



# **Overcoming Civil Death**

A Report on Needed Legal Reforms for  
People Seeking Restoration of Rights

A Report By:

**Disability Rights Texas**

The Protection and Advocacy Agency  
for Texans with Disabilities

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# Table of Contents

<b>Overcoming Civil Death</b> .....	1
<b>Executive Summary</b> .....	4
Disability Rights Texas .....	4
Civil Death and the Rise of Restoration.....	4
Report Overview.....	5
<b>Highlighted Issues</b> .....	5
A Lack of Zealous Legal Representation is a Lack of Due Process.....	5
Inadequate Representation is a Risk When a Person Cannot Hire an Attorney .....	6
The Problem With “Best Interest” and Biases .....	6
The Problem with A Lack of Experience and Training of Guardianship Attorneys and Courts .....	8
Barriers to Hiring an Attorney.....	9
Perceived Legal and Ethical Dilemmas to Representing an Individual in a Guardianship9	
Actual Restrictions on an Individual’s Opportunity to Hire an Attorney .....	11
Inadequate Review and Response from Courts .....	13
The Annual Review Requirement Does Not Guarantee an Actual Review .....	13
How Annual Reviews Work Under the Estates Code.....	13
Annual Reports Are Ineffective Safeguards If They Are Not Required and Reviewed ..	14
Informal Requests for Review Are Limited by Courts’ Inaction.....	16
Texas’s Procedures for an Informal Request .....	17
Where Written Law and Court Procedures Diverge .....	18
<b>Recommendations</b> .....	21
People in Guardianships Must Be Able to Hire Their Own Attorney .....	21
Statutes Must Clearly State That a Person Can Hire Their Own Attorney .....	21
Attorneys are Required to Represent Their Client’s Expressed Wishes.....	22
People Need Meaningful Review of and Input in Their Guardianships .....	24
Annual Reviews Must Meaningfully Evaluate How to Maximize Autonomy .....	24
Individuals Must Have Meaningful Input Into Their Lives and Guardianships.....	25
<b>Conclusion</b> .....	25

# Executive Summary

## Disability Rights Texas

As the Protection and Advocacy (P&A) agency for Texas, Disability Rights Texas (DRTx) is able to represent individuals with disabilities who want to contest proposed or terminate unnecessary guardianships.<sup>1</sup> DRTx staff therefore have the unique perspective of protecting peoples' rights during guardianship proceedings, acting at times as hired attorneys and at others as interested third parties. DRTx staffs' experience and expertise allow us to observe how the Texas guardianship system operates and where it can fail individuals caught in the system.

## Civil Death and the Rise of Restoration

For a number of years, guardianship has been recognized as a civil death because it “take[s] away many, if not all, rights of allegedly incapacitated persons and can take away their dignity by stripping away the ability of such persons to make any decisions involving their life.”<sup>2</sup> Guardianships not only remove a person's ability to choose where they want to live, what doctor they want to visit, where they work, or how they spend their money, but they can often be as restrictive as limiting what a person wears, what they eat, or who they talk to. Without the authority to make either major or mundane life decisions, an individual under full guardianship is no longer able to express themselves or influence their own life. In a 1987 Congressional Hearing on abuses in guardianship, Chairman Claude Pepper stated guardianships are “in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception of course of the death penalty.”<sup>3</sup> Even in the most well-intentioned cases, a person can still lose complete independence for the rest of their life. This loss of self and civil rights is why it is important that mechanisms for ending guardianships are accessible and effective, and guarantee due process.

Restoration proceedings—where a person regains their civil rights and terminates the guardianship—have long existed; but they are gaining a renewed and wider interest with the media coverage of high-profile restorations like the one for Britney Spears.<sup>4</sup> Ms. Spears's case came as a surprise to those unfamiliar with guardianships, who learned that despite a person's successful career and apparent wealth, they can still be barred from making decisions about how their money is spent, about their birth control, or even about whom to hire to represent them in their own legal guardianship proceedings. For these reasons and numerous others, it's important to ensure and increase all individuals' abilities,

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<sup>1</sup> We do not use the term “ward” in this report unless using a direct quote because the term is widely considered antiquated and offensive. See ABA, *Directions of Reform: 2020 Adult Guardianship Legislation Summary* at 12 (2020) available at [americanbar.org](http://americanbar.org); and see also UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT (UGCOPPA) § 319(g) (2017) available at [uniformlaws.org](http://uniformlaws.org) [hereinafter UGCOPPA].

