removed. These states also require specific findings to support removal of these rights. [49]

The remaining four states, Nevada, Maine, Washington and New Hampshire, have a general statement of rights and include a specific reference to the right to marry. [50] Maine and Washington have adopted UGCOPPA, which provides that an adult retains the right to vote and marry, unless the court orders otherwise with specific findings required. [51] Nevada provides that each protected person has the right to exercise control over all aspects of life not specifically delegated to the guardian, including the right to marry or form a domestic partnership. No other specific rights are mentioned.[52] New Hampshire provides that that no person shall be deprived of the right to marry except upon specific findings. [53]

Five states, Michigan, Mississippi, Oregon, Tennessee, and New York, do not specifically mention the right to marry but the statutes are structured such that the removal or retention of the right would have to be specified in the order of adjudication.[54]

Of the remaining states, twenty-two either make some reference to limited protective arrangements or require that less restrictive alternatives to guardianship be addressed, which conceivably could be a basis for crafting more thorough adjudication orders covering multiple rights. Of all the states, only thirteen make specific reference to protections and supports.[55]

What happens when the court determines that the alleged incapacitated person has the capacity to exercise the right to marry but does not have capacity to contract? And thereafter, the adult under guardianship gets married.

In 2017, the Supreme Court of Florida answered that question with a unique approach. It held "[w]here the fundamental right to marry has not been removed but the right to contract has been removed, the ward is not required to obtain court approval prior to the marriage but court approval is necessary before the marriage can be given legal effect." A specifically concurring opinion in the case seems to recognize the right to marry as a fundamental right as well as a contractual arrangement.[56]

The Right to Divorce

---

[49] FLA STAT. §744.3215(2)(a); MINN. STAT. 5.24.5-120(11); MO. REV. STAT. §475.075(14)(7); OKLA. STAT. ANN. T30 §3-114; RSA 464-A:9 – I.
[50] NEV. REV. STAT. §159.328; 18-C M.R.S §4-310; W.R.C. 11.130.310(1)(d); RSA 464-A:9 – I.
[51] 18-C M.R.S. §4.310; W.R.C. 11.130.310(1)(d).
[52] NEV. REV. STAT. §159.328.
[53] RSA 464-A:9 – I.
[54] MICH. COMP. LAWS §700.5306a(1); MISS CODE ANN. §93-20-309(2); ORE.REV.STAT. §125.300(3); TENN. CODE ANN. §34-3-104(8); Mental Hygiene Law §81.29.
[55] American Bar Association Commission on Law and Aging and Sally Balch Hurme, *Capacity, Definition & Initiation of Guardianship Proceedings (Statutory Revisions as of August 20, 2020);* https://www.americanbar.org/aging.
[56] Smith v. Smith, 224 So. 3d 740 (Fla. 2017).

What are the rights of an incapacitated person to divorce? Like marriage, the legal standard to determine capacity to divorce has also been shaped by the historical and societal view of the institution of marriage and divorce. If, as previously suggested, marriage is more than a contract, then divorce can be more than a simple breach of contract, particularly if a person is under guardianship.

The Right of an Adult Not Under Guardianship to Divorce

If the adult has not been adjudicated to be incapacitated, it is generally presumed that the adult has the capacity to bring a divorce action. The test is that the adult reasonably understands the nature of the action taken.[57] Where there is no adjudication the cases cited typically adopt the rule that the petitioner not only understand the nature and purpose of the action, but the effect of their acts with reference to the action, and the will to decide for themselves whether or not to bring the action.[58]

In one article, the authors suggest that this test may no longer be adequate to address situations where a petitioner suffers from a psychiatric illness or condition that profoundly affects their judgment, such as a delusional disorder, but leaves other aspects of functioning intact.[59]

The authors reviewed the case law existing at the time and found only seven cases where the Petitioner seeking a divorce was not adjudicated to be incapacitated, and although not necessarily incompetent to manage most other aspects of their affairs, they reflected psychotic motivations.[60]

They ask how a court should respond in a situation where a married person has not been adjudicated to be incapacitated and seeks a divorce, but their functioning is impaired as a result of insipient dementia, Schizophrenia, paranoid type, Delusional disorder, Affective disorder or some other recognized behavioral disorder:

> If the trial court knows the husband is seeking to divorce his wife for reasons that represent symptoms of a severe mental illness, but the husband understands the key factual implications of obtaining a divorce – ending the marriage and separating lives and property, should the trial court allow him to proceed". [61]

[57] 19 A.L.R.2d 144, §21, 64.
[58] *Id.* at 65, *citing* Stephens v. Stephens, 10 N.W.2d 620 (Neb. 1943), Spooner v. Spooner, 97 S.E. 670 (Ga. 1918), and Lovett v. Lovett, 493 S.E.2d 435 (Ark. 1973).
[59] Mossman & Shoemaker, *supra* n. 24 at 119.
[60] Mossman & Shoemaker, *supra* n. 24 at 128.
[61] Mossman & Shoemaker, *supra* n. 24 at 196.

Although the article is ten years old, these types of cases are still prevalent in our practice and from personal experience are increasing yet the legal standards for capacity to divorce have changed little.

The authors of this article suggest that there is no consistent recognition by courts of a specific form of competence or incompetence to initiate or maintain a divorce action. In the article They propose a model statute.

These types of cases point out the shortcomings of a global approach to legal incapacity and the need to focus more on those functions or rights an individual is able to perform thereby seeking limited guardianships. In addition to cognitive impairment, there also needs to be a recognition of the impact of mental health and behavioral conditions that can impair an adult's ability to function or exercise their rights. We must take care not to adopt legal standards that limit the court's ability to consider all the strengths and limitations of the individual and all supports and protections available.

The Right of an Adult Under Guardianship to Divorce

What are the rights of an adult who has been declared to be incapacitated by a court to lack the capacity to initiate a divorce? To answer that question, we first need to examine the legal standard of capacity to initiate a divorce if there is not an adjudication, because that standard is typically applied if the adult is under guardianship.

Unlike other well established situation specific capacities previously mentioned, there is little case law on capacity to divorce. Under the case law during the early part of the 20th Century, capacity to divorce was presumed. All that was required was that the adult understand the nature of the action taken.[62] As the Supreme Court of Nebraska stated:

> If a plaintiff in an action for divorce reasonably understands the nature and purpose of such action, the effect of his acts with reference thereto, and has the will to decide for himself whether action should be brought, he has sufficient mental capacity to maintain such action in his or her name.[63]

The courts have recognized that even if there was no adjudication, the adult could participate, and be heard in the process of dissolution of the marriage.[64]

Where there is a limited guardianship and the right to divorce is not addressed in the order, attorneys retained by the Person under limited guardianship to seek a dissolution

[62] 19 A.L.R. 2d 144 §20, 65.
[63] Stephens v. Stephens, 10 N.W.2d 620 (Neb. 1943).
[64] Garnett v. Garnett, 114 Mass 379, 19 Am Rep. (Mass. 1874). The court stated, "Even a person who is incapable of managing property, or transacting the ordinary affairs of life, or of contracting a valid marriage, may yet have feelings and interests entitled to serious consideration in determining whether the status of the relations of marriage shall not continue."

of marriage are often in a quandary as to whether they can presume to represent the adult, or whether they have to rely on the consent of the guardian to proceed.

Right of Adult Under Guardianship Who is Respondent in a Divorce

Where the person under guardianship is a respondent in a divorce the case law will typically not prohibit the divorce. However, in states that have adopted statutes addressing this issue the statutes usually deal with representation and waiting periods before permitting the divorce to be finalized.

In Florida, mental incapacity is grounds for divorce. The incapacitated spouse must have been determined to be incapacitated pursuant to the provisions of Florida's Guardianship statute for a preceding period of at least 3 years. If the incapacitated person has no guardian other than the party bringing the proceeding, the court is required to appoint an ad litem to represent the interests of the incapacitated party.[65]

Rights of Adult Under Guardianship to Divorce - Majority Rule

If one of the parties to the marriage was incapacitated, the majority rule was that courts would not permit a fiduciary for the incapacitated spouse to bring an action for divorce. Marriage was an institution of society, regulated and controlled by public authority. Divorce was not perceived as a common law right. It too was regulated and controlled by public authority. The institution of marriage and the family are so fundamental to our society that institutional and legal principals have not favored divorce.[66] The courts reasoned that the right of a fiduciary to initiate a divorce for an incapacitated spouse would not be permitted absent specific statutory authority.[67]

This, along with the line of reasoning that divorce is simply too personal a decision to permit a fiduciary to pursue a divorce on behalf of the person under guardianship, became, and still is, the majority rule.[68] As the court said in Johnson v. Johnson, which prohibited a guardian from pursuing dissolution for the incapacitated spouse, even though the guardianship statute permitted the guardian to pursue actions in the name of the person under guardianship:

> "in conferring this general authority, the legislature did not intend to vest a guardian with the power over strictly personal and volitional affairs of the ward to the extent of controlling the wards marital status, and that the statute was intended to restrict the right of the

[65] FLA. STAT. § 61.052(1)(b).
[66] Mark J. Esposito, Esq., *Predatory Marriage*, 17 NAELA J e-issue (Spring 2021).
[67] *In re* Marriage of Drews, 534 N.E.2d 411.
[68] *See,* Keith Bradoc Gallant & Rebecca A. Iannantuoni, *When a Client Lacks Legal Competency, Who Files for the Divorce?,* 39 Family Advocate 12, 15(2017): s*ee also, In re* Jennings, 453 A.2d 572, 574 (Ch. Div. 1981; Ruvalcaba, 580 P.2d 674, 676 (Ariz. Ct. App. 1993).

> incompetent to maintain actions in his or her own name rather than as an enlargement of the powers of the guardian"[69]

It is universally recognized that there is, and historically has been, a majority rule among the states which does not permit a guardian or legally appointed fiduciary or next friend, to initiate a divorce for the person under guardianship. [70]

A rationale for the majority rule was offered by Bella Feinstein, Esq. in an article published in the Journal of the National Academy of Elder Law Attorneys, in the Fall of 2014:[71]

> "Under early common law majority rule a guardian lacked the authority to initiate a divorce action on behalf of the ward. Courts relied on two main rationales to support this rule. First, courts reasoned that the right to divorce is not a common law right, but rather a right dependent upon legislative enactments. Accordingly, absent a specific divorce or guardianship statute that grants guardian authority to initiate a divorce action on behalf of the ward, a guardian lacks the authority to do so. Second, courts reasoned that the decision to file a divorce is so personal that it cannot be made by anyone acting in a representative capacity."[72]

Those writing on this issue agree that the 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.[73] The fundamental unfairness of the majority rule is starting to be recognized in many jurisdictions.