<sup>2</sup> Michael Perlin & Naomi Weinstein, *Said I, But You Have No Choice: Why a Lawyer Must Ethically Honor a Client's Decision about Mental Health Treatment Even If It is Not What S/He Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 98 (2016) available at [digitalcommons.nyls.edu](http://digitalcommons.nyls.edu).

<sup>3</sup> HOUSE SELECT COMMITTEE ON AGING, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, House. Comm. Pub. 100-641 at 8 (1988) (statement of Chairman Claude Pepper) available at [eric.ed.gov](http://eric.ed.gov).

<sup>4</sup> See Carter Barrett, *Britney Spears Left Her Guardianship, But Others Who Want Independence Remain Stuck*, NPR (Jan. 9 2022) available at [npr.org](http://npr.org).

especially those who do not have resources, to guarantee due process and access to the necessary tools so they may rejoin the land of the living.<sup>5</sup>

## Report Overview

Developing and maintaining a person's independence has been a stated goal of Texas's guardianship statutes for several decades.<sup>6</sup> As Texans have expanded their understanding of how to support and encourage the independence and self-reliance of persons with disabilities, so too have the guardianship statutes been expanded to accommodate that understanding and to protect individual rights of those under guardianship. The most recent overhaul of guardianship statutes in 2015 emphasized an individual's right to maintain their autonomy and independence when less restrictive supports and services are available to successfully assist the individual in caring for themselves. These changes and the addition of a Bill of Rights for individuals subject to guardianships have had positive outcomes for individuals who wish to maintain their rights by contesting proposed guardianships or regain their rights by requesting restoration. Even with these positive changes, there is still more to be done.

This report will highlight two of the major issues currently faced by individuals who wish to contest or terminate their guardianship, and DRTx's recommendations for ensuring these individuals can exercise their due process rights. This report will first evaluate (1) the barriers individuals face when attempting to obtain an attorney who will zealously and competently advocate for their wishes, and (2) the barriers that deny an individual's access to the court. This report will then discuss DRTx's recommendations for overcoming and mitigating these barriers including:

- Allowing a person who is contesting the application of a guardianship or who is requesting restoration and termination of an existing guardianship to have access to the tools necessary to hire their own attorney;
- Ensuring court-appointed attorneys ad litem and hired attorneys for individuals in guardianship proceedings zealously advocate for the individual's expressed wishes; and
- Ensuring courts conduct meaningful, periodic reviews of the individual's well-being, including mandatory consideration of the wishes of the individual under guardianship, available less restrictive supports and services, and whether the individual can be fully or partially restored.

## Highlighted Issues

### A Lack of Zealous Legal Representation is a Lack of Due Process

Guardianship is one of the biggest threats to a person's liberty interests because it denies them the right to choose how and where they live. This deprivation of liberty is not a one-time event—as long as the guardianship continues, so too does the restriction of the individual's liberty, even if guardianship is no

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<sup>5</sup> See Jenny B. Davis, *Legally Bound: Renewed Attention on Guardianship Sparks Calls for Reform*, 107-JAN A.B.A. J. 52, 58-9 (2022) available at [abajournal.com](http://abajournal.com).

<sup>6</sup> TEX. ESTATES CODE § 1001.001(b).

longer (or never was) appropriate. Both the initial and continued restriction on a person's liberty interest trigger their due process right to representation by an attorney.<sup>7</sup>

Even though the Texas Estates Code mandates courts appoint attorneys ad litem for restoration proceedings, attorney biases, lack of training, and insufficient knowledge of less restrictive alternatives can lead to inadequate representation, essentially rendering the person's right to representation meaningless. But getting the opportunity to hire a zealous and knowledgeable attorney is an almost insurmountable barrier for individuals challenging initial guardianships or seeking to restore their capacity.

## Inadequate Representation is a Risk When a Person Cannot Hire an Attorney

In Texas, when an application for restoration of capacity or modification of guardianship is presented to the court, the court must appoint an attorney ad litem to represent the individual subject to guardianship.<sup>8</sup> However, a court-appointed attorney ad litem is not always an unbiased attorney who is knowledgeable on current services and supports available to persons with disabilities and a zealous advocate for their client's expressed wishes.

### The Problem With "Best Interest" and Biases

Many legal scholars argue that constitutional safeguards and legal ethical codes mandate that an attorney ad litem represent the *expressed wishes* of their client,<sup>9</sup> as opposed to a guardian ad litem who must report to the court what is in the individual's *best interest*.<sup>10</sup> However, the Texas Estates Code is not clear on an attorney ad litem's role,<sup>11</sup> which can lead some attorneys ad litem to rely on their own erroneous implicit biases regarding the person's best interest, rather than relying on their client's expressed wishes. The attorney's actions "may spring from misguided paternalism or a genuine concern for the health and safety of the client. Regardless of the reason, the result is that the individual does not have effective counsel advocating for the individual's desired outcome."<sup>12</sup> Implicit, ableist biases may

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<sup>7</sup> See Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 599-600 (2016) (analyzing the *Mathews v. Eldridge* factors for the constitutional right to due process) (internal citations omitted) *available at* [digitalcommons.law.uw.edu](https://digitalcommons.law.uw.edu).

<sup>8</sup> See TEX. ESTATES CODE § 1202.101.

<sup>9</sup> See Fourth National Guardianship Summit, *Maximizing Autonomy and Ensuring Accountability*, at 5 (2021) (recommending that "[i]n all guardianship proceedings, including termination or modification, state law should require the appointment of a qualified and compensated lawyer to represent the adult's expressed wishes") *available at* [law.syr.edu](https://law.syr.edu); Erica Wood, Pamela Teaster, & Jenica Cassidy, *Restoration of Rights in Adult Guardianship Research & Recommendations*, ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology, at 47 (2017) *available at* [americanbar.org](https://americanbar.org); and see generally Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at section III (analyzing and finding legal and ethical guidelines allow and even demand an individual in a guardianship receive legal representation).

<sup>10</sup> See TEX. ESTATES CODE § 1054.054(b). "A guardian ad litem is an officer of the court," and "shall protect the incapacitated person whose interests the guardian has been appointed to represent in a manner that will enable the court to determine the action that will be in that person's best interests." *Id.*

<sup>11</sup> See *id.* §§ 1054.001; 1202.101. Both provisions vaguely mandate an attorney ad litem be appointed to represent the unspecified "interests" of the person for whom a guardianship is proposed, or merely to "represent" the person currently subject to a guardianship.

<sup>12</sup> National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* 114 (2018) *available at* [ncd.gov](https://ncd.gov).

influence an attorney ad litem to believe their client does not have capacity, which can and has resulted in attorneys ad litem advocating for continuation of a loss of rights rather than a restoration of rights, as their clients have requested.<sup>13</sup> The ambiguously defined role of the attorney ad litem has also led some courts to conflate the roles of an attorney ad litem and guardian ad litem entirely.

### **Anna's Story: Opposed by Her Attorney Ad Litem**

In one case, a DRTx attorney filed an application for restoration on behalf of Anna<sup>14</sup>, who has an intellectual disability. With the use of extensive supports and services available to her through various state and federal programs, Anna was able to and had been directing her care since the death of her guardian years earlier. Despite DRTx having filed the restoration and representing Anna, the Court signed an "Order Appointing Attorney Ad Litem," which confusingly directed the attorney ad litem to "file a written report with the Court concerning the *best interest* of the Ward prior to a hearing date; and to perform other duties as necessary to represent the Ward and determine the *best interest* of the Ward." (Emphasis added). Consequently, the court-appointed attorney ad litem argued against his client's wishes for restoration, though both doctors' exams indicated Anna had at least partial capacity. The attorney ad litem also argued against community integration, even though that was not an issue at the hearing and Anna's team of treating professionals at her residential facility were recommending a less restrictive living arrangement. Because of the attorney ad litem's interference with his client's wishes, the Court refused to restore any of Anna's rights, despite clear medical evidence of at least partial capacity.