Development of the Minority Rule Permitting Guardians to Initiate Divorce Proceedings

The article by Bella Feinstein, Esq. reviewed cases in 18 states that have rejected the majority rule. The article suggests three trends in society that have led to rejection of the majority rule:

---

[69] Johnson v. Johnson, 170 S.W.2d 889 (KY. 1943).
[70] See Gallant & Innantuoni, *supra* n. 68 at 13-14. *See also,* Murray v. Murray, 426 S.E. 2d., citing 32 A.L.R.5th 883.
[71] Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203 (Fall 2014). *See also*, Mark Schwartz, *The Marriage Trap, How Guardianship Divorce Bans Abet Spousal Abuse*. 13 JLFS 187 at p. 2.; Matthew Branson, *Guardianship-initiated Divorces: A Survey*, 29 JAAML 2016, 171, 172; *In re* Marriage of Drews, 503 N.E.2d 339 (Ill.1987); Shenk v. Shenk, 135 N.E.2d 436 (Oh. 3d Dist. Ct. App. 1954).
[72] *Id,* at 6.
[73] *Id*.

> In the past 20 years, the convergence of three trends has led an increasing number of courts to reconsidering the majority rule barring guardian-initiated divorces: 1) the liberalization of divorce statutes and the commonality of divorce in our society; 2) the expansion of guardian powers to include immensely personal decisions such as refusal of medical care; and 3) an increasing societal focus on elder abuse and prevention. Based on these trends, a growing number of courts are now rejecting the majority rule.[74]

The cases reviewed show a variety of approaches states are taking to adopt the majority rule and reach a common goal of permitting guardians to initiate a divorce proceeding.

There are cases where the guardianship statute does not specifically authorize the guardian to initiate dissolution proceedings, but the court held that the broad and general powers of guardians found in their guardianship statutes were broad enough to encompass the power to initiate the divorce proceeding. Absent a statute prohibiting the guardian from initiating the divorce, the court can authorize it.[75]

There are cases that follow the majority rule but permit narrow exceptions such as a showing that the person under guardianship can demonstrate that he or she can exercise reasonable judgment, can express a desire to divorce, understands the nature of divorce proceedings or can testify.[76] This is a variation of the lucid moment rule cited in testamentary capacity cases.

There are cases where the courts create new rules establishing criteria similar to that mentioned in the previous paragraph and based on a substituted judgment standard. They permit the court to make the determination based upon the evidence presented such as statements of the adult to others, written expressions of desire to divorce or attempts to initiate a divorce prior to adjudication. If there is no evidence establishing what the adult under guardianship would have done under the circumstances, the court permits the application of the best interest standard.[77]

To protect the adult under guardianship from overreaching, some states require the appointment of an ad litem to represent the interests of the ward or require an enhanced standard of evidence before permitting the dissolution. [78]

Although states take different approaches and fashion their own versions of the minority rule, there is one constant. They all agree that there should not be an absolute prohibition against guardians being able to initiate divorce proceedings for the adult under

---

[74] Feinstein, *supra* n. 71 at 6.
[75] Broach v. Broach, 895 N.E.2d 436 (Oh. App. 1954).
[76] Syno v. Syno 594 A.2d 307, 311 (Pa. Super. 1911).
[77] Ruvalcaba v. Ruvalcaba, 850 P.2d 674, (Ariz. App. 1993).
[78] Feinstein, *supra* n. 71 at 210.

guardianship.[79] The guardians may be initiating the divorce at the direction of the adult under guardianship, but we need to recognize that the adult under guardianship may not want the divorce and may disagree with the petitioner who files for divorce and objects to the new spouse. [80]

Review of the case law after 2014 reveals a continuing trend in favor of the minority rule but there continues to be distinctions among the cases. In Brooks by Elder Serve, Inc. v. Hagerty,[81] a 2021 case, the Supreme Court of Kentucky overruled a long line of cases prohibiting such action finding that the cases were based upon guardianship statutes that had undergone fundamental revisions. The Court ruled that when a guardian initiates a divorce action on behalf of the person under guardianship, the district court is required to hold an evidentiary hearing. The only standard is that the court must determine if the action is in the wards best interest. The court is also required to permit the adult under guardianship to participate to the maximum extent of their abilities. If feasible the competent spouse is permitted to testify. If the guardian stands to benefit from the divorce the court may appoint an *ad litem* [82]

In *In re* Burnett Estate,[83] a 2014 Michigan case, the court permitted a guardian to initiate a proceeding for dissolution of marriage because the statute did not expressly prohibit it. It reasoned that the legislature wanted to prohibit it they could have expressly said so.[84]

Statutory Adoption of the Minority Rule

Because of the apparent struggle of the courts to reach a common goal with different approaches, it would appear that the reasonable approach would be by statutory reform.

Florida, Colorado, Missouri and Illinois have adopted statutes specifically permitting Guardians to initiate dissolution proceeding on behalf of the adult under guardianship. Maine and Washington have adopted the See UGCOPAA which has specific provisions permitting a guardian to initiate a divorce.[85]

Florida permits a guardian to petition for authority to initiate dissolution proceedings but it is included under special provisions for what is called extraordinary authority. These Extraordinary authority provisions are required for dissolution of marriage, commitment, or involuntary placement in certain psychiatric facilities, performing experimental biomedical or behavioral procedures or experiments under

[79] Feinstein, *supra,* n. 71, at 210.
[80] Diane Snow Mills *supra* n. 46 at 12.
[81] Brooks by Elder Serve, Inc v. Hagerty, 614 S.W.3d 903 (Ky. 2021).
[82] *Id.*
[83] *In re* Burnett Estate, 834 N.W.2d 93 (Mich. 2013).
[84] *Id.* at 97 (Mich. 2013).
[85] 18-C M.R.S. §4.314; W.R.C. 11.130.314(c); See UGCOPAA §314(c).

certain circumstances, consent to termination of parental rights, and sterilization or abortion procedures.[86]

The special procedures which must be followed require (1) appointment of an attorney for the person under guardianship, (2) receipt by the court of independent medical, psychological, or social evidence on the person under guardianship or appoint an expert, (3) personal meeting by the judge with the person under guardianship so the court can obtain its own impression and allow the person under guardianship to express his or her personal views and desires (4) finding by clear and convincing evidence that the person lacks capacity about the issue before the court , and (5) find by clear and convincing evidence that the action being sought is in the best interest of the person under guardianship.[87]

Prior to 2016 there was a requirement that the spouse consent. If the spouse would not consent, the person under guardianship would again be trapped in a marriage with little recourse. That requirement seemed to undercut the other protections. That requirement was removed by the Florida legislature in 2016 and is no longer a requirement. [88]

The Colorado Statute permits a guardian to petition for authorization to initiate a dissolution but only with evidence of abuse, exploitation, abandonment, or other compelling circumstances that a divorce is in the wards best interest.[89] The Missouri statute requires that the guardian have reasonable cause the ward is or has been a victim of abuse.[90] The Illinois Statute allows the guardian to bring an action for dissolution if it is in the best interest of the person under guardianship.[91]

The Uniform Guardianship, Conservator and other Protective Arrangements Act

The most reasoned approach to protecting the rights of adults under guardianship to marry and divorce, or for that matter, all rights of the adult under guardianship is (UGCOPPA) which has now been adopted in two states, Maine, and Washington[92]

As stated in Assessment of Older Adults with Diminished Capacities; a Handbook for Lawyers, 2nd addition, published by the American Bar Association, Commission on Law and Aging:

> "The 2017 *Uniform Guardianship Conservatorship and Other Protective Arrangements Act,* (UGCOPPA) does not include the terms "capacity" or "incapacitated", or "incapacitated person". Instead, it defines "the basis

[86] FLA. STAT. § 744.3215(4)(a)–(e).
[87] FLA. STAT. § 744.3725.
[88] FLA. STAT. § 744.3275.
[89] C.R.S 15-14-425.5 (2019).
[90] MO. REV. STAT. § 452.314 (2013).
[91] *Id.*
[92] Uniform Law Commission, s*upra* n. 4, https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c&tab=groupdetails.

for appointment of a guardian for an adult" as requiring evidence that:

> "(A) the respondent lacks the ability to meet essential requirements for physical health, safety, or self care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision-making; and (B) the respondents identified needs cannot be made by a protective arrangement instead of guardianship or other less restrictive option, but no medical conditions are included as an element of the definition.".[93]

Thus, the Uniform Act includes both functional and cognitive elements, as well as an assessment of necessity (needs cannot be met by a less restrictive alternative.)"[94]

Under the Uniform Act, only powers necessitated by the needs of the adult are granted to the guardian, and specific findings supporting removal of rights are required. [95]

There are provisions addressing protective arrangements other than guardianship[96], less restrictive alternatives to guardianship, and limited guardianship[97] as well as supported decision making. [98]The focus is clearly on the adult under guardianship.

The Uniform Act draws special attention to two specific rights, the right to vote and the right to marry. An adult subject to guardianship retains the right to vote and the right to marry unless the court orders otherwise. The order removing the right to marry or placing conditions of that right is required to include specific findings that support the removal or limitation of the right.[99]

As it pertains to marriage, this provision as well as the other provisions focusing on person centered guardianship embodies the aspiration of Article 23, of the United Nations Convention on the Rights of Persons with Disabilities which states in part:

---

[93] *See* UGCOPAA §301(a).
[94] American Bar Association, *supra* n. 59 at 77.
[95] *See,* UGCOPAA §310(a).
[96] *See,* UGCOPAA §501.
[97] *See,* UGCOPAA §301(b); §302(b); §310(a)(1); §411(c).
[98] *See,* UGCOCPAA §102(31); §310(a). §310(a); §301(d); §317(b)(3); §402(b)(5).
[99] *See,* UGCOPAA §310(a)(4), (b), §310(b).