### **Barbara's Story: A Biased Attorney Ad Litem**

In another case, a DRTx attorney represented Barbara who had her rights removed through a guardianship after having a break-through mental health crisis. Barbara had previously been stable for thirty years on her prescription medications, but was unable to consistently take them due to a change in her psychiatric provider. During the crisis, criminal charges were filed against Barbara. She was temporarily committed to a facility for inpatient psychiatric treatment and then discharged from the hospital into jail. The attorney ad litem who was appointed to Barbara for the initial guardianship hearing was already familiar with Barbara and her recent crisis through the civil commitment proceedings. The knowledge of her recent issues seemed to have biased the attorney's representation of his client during her guardianship hearing, since he appeared to ignore her previous decades of stability. Barbara was not allowed to attend the hearing and the attorney ad litem testified on Barbara's behalf that Barbara agreed to the guardianship and placement in a locked nursing home to avoid jail. Barbara, on the other hand, felt as if she were forced into the guardianship.

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<sup>13</sup> See John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, 42 No. 4 BIFOCAL: JOURNAL OF THE ABA COMMISSION ON LAW AND AGING 75, 78 (2021) (noting "prejudice against people with disabilities 'provokes stereotypes of incompetence and dependency'") available at [americanbar.org](https://www.americanbar.org); National Council on Disability, *Beyond the Guardianship*, *supra* note 12 at 88; and *Abuses in Guardianship of the Elderly and Infirm*, *supra* note 3 at 48-49 (statement of Nancy A. Trease) (noting some attorneys may use their own judgment on what is best for their client when client has a disability rather than advocating for their client's expressed wishes even though advocating for client's wishes is an attorney's ethical obligation).

<sup>14</sup> Identifying information for all of DRTx's clients have been changed to maintain confidentiality.

Both Anna’s and Barbara’s cases illustrate that without a clear delineation between the role of the attorney ad litem (to represent the person’s expressed wishes) and the role of the guardian ad litem (to represent the person’s best interests), a conflict of interest arises.<sup>15</sup> This conflict can result in the person’s sole legal representation advocating for their continued loss of independence and autonomy, rather than providing zealous advocacy for the person to regain their rights during a restoration or modification proceeding. As a result, the person’s right to due process and legal representation can be non-existent and their personhood continues to be ignored.

## The Problem with A Lack of Experience and Training of Guardianship Attorneys and Courts

Even in situations where the attorney ad litem advocates for their client’s expressed wishes, the attorney may not be as knowledgeable about their client’s disability or about the supports and services available to their client. The Texas Estates Code requires an attorney ad litem to evaluate the availability and effectiveness of supports that may be used as less restrictive alternatives to guardianship.<sup>16</sup> The countless types of supports and services range from informal friend and familial support to formal supports provided through public or private agencies and professionals. Despite the vast possible array of services and supports that may be available to individuals seeking to prevent or remove guardianship, the Estates Code requires attorneys to take only one hour of general training every four years regarding “alternatives to guardianship and supports and services available to proposed wards.”<sup>17</sup> One hour every four years cannot comprehensively cover the fundamentals of supported decision-making or the wide array of supports and services available.<sup>18</sup> Without a working knowledge of these subjects and of the available resources, an attorney ad litem cannot present the necessary evidence to adequately represent their client’s wishes regarding the guardianship. In many cases, DRTx attorneys find themselves having to educate other parties, attorneys, and even the courts on available services that allow people with disabilities to care for their needs safely and independently. If DRTx attorneys had not been present to provide the necessary evidence and education, it is unlikely that several of our clients would have been restored.

### **Flor’s Story: The Need for a Knowledgeable Attorney**

Flor’s case is illustrative of the need for competent attorneys who are well-versed in less restrictive alternatives to guardianship. Flor hired DRTx after the court, on its own motion, started to re-evaluate guardianships in which the individual retained their right to operate a motor vehicle with an eye towards removing this right for more individuals. Because Flor had retained this right, she was in jeopardy of losing more of her independence. When Flor’s appointed guardian ad litem informed her it was unlikely she was going to be able to keep her right to drive, Flor and her guardian both agreed she was ready to be restored and reached out to DRTx. After her doctor completed a certificate of medical examination showing Flor could be fully restored, the guardian ad litem filed an application for restoration. The guardian ad litem was then dismissed, but was re-appointed as the attorney ad litem, despite DRTx’s involvement in the case. At the hearing, all the parties were in favor of Flor’s full restoration of capacity and

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<sup>15</sup> See National Council on Disability, *Beyond the Guardianship*, *supra* note 12 at 114 (noting an “attorney who represented the client in the original guardianship proceeding is often appointed to represent the individual when seeking to restore rights. That attorney may or may not have advocated against the guardianship in the first place and is certainly unlikely to raise arguments that are based on evidence that his or her client was erroneously determined to lack capacity in the first place”).

<sup>16</sup> See TEX. ESTATES CODE §1054.004(a)(4).

<sup>17</sup> *Id.* §1054.201(b).

<sup>18</sup> See National Council on Disability, *Beyond the Guardianship*, *supra* note 12 at 145.



termination of guardianship; however, only Flor’s hired DRTx attorneys had and presented evidence of her current use of less restrictive community supports and services that she would continue to use after her rights were restored. Though all parties were in favor of restoration, Flor still needed the expertise and experience of her hired DRTx attorneys to present the necessary evidence the court required to fully restore her rights.

### **Barbara’s Story Continued: Evidence of Supports and Services**

Similarly, in Barbara’s case, which we discussed earlier, after DRTx staff filed an application for her restoration, the court appointed Barbara’s attorney ad litem from her first hearing as the guardian ad litem in her restoration hearing. This was the same attorney who knew Barbara from the mental health courts. Even though a court should focus only on evidence of the individual’s current abilities,<sup>19</sup> the guardian ad litem insisted on considering old and no longer accurate information from Barbara’s past mental health case and original guardianship. Though the guardian ad litem was also mandated by the Estates Code to evaluate less restrictive alternatives to guardianship,<sup>20</sup> he informed the DRTx attorney he would not agree to restoration unless the DRTx attorney could prove Barbara would not be homeless and would not skip her medications. The demanded guarantees ignored Barbara’s current situation, supports, and services and, while unlikely to occur again, is impossible to guarantee. Barbara’s rights were restored only because her hired DRTx attorney was able to present evidence to the court of Barbara’s capacity and the numerous supports and services she would receive.

## **Barriers to Hiring an Attorney**

Rather than rolling the dice on the appointment of an unknown attorney ad litem, an individual under guardianship may choose to hire their own attorney they know is experienced to advocate for their expressed wishes in a restoration or modification hearing. Unfortunately, if an individual wants to do this, they currently have to overcome additional, almost insurmountable obstacles. Between perceived legal and ethical limitations on an attorney’s authority to represent someone in a guardianship and actual prohibitions on an individual’s ability to act, an individual subject to a guardianship who wants to hire an attorney to represent them may not get the opportunity.

## **Perceived Legal and Ethical Dilemmas to Representing an Individual in a Guardianship**

The Texas Estates Code provides that a “ward may retain an attorney for a proceeding involving the complete restoration of the ward’s capacity or modification of the ward’s guardianship.”<sup>21</sup> Additionally, the Texas Bill of Rights for persons subject to guardianship says that an individual has the right to

petition the court and retain counsel . . . to represent the ward’s interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006.<sup>22</sup>

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<sup>19</sup> See TEX. ESTATES CODE §1202.151(a).

<sup>20</sup> See *id.* § 1054.045(c); (c)(1)-(2).

<sup>21</sup> *Id.* § 1202.103(a).

<sup>22</sup> *Id.* § 1151.351(b)(17).