> "The right of all persons with disabilities who are Of marriageable age to marry and to found a family on the basis of free and full consent of the intended spouses is recognized."[100]

There is also provision for court approval for the guardian to consent or not consent to marry and to petition for divorce or annulment with consideration of the adult's preferences and values.[101]

The UGCOPAA permits the court to fashion an order designed to address the specific needs of the individual adult under guardianship and forces an exploration of all of the above mentioned components of the act such as less restrictive alternatives to guardianship, non-guardianship protective arrangements and supports.

Marriage and Divorce: Best Practices for Guardians

1. In proceedings where an adult under guardianship has married and the Petitioners goal is to terminate the marriage, learn about and focus on the wishes aims and values of the person under guardianship and acknowledge that the motives of the petitioner may be financial or overly protective. Ensure that the person under guardianship has an advocate so that the process works with a focus on the adult.
2. Recognize that there are behavioral, psychiatric, and other conditions where the adult is not impaired in many day-to-day functions but may not have capacity to make a rational reasoned decision about divorce. Is the reason for the divorce a reason the adult would not hold if they were not suffering from a serious mental illness?
3. The guardian should encourage the right to counsel for an adult under guardianship where the guardianship was initiated to annul the marriage or set it aside.

Recommendations on Marriage and Divorce:

1. The legal test for capacity to marry should not be set too high such that it creates a bar to persons with intellectual disabilities whose lives would be enriched by marriage. The UGCOPPA should be adopted in all states because it provides the appropriate framework to protect and support the right to marry and yet includes components to protect adults from risk of harm.
2. There are statutory tests for specific capacities such as capacity to stand trial, capacity to testify, capacity to consent to medical treatment. A statutory test for capacity to divorce should be adopted as recommended by two articles cited in this paper.

---

[100] UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: https://www.refworld.org/docid/45f973632.html (accessed).

[101] *See,* UGCOPAA §314(c).

3. Develop training modules for court examining committee members or evaluators of alleged incapacitated persons in guardianship proceedings that specifically address functional impairment caused by conditions or diseases other than the major dementia causing diseases such as Alzheimer's type dementia. These include changes in personality and emotional makeup that may accompany early dementia, such as paranoia, and specific delusions/. Also included are Schizophrenia, Paranoid Type, Delusional Disorder, Affective Disorders, Traumatic Brain Injury.
4. NGN should enlist the support of the family law bar of each state to lobby for the adoption of the UGCOPPA.

The Right to Have Visitors

"Chronic loneliness increases the odds of an early death by about 20 percent…."[102]

"Estrangement from family, friends, and acquaintances can be a precursor and a consequence of guardianship. The factors that led to the appointment of a guardian – mental illness, dementia, poverty, abuse, and exploitation –may have also led to unwanted isolation. Family, friends, and professionals should all be aware of the potentially devastating effects of isolation on the person; loss of ties to friends, family, and social networks can have a negative effect on anyone's physical and mental health."[103]

[102] New York Times Editorial Board, *Nursing Home Patients Are Dying of Loneliness,* N.Y. TIMES (Dec. 29, 2020); https://www.nytimes.com/2020/12/29/opinion/coronavirus-nursing-homes.html (citing to John T. Cacioppo and William Patrick, LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTIONS (W.W. Norton & Co. 2008).

[103] ABA Legislative Fact Sheet: Guardianship and the Right to Visitation, Communication, and Interaction at 1-2 (citing to Isolation leads to an increased risk for depression, cognitive decline and dementia, and even premature death. Julianne Holt-Lunstad, The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors. Public Policy & Aging Report, The Gerontological Society of America, Vol. 27 No. 4 at 128 (2017).); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.

Brooke Astor.[104] Glen Campbell.[105] Casey Kasem.[106] Peter Falk.[107] Mickey Rooney.[108] Besides their fame and fortunes, they have something else in common. All of them were isolated. As social creatures, humans' ability to interact with others, especially those close in our hearts, can be an important part of physical and mental health.[109] However, family tensions, sibling rivalries and more can cause negative emotions to explode during a visit with the adult, leading to the guardian's restricting visits when these visits become detrimental to the well-being of the adult. But what if the adult is the mother and the guardian is one of the siblings and the other siblings have a fraught relationship with the sibling guardian? Is it appropriate for the guardian to restrict visitation of the siblings with their mother just because the siblings have a poor relationship? What if the siblings spend their time with their mother whispering negative thoughts or outright lies about the guardian, hoping to turn the mother against the guardian-child? In cases like these, is it appropriate for the guardian to restrict or eliminate the siblings' visits with their mother? What if instead, the guardian is a professional, and determines that the children can only have supervised visits with their parent because the parent is so upset after the children's visits? What if the adult is an adult child with the parent as guardian, and the parent/guardian doesn't approve of the friends with whom the adult is associating?

The ABA Commission on Law and Aging released a significant paper addressing visitation, with a number of FAQs, ranging from a review of various state statutes, the impact of the UGCOPAA, standards for the guardian and the adult's rights.[110] The thirteen FAQs cover a

---

[104] Astor, a wealthy socialite and philanthropist, was isolated and exploited by her son. *See, e.g.,* Phillip C. Marshall, *Beyond Brooke: Brooke Astor and the Cause of Elder Justice*; 36 BIFOCAL 67 (Jan.-Feb. 2015); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2015-bifocal-january-february.pdf; John Richardson, *The Battle for Mrs. Astor*, Vanity Fair (Sept. 4, 2008); https://www.vanityfair.com/news/2008/10/astor200810.

[105] Campbell, a famous singer, became the subject of a visitation fight between his children and spouse. *See,* Sterling Whitaker, *Glen Campbell's Oldest Children Granted Visitation by Law* (2016); https://tasteofcountry.com/glen-campbell-children-visitation-law/.

[106] Kasem, a famous radio personality, became the subject of a fight between his current wife and children from his prior marriage. The children accused the wife of isolating him and refusing to allow the children to visit him, leading to litigation. *See, e.g.,* Randi Belisomo, *The End-Of-Life Lessons from Casey Kasem's Family Feud*, Vol. 1, Voices in Bioethics (June 16, 2014); https://journals.library.columbia.edu/index.php/bioethics/article/view/6531/3364.

[107] Falk, a famous actor, became the center of a visitation dispute between his current wife and his children and friends. *See*, *The Falk Family Story, The Roots of the Catherine Falk Organization*; http://catherinefalkorganization.org/the-catherine-falk-story/#tab-id-1.

[108] Rooney, a famous actor from childhood, became the face of elder abuse when he testified before the Senate Committee on Aging about his treatment by his wife and family. *See, e.g.,* Michael Ollove, *Family Members Fight for Right to Visit Ailing Relatives*, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/26/family-members-fight-for-right-to-visit-ailing-relatives; https://vimeo/com/320551894.

[109] *See, e.g.*, Dari Pogach, *Guardianship and the Right to Visitation, Communication, and Interaction: An Overview of Recent State Legislation*, 40 BIFOCAL 27 (ABA Nov.-Dec. 2018)(noting physical and mental implications of isolation).

[110] *See,* ABA Commission on Law & Aging Legislative Fact Sheet on Guardianship & the Right to Visitation, Communication, & Interaction, (2018); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.

variety of topics, from the applicable laws to the substance and process in restricting visitation.[111]

The Third National Guardianship Summit[112] also addressed the topic of visitation, adopting recommendations that pertain to the right of visitation.[113] These recommendations provide that the guardian support the adult's socializing and "meaningful relationships" and not create hurdles for the adult to maintain existing relationships, unless the adult is at risk of significant harm.[114] To that end, when the guardian is picking a location for the adult to reside, the guardian must consider that location in relation to the adult's friends and family.[115] Further, if the adult is absent from home for a while, the guardian should take steps to keep the adult's network of friends and supports in place.[116]

The right of visitation is not limited to a specific age group or a specific type of housing. The right to have visitors is important for any adult under guardianship. So, who has the "right" to visit the adult? Separate from those authorized under the law to visit (such as adult protective investigators, federal surveyors when adults reside in long-term care facilities, etc.) the right of visitation belongs to the adult.[117] The same is true for those residents of long-term care facilities (whether under guardianship or not).[118] Perhaps the better way to state it, is in some cases a third party may be privileged to visit with the adult, but has no right to do so, especially if the adult specifically states they do not want to visit with the third party. Three visitation situations that could be summarized as: whether a third party may visit with the adult; the third party may visit, subject to the consent of the adult; and the third party may visit, with the permission of the guardian or the court.[119]

The UGCOPPA § 311(b)(6) 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[120] (as contemplated in the

---

[111] *Id.* The FAQs are listed in Appendix A.

[112] *Third National Guardianship Summit Standards And Recommendations*, 2012 UTAH L. REV. 1191, 1198 (2012).

[113] Although the standards are not couched in, and don't use the term, visitation.

[114] THIRD NATIONAL GUARDIANSHIP SUMMIT STANDARDS AND RECOMMENDATIONS, Standard #6.9, 2012 UTAH L. REV. 1191, 1198 (2012).

[115] *Id.* at Standard #6.10.

[116] *Id.* at Standard #6.1.1

[117] *See, e.g.*, UGCOPAA § 315, cmts.

[118] 42 C.F.R. § 483.10(f)(4) "The resident [of a long-term care facility] has a right to receive visitors of his or her choosing at the time of his or her choosing, subject to the resident's right to deny visitation when applicable, and in a manner that does not impose on the rights of another resident…." *See also*, 42 C.F.R. § 483.10(f)(4)(ii) "The facility must provide immediate access to a resident by immediate family and other relatives of the resident, subject to the resident's right to deny or withdraw consent at any time; (iii) The facility must provide immediate access to a resident by others who are visiting with the consent of the resident, subject to reasonable clinical and safety restrictions and the resident's right to deny or withdraw consent at any time…." The facility is also required to have a policy regarding visitation and inform residents of their rights vis a vis visits by others. *Id.* at (f)(v),(vi). See also 42 U.S.C § 1395i-3(c)(3)(B),(C) (discussing resident right to have visitors).

[119] *See, e.g.,* Pogach, *supra* 109 at 28 (summarizing various approaches taken by some state legislatures).