Those limiting factors in Section 1054.006 say a person may substitute their hired attorney for a court-appointed attorney ad litem if the person has capacity or retains the right to contract.<sup>23</sup> Even under the plain language of the Estates Code, it is possible for an individual to still hire their own attorney when they are subject to a full guardianship. Where the person hasn't retained the right to contract, the hired attorney will not replace the court-appointed attorney ad litem, but can still be hired by the ward. But some courts have construed an individual's lack of capacity to mean they also lack the right to hire an attorney to oppose a guardianship, despite the plain language of the statutes.<sup>24</sup> Additionally, some attorneys may question their legal and ethical obligations when representing a person who has been adjudicated to lack capacity, even though the Estates Code expressly authorizes an individual to hire an attorney.<sup>25</sup>

### **Macy's Story: Denied Her Right to Hire Counsel**

Macy contacted DRTx for representation in a contested guardianship case. Initially Macy's father had reached out to the court for assistance to begin the guardianship process because Macy was in a coma. While the father waited for the appointed guardian ad litem to investigate and an attorney ad litem to be appointed, Macy's condition improved and she was able to participate in rehabilitation. Macy's father contacted the guardian ad litem to let them know he wanted to stop the guardianship proceeding and withdraw the application for permanent guardianship. The guardian ad litem refused to withdraw the application or get an updated medical examination. During this time, the guardian ad litem had not visited with Macy, but had spoken with the attorney ad litem who also believed the guardianship was in the best interest of Macy.

When the DRTx attorney entered the case, both the guardian ad litem and the attorney ad litem wanted to proceed with the guardianship, despite the father who originally contacted the court requesting that the application be withdrawn. The DRTx attorney met with Macy to discuss the case and her wishes, which were clear—she did not wish to be put under guardianship. The DRTx attorney notified the court of their involvement and requested a continuance to allow DRTx to prepare for the upcoming hearing. At the hearing, the guardian ad litem with the support of the attorney ad litem filed a motion for DRTx to show authority, arguing that DRTx cannot act on behalf of Macy despite there being no determination or adjudication by the Court of Macy's capacity. The judge ultimately determined Macy did not have the capacity to contract, despite no determination of capacity at that point, and therefore did not have the ability to retain an attorney of her choice. The judge made the decision without ever speaking with Macy or her father. The judge had only statements made by the guardian ad litem, the attorney ad litem, an outdated medical examination documenting partial capacity,

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<sup>23</sup> See *id.* § 1054.006(a)(1)-(2).

<sup>24</sup> See *in re Guardianship of Wehe*, 2012 WL 5292893, at \*1 & \*3 (Tex. App.—Corpus Christi-Edinburg 2012, no pet.) (mem. Op.) (finding that attorney hired for free by the individual to appeal the trial court's order for guardianship, could not represent the individual because the attorney had not shown the individual had capacity to contract); and *cf. In re Guardianship of Tonner*, 514 S.W.3d 242, 244-45 (Tex. App.—Amarillo 2014, pet. granted) (mem. op.) (stating that individual's rights to make medical decisions, choose his residence, and make financial or business arrangements could not be restored despite evidence of his capacity and less restrictive alternatives making in these areas because evidence suggested he lacked the capacity to contract).

<sup>25</sup> See Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 583 – 84.

specifically no capacity to make complex business decisions. Macy was left with no legal representation of her express wishes—a violation of the Texas Estates Code as well as her right to due process.

As the statutes suggest, sometimes an individual has both a hired attorney and an attorney ad litem if they did not retain the capacity to contract or a court otherwise appoints an attorney ad litem despite a ward’s preferred attorney already having appeared. Unfortunately for the client, this is not always beneficial to them as the two attorneys may end up opposing each other even though both should be advocating for the client’s expressed interest.<sup>26</sup> In Anna’s restoration hearing, as mentioned earlier, Anna had both a hired attorney through DRTx, and a court-appointed attorney ad litem. Though the DRTx attorney represented Anna’s desire to be restored, it was the attorney ad litem who argued for continued guardianship against his client’s wishes and won.