[120] Under UGCOPAA § 502(b)(1)(C),(2), the court can enter a protective arrangement in lieu of a guardianship, limiting or eliminating a third-party's interactions with the adult. The comments note that in

UGCOPAA) which places restrictions on interaction between the adult and others, or (3) in cases where 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 not open-ended.[121] The adult must be given notice of any restriction within a month of the guardian's appointment.[122] The comments to UGCOPAA § 315(c)(3) explains the limitation on the guardian's ability to restrict visitation.

> [It] 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. It recognizes that adults subject to guardianship have a right to interactions with family and friends, and severely limits the circumstances under which this important right may be curtailed. While the act is sensitive to the interests of family members and friends, it *situates the right to choose whether or not to interact with the adult subject to guardianship, not with the would-be visitor*. Locating the right with a visitor, by contrast, would be an affront to the rights of the adult subject to guardianship as it would limit the adult's ability to make choices for himself or herself as to with whom to interact.[123]

The states' approaches vary. In some states, the visitation statutes might be described as rights-limiting; the guardian has the right to restrict visitation without seeking prior court approval.[124] Other statutes might be considered as rights-enabling or enhancing, that is prohibiting any restriction on visitation without prior court order or allowing the adult or a surrogate to petition the court for visitation.[125] Given the

---

entering an order creating a protective arrangement, "the court is acting much like a guardian would in making a decision for an adult subject to guardianship. Accordingly, … the court [must]consider factors a guardian must consider when making decisions for an adult. The result is that the court may not make an order simply because the court believes the order would be in the best interest of the adult." *Id.* at § 502, comments. *See also* Pogach, *supra* n. 129 at 29-30.

[121] UGCOPAA § 311(b)(6)(A)-(C). Under (C) the restriction is time-limited to seven business days when there is an existing social relationship with the third party or the third party is related to the adult, or for no more than two months when the third party is neither a relative or has on prior social relationship with the adult. *Id. See also*, UGCOPAA § 315(c) which prohibits the guardian from limiting visitation unless specifically ordered by the court, pursuant to an existing protective order or arrangement, the guardian has a good faith belief that visitation with the individual with likely result in some kind of harm to the adult and the restriction is time limited. (7 business days in cases of family or existing social interactions, 60 days in all other cases).

Id. at UGCOPAA § 315(c).

[122] *Id.* at § 311(b).

[123] UGCOPAA § 315, cmts. (emphasis added). *See also*, generally, UGCOPAA § 316.

[124] *See, e.g*, IOWA CODE § 633.635(2)(i) provides that the guardian "[makes] reasonable efforts to identify and facilitate supportive relationships and interactions of the protected person with family members and significant other persons. The guardian may place reasonable time, place, or manner restriction on communication, visitation, or interaction between the adult protected person and another person except as otherwise limited by subsection 3." Subsection 3 requires prior court approval before the guardian may prohibit all visitation by the adult with a third person whether "with whom the protected person has expressed a desire to … visit … or with a [third] person who seeks to … visit… with the protected person." In order to prevail, the guardian must show good cause. *Id.* at § 633.635(3)(c).

[125] *See, e.g.*, R.I. GEN. LAWS § 33-15-18.1(a).

importance of this right, statutes should contain a process for the adult or surrogates to seek visitation or to challenge a guardian's decision to restrict or prohibit visitation.[126] If an adult makes a decision to not visit with someone, absent a showing that the adult's decision was negatively influenced, the adult's decision should be honored.[127]

[126] In Illinois, the standard for certain relatives to seek court relief is if the guardian "unreasonably prevents" the relative from visiting with the adult. The relatives who have standing to petition are the spouse, adult child or grandchild, the parent, or an adult sibling. ILL. COMP. STAT. 755 § 5/11a-17(g)(2).

[127] *See, e.g.,* Arkansas gives a relative the right to petition the court for a visitation order on a fact-supported reasonable belief that the guardian is interfering with visitation. Relative is defined as "spouse, child, grandchild, parent, grandparent, or sibling of [the adult.]" ARK. CODE ANN. § 28-65-101(9). ARK. CODE ANN. § 28-65-110(a)(1) ("relative has reason to believe [plus] facts to substantiate … belief that the … is unreasonably interfering with or denying visitation between the relative and the [adult], the relative may file a petition for reasonable visitation….") *Id.* If the adult declines to visit with the third party, the third party has to provide by the preponderance of the evidence that the adult's declination of visitation was the result of undue influence asserted by the guardian or another. On the converse, if the adult wishes visitation, doesn't disagree to visitation or cannot express consent or disagreement with visitation, then the guardian has the burden of proof to rebut the presumption that visitation would be in the adult's best interest.[127] For those adult with a disability, others who have a "significant relationship" with the adult, as well as the adult themselves, may also petition for an order allowing contact. *Id.* at ARK. CODE ANN. § 28-65-110(b)(1). *Id.*at ARK. CODE ANN. § 28-65-110(b)(2). The guardian has to show the existence of one of two situations (1) the third party has abused, assaulted, neglected or exploited the adult or another or the visitation would be otherwise harmful to the adult. *Id.* at ARK. CODE ANN. § 28-65-110(b)(2)(A)-(B). ARK. CODE ANN. § 14-5316. A "significant relationship" is defined as related by blood or marriage or a "close friend … as established by a history of pattern and practice." ARK. CODE ANN. § 14-5101(14).) *See also*, R.I. GEN LAWS § 33-15-18.1(a) which provides that the guardian is prohibited from restricting the adult's right to visit without a prior court order specifically empowering the guardian from restricting visitation. If the adult "is unable to express consent to [visit] … due to physical or mental condition, then consent …. May be presumed based on the [adult's] prior relationship history with the person." The guardian must show good cause for the court to enter the order. *Id.* at § 33-15-18.1(b).

[127] ARK. CODE ANN. § 14-5316(D). *See also*, ILL. COMP. STAT. 755 § 5/11a-17(g)(2). The court will not order visitation if the court finds that the adult has to make visitation decisions and declined the opportunity to visit. The relatives who have standing to petition are the spouse, adult child or grandchild, the parent, or an adult sibling. ILL. COMP. STAT. 755 § 5/11a-17(g)(2).

The statute should clearly set out the circumstances that would justify a guardian's restriction of visitation,[128] as well as a process to be followed,[129] which includes notice to the adult, the individual who is not allowed to visit, and the court.[130] For example, both Nevada[131] and Washington state[132] only allows a guardian to restrict visitation in specified circumstances. Rhode Island, like Iowa,[133] requires a showing of good cause to the court by the guardian. When a dispute arises over visitation, the guardian could ask the court to

[128] *See,* MINN. STAT. § 524.5-120(10) ("good cause to believe restriction is necessary because interaction with the person poses a risk of significant physical, psychological, or financial harm to the person subject to guardianship, and there is no other means to avoid the significant harm."); R.I. GEN LAWS §§ 33-15-18.1(b),(c) requires a showing of good cause to the court by the guardian, which would include the existence of protective orders, the third party has committed elder abuse against the adult, the guardian has a record of the adult declining the visitation, any directive with information about the adult's preference, as well as anything else the court determines to be relevant. R.I. GEN LAWS § 33-15-18.1(a) provides that the guardian is prohibited from restricting the adult's right to visit without a prior court order specifically empowering the guardian from restricting visitation. If the adult "is unable to express consent to [visit] … due to physical or mental condition, then consent …. May be presumed based on the [adult's] prior relationship history with the person." The guardian must show good cause for the court to enter the order. *Id.* at § 33-15-18.1(b). See also, the Texas bill of rights statute, which specifically provides that the adult under guardianship has the right to "unimpeded, private …. visitation with persons of the [individual's] choice, except that if the guardian determines that … visitation cause substantial harm to the ward." TEX. EST. CODE § 1151.351(b)(16).

[129] MINN. STAT. § 524.5-120(10) In addition to notice, the statute provides that "[t]he person subject to guardianship or the person subject to restrictions may petition the court to remove or modify the restrictions." Texas: If visitation is restricted, the adult may seek a court order to remove the restrictions.[129] Texas takes the approach of allowing a certain relatives to petition the court for visitation.[129] *Id.* at 1151.351(b)(16)(B).

[129] TX. EST. CODE § 1151.055; § 1151.351(b)16). *See also,* Shaw v. Harris Co. Guardianship Program, 2018 WL 32233237 (Tx. App. July 3, 2018)("When restrictions on visitation have been imposed, the Code provides that 'the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A)'… [and] [a] relative of [an adult] under guardianship] may file an application with the court requesting access to the ward, including the opportunity to establish visitation or communication with the ward.'") *Shaw* at *2.

[130] Minn. 524.5-120(10) ("In all cases, the guardian shall provide written notice of the restrictions imposed to the court, to the person subject to guardianship, and to the person subject to restrictions.") *See also*, W. VA. CODE §§ 44A-3-17(a), 44A-3-18(a)-(b) (statutorily defined relative right to petition for visitation and receive notice).

[131] NEV. REV. STAT. § 159.332(1). The statute notes that the guardian may restrict visitation in cases where the adult does not want the visitation, where the court authorizes no visitation, where the relative is under investigation for elder abuse, the guardian determines the relative is causing emotional or physical harm to the adult, or based on the care plan findings, it is concluded that it's harmful to the health and wellbeing of the adult for the relative to visit. *Id.* at §159.332(1)(a)-(e).

[132] Wash. RCWA §11.92.195 (effective *until* January 1, 2022). The basis for restriction on visitation includes a court order entered by the guardianship court, a protective order that includes a restriction on visitation or in the case where the guardian has "good cause to believe" that the adult is in an immediate risk of harm and the restriction on visitation is necessary to protect the adult from elder abuse or abandonment, or to protect the adult from visitation that would "unnecessarily impose significant distress on" the adult under guardianship. *Id.* at §11.92.195(2). On January 1, 2022, the Washington Guardianship, Conservatorship, and Other Protective Arrangements Act goes into effect. *See*, Wash. RCWA § 11.130.335 (eff. Jan. 1, 2022).

[133] IOWA CODE § 633.635(3)(c).

order eldercaring coordination, a court ordered dispute resolution process, if available in their jurisdiction.[134]

"The issues presented in this case are at the intersection of protection against harassment and guardianship law."[135]

Case Law Approaches to Visitation Controversies

The state guardianship courts' approaches to visitation is very much fact specific. A few cases illustrate the various approaches the courts have taken. For example, one Florida appellate court affirmed the trial court's order approving denial of the spouse's visitation with the adult under guardianship.[136] The guardian/son moved the adult from the marital home to a guest house on the guardian's property and filed a domestic violence complaint against the spouse.[137] Among other things, the spouse moved to require visitation with the adult, alleging any decision by the adult to not visit with her was because of the guardian's influence.[138] The appellate court noted that the guardianship court is best for determining the wishes of the adult under guardianship.[139]

A Georgia appellate court approved a visitation schedule over the objection of the guardian.[140] Initially visitation was provided in the parents' marital settlement agreement[141] and when the mother petitioned to be appointed guardian, the father filed a motion in the guardianship proceeding to continue and expand visitation.[142] The guardianship court granted limited supervised visitation for the father, which the guardian appealed, claiming the guardianship court lacked jurisdiction.[143] Reviewing the statutes and prior cases, the appellate court determined that the guardianship court did have authority over the question of visitation.[144]

In some instances, the requested visitation is made by a parent of an adult child under guardianship, whether pursuant to a family court order, or under the guardianship statute. For example, an appellate court in Illinois determined that the statute in question did not authorize a guardianship court to order visitation between an adult disabled child and one parent.[145] Reviewing the statute in question, the appellate court concluded that the

---

[134] https://www.eldercaringcoordination.com/. ("Eldercaring coordination is a court ordered dispute resolution process during which an eldercaring coordinator assists families to resolve disputes with high conflict levels that impact the elder's autonomy and safety."); https://www.eldercaringcoordination.com/about-1.

[135] Harris v. Gellerman, 2021 WL 232866,*1 (Min. App. Jan. 25, 2021).

[136] Green vs. *In re* Guardianship of Green, 67 So. 3d 432 (Fla. Dist. Ct. App. 2011).

[137] *Green* at 433.

[138] *Green* at 434.

[139] *Green* at 435.

[140] Estate of Wertzer,765 S.E.2d 425 (Ga. App. 2014) (guardian mother objected to father's request to visit with adult child under guardianship).

[141] *Id.* at 427.

[142] *Id.*

[143] *Id*

[144] *Id.* at 428-430. The guardian also argued it was not in the adult's best interest for the father to visit with the adult. The guardianship court ordered visitation after the hearing during which the court heard witness testimony and received recommendations. The appellate court affirmed; the probate court's order regarding visitation was based on sufficient, competent evidence. *Id.* at 431.

[145] *In re* Guardianship of Sanders v. Sanders, 2018 Il. App. 4th 170921-U (Oct. 18, 2018).

language of the statute at the time in question failed to allow a trial court to order visitation between a parent and their adult disabled child.[146]

Another court took a different approach on the question, when the father of the adult disabled child sought to visit despite her mother/guardian's position denying visitation.[147] The appellate court reviewed the applicable sections of the guardianship statute,[148] as well as noting the state's longstanding public policy of permitting visitation between a child and their parent, despite a divorce, when the parent seeking visitation has shown the parent will act in the best interest of the child.[149] There must be extraordinary circumstances where "there is 'reasonable probative evidence' that the parent is morally unfit" before the court would deny a parent any visitation,[150] even in cases where the guardian denied visitation on the grounds of the best interest of the adult.[151]

A recent Minnesota appellate court opinion[152] examined the right of visitation as contained in the bill of rights provision in the Minnesota guardianship statute.[153] The daughter/guardian sought another restraining order to prohibit visitation by between the defendant, the long-term boyfriend, and the mother who was under guardianship.[154] The adult under guardianship wanted visitation with the defendant.[155] The appellate court stressed the bill of rights as a basis for the adult's right to visit with others[156] and noted the trial court's error to not hear from the adult on her wishes regarding visitation with the defendant.[157] The court's responsibility is to determine what rights are retained by the adult, their preferences vis a vis those rights, and give those rights force and effect.[158]

It is important to remember that the right to visitation belongs to the adult.[159] If the adult does not want to visit with a particular person, that is relevant to both the guardian, and the court, in denying visitation.[160]

---

[146] *Id.* at ¶ 19.
[147] Mitchum v. Manning, 698 S.E.2d 360 (Ga. App. 2010).
[148] *Id.* at 361.
[149] *Id.* (citations omitted).
[150] *Id.*
[151] *Id.* In affirming visitation, the appellate court noted the guardian failed to present sufficient evidence to show visitation was not in the adult's best interest. *See also*, Estate of Wertzer, 765 S.E.2d 425 (Ga. App. 2014) (affirming trial court, over objection of mother/guardian, grant of visitation ordered based on recommendations from guardian ad litem and court appointed attorney as well as credibility of witnesses)
[152] Harris v. Gellerman, 2021 WL 232866 (Minn. App. Jan. 25, 2021).
[153] *See,* MINN. STAT. § 524.5-120(10).
[154] *Id.* at *1 (court describes relationship as "on-again-off-again" ten-year relationship). *Id.* The daughter had obtained a prior restraining order against the defendant, which had expired by the time in question. *Id.*
[155] *Id.*
[156] *Id.* at *4 The court also noted that the right of visitation existed before the adoption of the current statute, citing to case law and pointing out that "courts have an ongoing responsibility to ensure that a person subject to guardianship's right to visitation is protected." *Id.* at *4-5. (citations omitted).
[157] *Id.*
[158] *Id.* at *4-5.
[159] *See,* UGCOPAA § 315, cmts.
[160] *See, e.g.*, Guardianship of Borovetz, 300 P.3d. 140 (Ok. App. 2013). The adult sought to terminate the court-ordered visitation by her father, claiming the visits harmed her health. *Id.* at ¶ 2. Since father was co-guardian, father could have limited contact with the adult in order to discharge his duties as guardian, but the adult would not be forced to visit. *Id.* at ¶ 8.

What happens when a guardian sets visitation schedule, but the relatives of the adult choose to not follow it? In Guardianship of Flohr,[161] the trial court denied the son's visits with his father, the adult under guardianship, until the son had a psychiatric evaluation.[162] On appeal, the son argued the requirement for an evaluation as a precedent to visitation violated his constitutional right to associate with his father and the order violated his procedural due process.[163]

The appellate court noted that an adult child does not have a constitutional right to associate with their parent ("right of familial association"), there is a definite established right for one adult to associate with another adult who consents.[164]

Visitation Guidance Pre-Pandemic[165]

The courts are loath to deny visitation,[166] especially when the adult wishes to visit or when the person seeking visitation has a prior close relationship with the adult. The guardian, as well as the court, has to consider the best interest of the adult in making visitation decisions. This is especially true when the adult expresses a desire to *not* visit with the person.[167] Considerations for the guardian and the court include how visitation impacts the adult and any disruptions caused by the visitor.[168]

The National Guardianship Association[169] has long addressed visitation in its standards of practice. These standards include the encouragement of social relationships;[170]

---

[161] 2014 WL 7476166 (Ohio App. Dec. 12, 2014).

[162] *Id.* at ¶ 1. The guardian ad litem for the adult found that the guardian was too heavy-handed and controlling in restricting access to the adult and that the guardian should be removed if "she continued to overreact to the [adult's] exercising his independence by 'violating her visitation schedule." *Id. at* ¶ 7. Further the GAL recommended that the guardian "not be responsible for perpetuating the relationships between [the adult]" and his children, and her siblings should make their own arrangements if they wished to see the [adult]. *Id.*

[163] *Id.* at ¶¶ 13-14.

[164] *Id.* at ¶ 19. The appellate court found a due process violation in that the notice given to the son did not indicate the issue of restricting the son's right to visit or require a physiological evaluation; neither did he receive a copy of the GAL report. Instead the guardian's motion sought enforcement by the guardianship court regarding the visitation schedule among other matters. *Id.* at ¶ 24.

[165] Much of the recent attention given the issue of visitation is due to the pandemic.

[166] *See, e.g.* In Matter of Guardianship of McElhany, 1998 WL 34604 (Jan. 14, 1998)(unreported)(Court reticent to prohibit visitation at the time in question). *Id.* at *2.

[167] *See, e.g.*, Guardianship of Basista, 2015 WL 5334092, ¶¶ 12-13 (Oh. App. Sept. 14, 2015)(adult did not want to visit with her father).

[168] *See*, *id.* (noting the demonstrated hostility of the visitor toward the staff of the facility and concomitant disruptions from the visit). The court ruled in favor of one last chance at visitation, setting limits for supervised visitation and providing the guardian with the ability to terminate the visit and bar further visits if the guardian concluded that the visits were harmful to the adult's wellbeing. *Id.*

[169] www.guardianship.org.

[170] NGA Standards of Practice (4th ed. 2013).
https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf
Standard #6. *Residential Decision-Making, Standard* ***#6.9*** ("guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person [and] encourage and support the [adult] in maintaining contact with family and friends as defined **by** the [adult] ….").
See also, NGA Standard 4 ("guardian shall promote social interactions and meaningful relationships consistent with the preferences of the [adult] by [encouraging and supporting] the [adult] in maintaining

directing the guardian to consider the location of housing in proximity to the adult's friends and family;[171] and undertaking "reasonable efforts" to keep the adult's existing "social and support networks" in place during the adult's short absences from the adult's main residence.[172] In addition to NGA Standard 4 covering visitation, there are standards from other organizations that support the adult's right of visitation.[173]

COVID and Visitation: there is no "new" normal, there's just no normal.

The guardian shall keep persons who are important to the adult reasonably informed of important health care decisions.[174]

Once COVID started its rampage across the U.S. the nursing homes in Seattle became ground zero, followed quickly by those in New York and New Jersey.[175] Facilities closed their doors to outsiders, which eliminated any opportunity for in person visitation.[176] States limited or eliminated visitation.[177] Essential visitors might have been allowed, but the question remained

---

contact with family and friends, as defined by the [adult] …. .") *Id. See also* NGA Standard 12(3) (considering location of residential setting vis a vis location to friends and family).