## Actual Restrictions on an Individual’s Opportunity to Hire an Attorney

Other barriers are built into the nature of guardianship and prevent a person from being able to hire effective representation. Since the vast majority of guardianships are full—meaning all decision-making power is granted to the guardian—most individuals in a guardianship are not allowed to choose a physician to complete a capacity examination, access their records, or use their funds to hire an attorney.<sup>27</sup> Additionally, some guardians prohibit or limit an individual’s access to the internet, their phone, or visits from friends, family, or other professionals, all of which limit a person’s ability to identify and access legal assistance.

In a 2017 study conducted by the America Bar Association (ABA), the findings highlighted “the extreme difficulty of an individual whose rights have been removed by the court—and who may be under the thumb of an adverse guardian—in finding, contacting, meeting with, directing, and paying a lawyer, particularly one with the background and skills to secure a restoration.”<sup>28</sup> For example, in the Jenny Hatch case—a landmark restoration case out of Virginia—her guardians prohibited any visitors from speaking to Jenny about her guardianship, including any attorneys, effectively cutting Jenny off from restoration proceedings and from receiving any due process.<sup>29</sup> Likewise, when DRTx began to represent Barbara, her nursing facility was hesitant to relay information to Barbara from her attorneys since she had a guardian. Because DRTx has the federally-mandated authority to speak to individuals with disabilities whose rights may be violated even over a guardian’s objection,<sup>30</sup> DRTx was still able to

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<sup>26</sup> See National Council on Disabilities, *Beyond the Guardianship* *supra* note 12 at 115 (“in one case, the court effectively made the original [court-appointed] attorney co-counsel [with the hired P&A attorney], although he subsequently appeared as a witness and testified that the individual subject to guardianship continued to need a guardian”).

<sup>27</sup> See Pollock & Rusciano, *Right to Counsel in Restoration of Rights Cases*, *supra* note 13 at 75, 78 (noting individuals in guardianships “may not have the right to make medical decisions or obtain their own records”); and Davis, *Legally Bound* *supra* note 5 at (59).

<sup>28</sup> Wood et al., *Restoration of Rights in Adult Guardianship*, *supra* note 9 at 47.

<sup>29</sup> See The Jenny Hatch Justice Project, *The Justice for Jenny Trial* website available at [JennyHatchJusticeProject.org](http://JennyHatchJusticeProject.org), and *Visitation Documents* also available at [JennyHatchJusticeProject.org](http://JennyHatchJusticeProject.org).

<sup>30</sup> See 42 U.S.C. §§ 15043(a)(2)(A), (H); 42 U.S.C. § 10805(a)(3); and 29 U.S.C. § 794e(f)(2); see also *State of Conn. Office of Prot. and Advocacy for Pers. with Disabilities v. Hartford Bd. of Edu.*, 464 F.3d 229, 242-43 (2d Cir. 2006) (then Circuit-Judge, now Supreme Court Justice Sonya Sotomayor, noting for the court that the federal acts that grant P&As reasonable access to investigate incidents of abuse and neglect of individuals with disabilities and to monitor conditions do not “condition[] this access on the consent of an individual’s parents or guardians”); and Tex. Att’y Gen. Op. No. JC-0461 (2002) (Texas P&A entitled to

communicate with and help Barbara. Any other attorney, however, may not be able to contact an individual if a guardian objects to it. Importantly, these cases show the “right to select an attorney is illusory unless a person has the tools to do so.”<sup>31</sup>

### **Shannon’s Story: Guardian Interference**

Shannon had a similar experience to Barbara. She had previously been in a guardianship and was restored in 2009 with the help of her supportive professional guardian. But in 2012, after the death of her husband, Shannon had a mental health crisis. Remembering the support of her first guardian who guided her through to stability and independence, she agreed to a new guardianship when she was faced with the issue after checking herself into a mental health facility. Unfortunately, Shannon’s professional guardian this time was anything but supportive. Her guardianship was severely restrictive, isolating her from friends and family by limiting visitation and prohibiting the use of electronics. Shannon could only use the landline twice a day for 30 minutes at 4:00 pm and 7:30 pm. Shannon was even prohibited from spending her own money; instead the guardian directed staff employed by Shannon’s service provider to buy items regardless of Shannon’s preference. When Shannon regained her stability, her guardian refused her repeated requests for restoration. And after the hired DRTx attorney filed an application for restoration on her behalf, her guardian removed her cell phone in retaliation. Despite the guardian’s interference, Shannon was able to reach DRTx whose attorney was then able to help ensure the Court restored Shannon to her full capacity.