[171] *Id.* at *Standard* ***#6.10*** ("guardian shall consider the proximity of the setting to those people and activities that are important to the [adult] when choosing a residential setting.")

[172] *Id.* at *Standard* ***#6.11.***

[173] *See* ABA*, supra* n. 217 referencing Standard #7 ("Identify and advocate for the person's goals, needs, and preferences" and "[a]sk the person what he or she wants); Standard #8 ("Weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection, and safety"); Standard #9 ("Encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her"); Standard #10 ("Acknowledge the person's right to interpersonal relationships"); and Standard #12 ("Consider the proximity of those people and activities that are important to the person when choosing a residential setting."). ABA Comm'n on Law & Aging; *Legislative Fact Sheet on Guardianship & the Right to Visitation, Communication, & Interaction*; Am. Bar Ass'n (May 24, 2018); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.

[174] THIRD NATIONAL GUARDIANSHIP SUMMIT STANDARDS AND RECOMMENDATIONS, Standard #5, 2012 UTAH L. REV. 1191, 1197 (2012).

[175] *See,* for example, Kevin Stankiewicz & Nate Rattner, *Nursing homes create 'perfect storm' for COVID outbreaks as cases and deaths surge again* (Dec. 2, 2020): https://www.cnbc.com/2020/11/30/covid-cases-and-deaths-in-nursing-homes-are-getting-worse-.html.

[176] *See, generally,* Nursing Home Visitation - COVID-19, Memo to State Survey Agency Directors, Ref. # Ref: QSO-20-39-NH, CMS (Revised March 10, 2021); https://www.cms.gov/files/document/qso-20-39-nh-revised.pdf.

[177] *See, e.g.*, California: *Guidance for Limiting the Transmission of COVID-19 in Long-Term Care Facilities*, https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-22.aspx; Michigan: *Executive Order 2020-123: Enhanced protections for residents and staff of long-term care facilities during the COVID-19 pandemic*; https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-531929--,00.html. *See also*, *Track the Status of Nursing Home Visits in Your State* (Dec. 16, 2020); https://www.aarp.org/caregiving/health/info-2020/nursing-home-visits-by-state.html. CMS issued guidance for nursing homes. The CMS guidance has changed over time depending on the infection rates in the area. The current guidance is found at Nursing Home Visitation - COVID-19, Memo to State Survey Agency Directors, Ref. # QSO-20-39-NH, CMS (Sept. 2020); https://www.cms.gov/files/document/qso-20-39-nh.pdf.

whether a guardian would be considered an essential visitor.[178] Although the media attention was on nursing homes, COVID-based visitation restrictions were not limited to just those locations.[179] The right to visit is important to the adult, regardless of where the adult resides: nursing home, supportive housing or an individual home.

Although a number of states had adopted visitation rights provisions in their guardianship statutes,[180] it took COVID for the public to understand the importance of visitation for all of us.[181] Guardians in particular were faced with changing their methods of visiting with the adults. Technology works for many folks to stay in touch, but it quickly became clear that for many, it was not the answer.[182]

The government, particularly CMS, began to release guidance on visitation for those in long term care facilities.[183] The guidance is useful even for those adults who do not reside in a facility and will be useful for future pandemics as well-this wasn't the first pandemic, and it won't be the last. The CMS memo on visitation provided guidance to facilities on how in-person

---

[177] Suzy Khimm, *The Hidden Covid-19 Health Crisis: Elderly People Are Dying From Isolation*, NBC News (Oct. 27, 2020): https://www.nbcnews.com/news/us-news/hidden-covid-19-health-crisis-elderly-people-are-dying-isolation-n1244853 (discussing impact of social isolation).

[178] *See, e.g.,* Oregon Dept. Human Services, https://www.oregon.gov/dhs/PROVIDERS-PARTNERS/LICENSING/APD-AFH/Alerts/DHS%20Long-Term%20Care%20Covid-19%20Visitation%20Policy%203-18-2020.pdf (Mar. 18, 2020) (including legal guardian in definition of essential individual).

[179] For example, the Oregon memo on visitation included "nursing facilities, adult foster homes licensed under OAR 411-050, residential care facilities and assisted living facilities, including those with memory care endorsements…." Oregon Dept. Human Services, https://www.oregon.gov/dhs/PROVIDERS-PARTNERS/LICENSING/APD-AFH/Alerts/DHS%20Long-Term%20Care%20Covid-19%20Visitation%20Policy%203-18-2020.pdf (Mar. 18, 2020).

[180] Between 2015-2018, twenty-two states passed legislation pertaining to visitation. ABA Commission on Law & Aging Legislative Fact Sheet on Guardianship & the Right to Visitation, Communication, & Interaction at 3 (2018); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.

[181] The visitation issue even made its way to the halls of Congress. Senators Klobachur and Casey introduced The Advancing Connectivity During the Coronavirus to Ensure Support for Seniors (ACCESS) Act in mid-March of 2020. https://www.congress.gov/bill/116th-congress/senate-bill/3517/actions?q=%7B%22search%22%3A%5B%22Advancing+Connectivity+during+the+Coronavirus+to+Ensure+Support+for+Seniors+%28ACCESS%29+Act%2C%22%5D%7D&r=3&s=3 (last visited Jan. 29, 2021). The bill, which failed to advance, was designed to "enhance telehealth support for seniors and increase access to technology for "virtual visits" during the coronavirus pandemic … [and] help protect one of the most vulnerable populations from risking exposure to the virus when accessing remote health care and connecting with loved ones." *Klobuchar, Casey Introduce Legislation to Increase Seniors' Virtual Connection to Health Care and Community Amidst Coronavirus Outbreak*, https://www.klobuchar.senate.gov/public/index.cfm/2020/3/klobuchar-casey-introduce-legislation-to-increase-seniors-virtual-connection-to-health-care-and-community-amidst-coronavirus-outbreak. (last visited Jan. 29, 2021).

[182] *See,* Corona Virus Commission, https://www.cms.gov/files/document/covid-final-nh-commission-report.pdf at 129-131. ("Maintaining those relationships in the absence of in-person visitation has posed a challenge due to limited supply of technology, lack of staff training on that technology, and difficulty tracking evolving CMS expectations.") *Id.*

[183] The Center for Medicare and Medicaid Services, *Nursing Home Visitation —COVID-19*; https://www.cms.gov/files/document/qso-20-39-nh-revised.pdf (Revised Mar. 10, 2021).

visits might occur with adult residents.[184] As well, the Corona Virus Commission report[185] included specific sections addressing visitation.[186] Under section 3.4 of the report, the Commission noted that four problems were connected with visitation, which are particularly instructive for the future.

1. Although visitation restrictions have partially protected the physical health of residents, the practice also has resulted in unintended harm. Residents experience loneliness, anxiety, and depression due to prolonged separation from families and loved ones.[187] These measures also compromise the ability of families and guardians to validate resident well-being and safety, and caused significant distress for families.[188]
2. Virtual visitation often provides an insufficient substitute to address resident needs. The gap between in-person and virtual visitation is even more acute when combined with limitations due to differing physical and cognitive abilities; resident, family, and/or staff unfamiliarity with proper equipment use and functionality; and equipment and internet availability.[189]
3. The extent of this unintended harm has not been adequately assessed ….[190]
4. Visitation guidance is currently unclear. CMS and its federal partners have issued directives and guidance pertaining to visitation during the pandemic in multiple documents, making it challenging for nursing homes to meet (and CMS to enforce) federal expectations or leverage evolving flexibility….[191]

---

[184] Nursing Home Visitation - COVID-19, Memo to State Survey Agency Directors, Ref: QSO-20-39-NH, CMS (Rev. Mar. 13, 2021); https://www.cms.gov/files/document/qso-20-39-nh-revised.pdf

[185] Corona Virus Commission, https://www.cms.gov/files/document/covid-final-nh-commission-report.pdf.

[186] *Id.* at § 3.4.

[187] *Id.* at 117, 118.

[188] *Id.* at 119.

[189] *Id.* at 120.

[190] *Id.* at 121.

[191] *Id.* at 122. The impact on the residents' physical and mental health was discussed during the Commission's meetings. *Id.* at 123-124. "[M]any members expressed serious concerns about the effect restrictions have on residents' mental health and well-being; they supported finding ways to increase visitation without compromising infection prevention and control. Other members questioned whether relaxing restrictions—especially in areas with high community prevalence—would increase the risk of COVID-19 transmission." *Id.* In addition, the members considered monitoring and prevention of the inappropriate medication use, specifically antidepressants and antipsychotics, and specifically with those residents who are isolated. *Id.*

[191] *Id.*

[191] *Id.* at 126-129. Public comments called for the focus on the adult residents, maintaining communication and bettering visitation with these residents.[191] Evidence shows that interactions with others, especially family and friends, is critical for the wellbeing of the residents. *Id.* at 126-129. Further, CMS has collected sixteen categories of resources for each state with category fifteen devoted to screening and visitors. CMS, Toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes at 142-151 (version 16) (Dec. 2020); https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf.

The final report of the Coronavirus Commission[192] recommended that visitation of a resident be considered a critical resident right.[193] Although this guidance is not specific to guardianship, it does useful provide parameters for guardians attempting to visit the adults and underscores the significance of the right of the adult to interact with others. And as the commission's report notes, visitation is a critical resident right[194] which can be extrapolated to apply to any adults, regardless of their location. Stated another way, visitation is a critical, if not fundamental, right of those adults under guardianship.

Visitation Best Practices: Suggestions for Guardians

COVID is not the first pandemic, nor will it be the last. Guardians need to be prepared for various emergencies that may occur, whether a natural disaster or a pandemic. Here are some thoughts for guardians to move forward.

1. Caregiving for the adult.
    a. If the adult is being cared for at home by relatives, have a backup plan in place if the relatives become ill in instances where others are restricted from visiting.
    b. Before selecting a facility for the adult, the guardian should examine the facility policies on emergencies and pandemics, including isolation and visitation.

---

[192] Coronavirus Commission on Safety and Quality in Nursing Homes (Sept. 2020) https://www.cms.gov/files/document/covid-final-nh-commission-report.pdf.

[193] *Id.* at 32-37. This may be useful for those states without a bill of rights in the guardianship statute, or for those with bill of rights that do not mention the adult's right of visitation. *See* also, Executive Summary viii, suggesting the following for investigation: "virtual visitation tools and techniques…, [providing] resources to help nursing home staff assess and improve the mental health and psychosocial well-being of residents during and after the pandemic … [and] [assessing, streamlining, and increasing]the accessibility of COVID-19- related directives, guidance, and resources on visitation into a single source."

As well, a guardian may be available to visit the adult in a SNF under the SNF's compassionate care policy, which is designed to take a broader view of compassionate care beyond end of life scenarios. Nursing Home Visitation - COVID-19, Memo to State Survey Agency Directors, CMS at 4 (Sept. 2020); https://www.cms.gov/files/document/qso-20-39-nh.pdf. The compassionate care provision explains:

> Allowing a visit in these situations would be consistent with the intent of, "compassionate care situations." Also, in addition to family members, compassionate care visits can be conducted by any adult that can meet the resident's needs, such as clergy or lay persons offering religious and spiritual support. Furthermore, the above list is not an exhaustive list as there may be other compassionate care situations not included. Lastly, at all times, visits should be conducted using social distancing; however, if during a compassionate care visit, a visitor and facility identify a way to allow for personal contact, it should only be done following all appropriate infection prevention guidelines, and for a limited amount of time. Through a person-centered approach, facilities should work with residents, families, caregivers, resident representatives, and the Ombudsman program to identify the need for compassionate care visits. *Id.*

Further, if the guardian is required to visit the adult, say for example, pursuant to court order, then the guidance provides "reasonable ways a nursing home can facilitate in-person visitation. Except for on-going use of virtual visits, facilities may still restrict visitation due to the COVID-19…. [and] [r]esidents who are on transmission-based precautions for COVID-19 should only receive visits that are virtual, through windows, or in-person for compassionate care situations, with adherence to transmission-based precautions…." *Id.* at 5.

[194] Coronavirus Commission at 32-37.

c. Before selecting a facility for the adult, the guardian should examine the facility's infection control records and preparations for pandemics, as well how close the facility is located to the family, friends and activities for the adult.

2. Adult's safety.
   a. The guardian must have a process to ensure that any visitation occurs safely, and the safeguards are followed by third parties.
   b. The guardian should identify a specific location that would allow visitation more safely. In doing so, the guardian should consider whether the adult be able to hear the visitor when at a social distance.
3. Health care consents.
   a. Clarify with the court whether the guardian needs prior court approval to consent to vaccinations in order to facilitate resumption of visitation.
4. Notice to the Court
   a. In the case of a pandemic or natural disaster, courts will likely know it has happened, but that should not excuse the guardian from contacting the court and filing an update. The guardian should request guidance from the court on the inability to visit with the adult and also update the court on the plan of action should medical care be needed for the adult.
   b. The guardian should be proactive with the court, rather than waiting for the court's order to update the court.

Termination of the Guardianship: Restoration of Rights of the Adult

The person subject to guardianship … retains all rights not restricted by court order … These rights include the right to: … at any time, petition the court for termination or modification of the guardianship or conservatorship ….[195]

For many adults under guardianship, the guardianship will end with the death of the adult. For others, however, a different ending may be in their future. An adult under guardianship with an intellectual disability, whose condition is static[196] may be able to receive needed assistance in a far less intrusive way, using various mechanisms, such as supported decision-making,[197] restricted accounts, or other tools to provide the necessary supports. Even some older adults under guardianship,[198] others with conditions that have the potential for improvement, or those for whom supports are now available that weren't

[195] MINN. STAT. § 524.5-120(13).
[196] Unlike an adult with Alzheimer's whose condition may be progressive and whose cognitive abilities may deteriorate over time. *What is Alzheimer's Disease?* Alz. Ass'n; https://www.alz.org/alzheimers-dementia/what-is-alzheimers (last visited Feb. 24, 2021).
[197] Reference Constanzo article
[198] Reference Diller Whitlach article

available when the guardianship was established,[199] may no longer need a guardian.[200] As one court stated, "impairment is often not a permanent condition. People can recover and no longer need a surrogate."[201]

The most comprehensive look at the issues surrounding restoration[202] was completed by the ABA Commission on Law and Aging[203] with the Virginia Tech Center for Gerontology.[204] The report identified several areas for improvement,[205] which if incorporated into the state statutes, would ensure that the right of restoration is a meaningful one. In particular, the focus should not be limited to the statutes, but also include the guardian, attorneys and the courts.[206] In keeping with due process protections for the adult, every guardianship statute must have provisions allowing the adult, or their surrogate,[207] to access the court to request restoration of some or all of the rights of the adult under guardianship. The statute must contain a process, at a minimum including

---

[199] *See, e.g.,* Matter of Guardianship of Capurso, 98 N.Y.S. 3d 381 (2019)(noting adult now had "system of supported decision making in place that constitutes a less restrictive alternative…. The guardianship is no longer warranted." *Id.* at 384).

[200] See, NGA Standards of Practice (4th ed. 2013); https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf. Standard 12(I)(H) list five grounds for when termination may be sought. *See also,* Erica Wood, Pamela Teaster, Jenica Cassidy, *Restoration of Rights in Adult Guardianship: Research and Recommendations,* ABA Comm. on Law & Aging with Va. Tech. Center for Gerontology (2017); https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf at 54 (hereinafter *Restoration of Rights*); https://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_CassidyRestorationofRightsChart7-13.pdf; https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_RestorationCaseLawChartSortedbyState.pdf. *See also*, Pollock and Rusciano at 75.

[201] *Matter of* Guardianship and Conservatorship of Crist, 433 P.3d 709, *5 (Ks. App. 2019) (Among other things, at the time of guardianship, adult had several health issues, which improved with relocation to nursing home and ultimately ALF). *See also,* the dissent in Matter of Guardianship of Croft, 560 S.W.3d 379, 391-392 (Tex. App. 2018). ("Unfortunately, none of us can restore our mental capacity to what it was ten years ago, with or without experiencing a traumatic event such as [the adult] suffered…. Our memory fades, our mood swings, and our filter loosens or dislodges completely…. That does not mean, however, that we are substantially unable to manage our own affairs. All that is required under [the statute] is a finding that [the adult]completely regained his ability to" care for themselves, and property).

[202] *Restoration of Rights*, *supra* n. 200.

[203] https://www.americanbar.org/groups/law_aging/.

[204] https://liberalarts.vt.edu/research-centers/center-for-gerontology.html.

[205] *See*, *Restoration of Rights*, Part III (including insufficient knowledge of the right, court review, court access, representation of the adult by an attorney, the guardian's role, available supports, applicable evidentiary standards and evidence). *Id.*

[206] *See, e.g., Restoration of Rights* at 200.

[207] UGCOPAA § 319(a) provides that the adult under guardianship or "a person interested in the welfare of the adult" may petition to terminate the guardianship. Minnesota takes a broader approach, granting the ability to petition to "any person interested in the welfare of the person subject to guardianship." MINN. STAT. § § 524.5-317(b). New Jersey limits the right to the adult and the guardian. N.J. STAT. ANN. § 3B:12-28. Ohio includes the adult, the adult's attorney or other interested person. Oh. Rev. Stat. § 2111.49(C). In Pennsylvania provides the ability to petition to the adult, guardian, or other interested person. 20 Pa. C.S.A. § 5512.2(a). Note that Ohio, similar to the UGCOPAA, requires that a certain amount of time elapse before the petition will be heard Oh. Rev. Stat. § 2111.49(C)) (120 days after the order of appointment of the guardian); UGCOPAA § 319(b)(1) (court may choose to not hold hearing "if a petition based on the same or substantially similar facts was filed during the preceding six months").

notice and opportunity to be heard, and not be so burdensome to be an obstacle for the adult to access the court.[208] The statute should delineate others who can file the petition, not limited only to the adult under guardianship, but include a surrogate for the adult, whether the guardian, a family member, friend, or staff of a facility who interact frequently with the adult.[209]

Additionally, the guardian, the individual the second most likely to know[210] if the adult is capable of having their rights restored, must be required to update the court on the adult's condition and potential for restoration.[211] This update should not just be a "check off the box" provision in an annual report; instead it should be a detailed and thoughtful analysis of the adult's capability for restoration. Concomitantly, the court should closely review the guardian's annual report, ensuring that sufficient detail is provided on the question of restoration.[212] Finally, the termination process must include the adult's right to representation, whether court-appointed counsel or counsel of the adult's choosing.[213]

Critical to the process regarding termination of guardianship is the right to counsel. Without counsel, the adult will have even more challenges in accessing the court and presenting their case. In fact, the right to counsel is part and parcel of enforcement of the adult's post-appointment rights. As far as termination of guardianship, some statutes explicitly require appointment of counsel[214] while others do it more obliquely.[215] As an example, Nevada provides that the attorney appointed for the adult alleged to be in need of protection "shall represent the proposed [adult] until relieved of the duty by court order."[216]

In order for a 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

---

[208] *See, e.g.*, Co. Stat. § 15-14-318(3),(3.5); Minn. Stat. § 524.5-317; Or. Rev. Stat. § 125.090.

[209] *See, e.g.,* Co. Stat. § 15-14-318(2) ("[adult], a guardian, or another person interested in the [adult's] welfare,"); Minn. Stat. § 524.5-317(b) ("any person interested in the welfare of the person subject to guardianship.").

[210] In our view, in a logical, unemotional way, the adult is most likely to know whether they are capable of making their own decisions, although we recognize that others will disagree with us.

[211] OHIO REV. CODE ANN. § 2111.49(A)(1)(f) (guardian's report shall include guardian's view on whether guardianship still needed). *See also*, 20 Pa. C.S.A. § 5521(c)(1)(ii)(D).

[212] *See, e.g.*, *Restoration of Rights*, Part III at 39-41.

[213] *See, e.g., In the* Matter of Joyce, 2020 WL 2111959 (Md. App. May 4, 2020) (unreported) (detailing, among other matters, the adult's attempts to have representation in seeking a hearing on termination). *See also, e.g.,* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 100-102 (2015); COLO. REV. STAT. § 15-14-319 (right to have attorney absent finding by court that adult lacks capacity to give informed consent to hire attorney. *Id.* at 15-14-319(1)).

[214] The UGCOPPA provides states with two alternatives for adoption. The first does not require the appointment of counsel but does unequivocally provide that the adult has the right to counsel. The second specifically provides that the court must appoint counsel for an unrepresented adult. ("An adult subject to guardianship who seeks to terminate or modify the terms of the guardianship has the right to choose an attorney to represent the adult in the matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.]). UGCOPPA § 319(g). *See also,* e.g., John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, 42 BIFOCAL 75, 77 (Mar.-Apr. 2021) (*citing to* CAL. PROB. CODE § 1471(a)(2) and CONN. GEN. STAT. § 45a-660).

[215] See, e.g., John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, 42 BIFOCAL 75, 77 (Mar.-Apr. 2021)(*citing to* ALA. CODE § 26-2A-110; HAW. REV. STAT. § 560:5-318.

[216] NEV. REV. STAT. 159.0485(2)(a).

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.[217] Further, That notice is followed up by the Court providing to the adult, the guardian, and the others entitled to notice, a statement of the adult's rights.[218] Mississippi takes a similar approach, requiring the guardian within fourteen days to give the adult and other interested persons notice of the appointment and right to seek termination.[219] In addition, within that same time period the guardian must request the bill of rights from the court, and give a copy to the adult.[220] That is a good start, but it's not enough. Vermont's annual notice approach is the better approach,[221] although a strong argument can be made that a notice of rights should be provided anytime the adult interacts with the court.[222]

The initiation of the request for termination or modification should not be so cumbersome as to present a barrier to the adult.[223] Access to the courts is a critical right for all adults under guardianship.[224] The UGCOPAA allows for a formal petition, "informal communication,"[225] the guardian's report, or the court's own determination to begin the inquiry about termination.[226] The question also arises as to what is the appropriate role for the guardian in termination proceedings.[227] Should the guardian automatically oppose the petition? Should the guardian remain neutral? Or should the

---

[217] UGCOPAA § 311(a).

[218] UGCOPAA § 311(b) ("Not later than 30 days after appointment of a guardian … the court shall give to the adult subject to guardianship, the guardian, and any other person entitled to notice … a statement of the rights of the adult … and procedures to seek relief if the adult is denied those rights. The statement must be in at least 16-point font, in plain language, and, … in a language in which the adult subject to guardianship is proficient. The statement must notify the adult … of the right to … seek termination or modification of the guardianship…") *Id.* at § 311(b)(1). According to the comments to this section, the emphasis is on "providing notice of key rights…. so that [adults] … and their families are in a better position to act on their rights. Among the key rights are the right to seek termination or modification of the guardianship…." *Id.* comments to § 311. *See also,* 20 Pa. C.S.A. § 5512.1(h) (court "assures" adult told of right to petition to terminate or modify guardianship at conclusion of hearing adjudicating adult.)

[219] MISS. CODE ANN. § 93-20-310(1).

[220] MISS. CODE ANN. § 93-20-310(2).

[221] 14 VER.STAT.ANN. § 3078. *See also*, MINN. STAT. § 524.5-310(i) (requiring notice annually within one month of the appointment anniversary. The notice is sent to the adult and those entitled to notice, along with a copy of the guardianship bill of rights and the adult's right to vote).

[222] *See*, *Restoration of Rights supra* n. 200, at 38 (IIIA: recommendation from roundtable participants).

[223] *See, e.g., In the* Matter of Joyce, 2020 WL 2111959 (Md. App. May 4, 2020) (unreported) (detailing, among other matters, the procedural hurdles faced by the adult in seeking a hearing on termination. Adult filed petitions and letters. *Id.* at *2-*6.).

[224] *See, e.g.,* FLA. STAT. § 744.3215(1)(k); MINN. STAT § 524.5-120(13). *See also,* Pollock and Rusciano at 75.

[225] The comment to UGCOPAA § 319(b) notes that "[t]he form that the communication takes is not determinative, and could include a grievance filed under Section 127… Permitting a communication that falls short of a petition … is necessary to make restoration a practical possibility for adults subject to guardianship." (citing to *Restoration of Rights*). *See also*, *e.g.,* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83 (2015).

[226] UGCOPAA § 319(b).

[227] *See, e.g.*, NGA Standard 21 (guardian should seek to have guardianship limited or ended including when it no longer benefits adult, adult has regained some or all capacity, or there is less restrictive alternative). *Id.*at III.

guardian support the adult's attempt to prove restoration potential?[228] When a petition for termination is filed, isn't the guardian in an inherent conflict, especially if the guardian is paid for their service?[229]

Colorado took a unique approach to the role of the guardian in a termination proceeding. The approach, something of a "hands-off" approach, limits the guardian's role to certain actions[230] and further prohibits the guardian from taking any other steps "to oppose or interfere in the termination proceeding."[231]

A recent unreported case from Maryland[232] is quite illustrative of the procedural obstacles in a termination hearing. The adult under guardianship sought termination on several occasions, only to run into various hurdles.[233] The adult was faced with an obstacle in complying with the statute, which required a doctor's certificate,[234] and on several occasions the adult was unsuccessful in the request to be represented by counsel,[235] with the guardian arguing at one point that only the guardian had the right to hire an attorney.[236] The adult persevered, even filing a notice of appeal.[237] Unfortunately, the record from the court below was insufficient for the appellate court to examine the trial court's decisions and the case was remanded "without affirming, reversing, or modifying any of the court's orders" so the trial court could "explain any and all reasons that [it] issued the orders…."[238] Ultimately, after further hearings on remand, the guardianship of the person only was terminated.[239]

Termination of Guardianship and COVID: There is still no new normal

As noted earlier in this paper, COVID may have prevented guardians from interacting with adults to the same degree as pre-COVID. As life returns somewhat to business as usual, guardians should take to heart lessons learned from this pandemic. Going forward, the guardian's communications with the adult can include information about the adult's right to seek termination of the guardianship and the process for doing so, even more detailed than what may be required by the applicable statute. Although the

---

[228] *See, e.g.,* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 105-108 (2015).
[229] *Cassidy,* at 106.
[230] COLO. REV. STAT. § § 15-14-318(3.5).
[231] COLO. REV. STAT. § § 15-14-318(3.5)(c).
[232] *In the* Matter of Joyce, 2020 WL 2111959 (Md. App. May 4, 2020) (unreported) (detailing, among other matters, the procedural issues in complying with the statute regarding initiating restoration, access to evidence, and right to representation).
[233] *Id.*at *2-*7.
[234] *Id.* at *3-*4.
[235] *Id.* at *2-*8.
[236] *Id.* at *2.
[237] *Id.* at *5, *7.
[238] *Id.* at *10. The court determined that the remand was needed in "the interests of justice….for further proceedings…. The purpose of this limited remand is to allow that court to supplement the record with an explanation for the reasons for issues [its] orders…." *Id* at *9
[239] Click on to http://casesearch.courts.state.md.us/casesearch/processDisclaimer.jis and search for case # 92109FL. Scroll through the docket entries until the entry for the order January 29, 2021, Order, Terminating Guardianship of the Person.

guardian does not have to help the adult with the mechanics of seeking restoration, there is no prohibition on the guardian doing so.

Termination of Guardianship: Best Practices for Guardians

1. The guardian should avoid paternalistic thinking about the continuing need for guardianship. If the adult wants to court to determine whether the guardianship should be terminated or modified, the guardian should facilitate that.
2. The guardian should be cognizant of conflicts of interest, especially those where the guardian is paid; there is at least an appearance of a financial incentive for the guardian to have the guardianship continue.
3. Even if not required by statute, the guardian should at least annually give the adult the notice of rights.
4. If the adult seeks to terminate or modify the guardianship, the guardian should not oppose the adult's hiring of counsel for the proceeding.
5. In the annual report, the guardian should include a detailed description of whether the adult is capable of regaining some, if not all, rights.
    a. It is incumbent on the guardian to raise it with the adult's doctor to get the doctor's thoughts on restoration as well as supports that may be sufficient for the adult.
    b. The guardian should stay up to date on various supports available, or emerging, that may be useful for the adult, including various technologies.
6. In all things the guardian should be professional and remember that the purpose of the guardianship is to assist the adult and to maximize the adult's autonomy.
7. The guardian should periodically review the ABA Toolkit on less restrictive alternatives to guardianship.[240]

Conclusion

The number of post-appointment issues are numerous and evolving all the time. This paper just briefly discussed four of the common post-appointment issues that are directly relatable to the autonomy and self-determination of the adult. Despite all the laws and procedures, how well the guardianship process works depends on the people making it work.[241] So much focus over the years has been placed on the statutes, but perhaps now is the time not to focus on regulation, but implementation. Heightened due process protections such as the ones discussed above place the emphasis more on person-centered planning rather than a check off the box process.

Recommendations For Adoption:

We recommend that the delegates consider adoption of the following overarching recommendations:

[240] ABA Comm'n on Law & Aging, PRACTICAL Tool for Lawyers; https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/

[241] For an example of the wrong type of folks to be involved in the guardianship process, *see, e.g.,* the movie, *I Care A Lot*, Netflix (2021); https://www.netflix.com/title/81350429. The movie, described on the Netflix site, "A court-appointed legal guardian defrauds her older clients and traps them under her care…."

1. Every guardianship statute should contain a clear statement of the rights of adults under guardianship (bill of rights). If the statute does not have one, the guardian should develop one, implement it, and provide a copy to the adult and those entitled to notice.
2. Statutes should address the guardian's right to seek a dissolution of marriage on behalf of the adult, if that is the wish of the adult.
3. Absent good cause and a likelihood of harm, a guardian should not restrict visitation when the adult consents to it. The guardian should seek a court order and document the instances that support the restriction of visitation.
4. The guardian should consider seeking a court order for eldercaring coordination to resolve visitation disputes with the adult's family.
5. Within 14 days of appointment and at least annually thereafter, the guardian should provide the adult and those entitled to notice information about the right to seek restoration.
6. In cases where the adult seeks restoration, the guardian should not affirmatively act to block the adult's efforts and where appropriate, facilitate the adult's efforts.
7. Each guardianship statute must contain an explicit provision to allow restoration of rights to the adult, including a process to follow to do so.
8. Each guardianship statute should clearly provide for appointment of counsel for adults seeking termination of guardianship.