Restrictions like the ones Shannon was subject to are not uncommon; however, Shannon finding a way around them to get assistance is. Limitations like these prevent a person from being able to contact attorneys during business hours and hire them for a restoration or modification proceeding.

Even if the person has been able to secure representation from someone, usually a legal aid or protection and advocacy agency who is working for free,<sup>32</sup> the Estates Code does not explicitly allow the contracted attorney the same access to records a court-appointed attorney ad litem is guaranteed.<sup>33</sup> Additionally, a hired attorney is not able to seek a certificate of medical examination, which is required before the court can grant restoration or modification,<sup>34</sup> without consent from a possibly-adversarial guardian or from the court. In the event that the guardianship is contested, it is often highly unlikely that a guardian will consent to an examination by a doctor of the person’s or the hired attorney’s choosing.

### **Elena’s Story: Barriers to Getting an Examination**

In the case of Elena, a DRTx attorney helped her ask her guardians to allow her to get a certificate of medical examination from her primary care doctor in anticipation of filing

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access person with a mental illness or developmental disability living in a facility, even over objection of the guardian).

<sup>31</sup> Brief of Disability Rights Organizations as Amici Curiae Supporting Conservatee Britney Jean Spears, *In re the Conservatorship of Britney Jean Spears*, Case No. BP108870 in the Superior Court for the State of California for the County of Los Angeles, Central District (July 14, 2021) available at [ACLU.org](https://www.aclu.org).

<sup>32</sup> For example, Barbara turned to DRTx after other attorneys refused to represent her in a restoration hearing because she didn’t have access to her funds and could not afford their fees.

<sup>33</sup> See TEX. ESTATES CODE §§ 1054.003 & 1054.004 (listing records attorneys ad litem shall review and have access to).

<sup>34</sup> See TEX. ESTATES CODE § 1202.152.

for restoration. Her guardians agreed and the doctor found Elena had full capacity. After reviewing the results of the assessment, the guardians initially agreed to file for restoration on behalf of Elena. They later changed their minds, expressing concerns about the validity of the assessment when they learned a staff person from Elena's residential provider was in the room at the time of the assessment—a common support for many individuals. The DRTx attorney attempted to facilitate another exam with the same physician, this time with no one but Elena and her doctor in the room, but the guardian refused. The guardian then tried to get a second assessment done by two of Elena's other treating physicians who all declined, stating they were new to her case or did not have the expertise to influence such a major change in Elena's life. The guardian instead chose a doctor Elena had never met, who also found that Elena had full capacity. Elena was fully restored.

Had the second doctor's certificate of medical examination not been favorable and if Elena did not have DRTx representing her, her quest for restoration would have stalled. Even with DRTx's representation, it was difficult to obtain another assessment once the guardian decided against it. Without the tools to hire effective legal representation, secure an accurate medical examination, or access records, a person's right to due process is toothless—a right without a remedy.

A lack of zealous legal representation is one of the two major highlighted issues currently faced by individuals who wish to contest or terminate their guardianship. A lack of zealous legal representation is a lack of the due process activated by the deprivation of liberty in guardianships. The ability to get zealous legal representation is obstructed by both inadequate representation due to biases or lack of expertise and barriers to hiring an attorney caused by perceived legal and ethical limitations on an attorney's authority and actual prohibitions on an individual's ability to act while under guardianship. The other major issue highlighted by this report is inadequate review of guardianships and the deficient response from courts.

## Inadequate Review and Response from Courts

Courts are required to review guardianships at least annually to ensure the individual is being appropriately cared for and to determine if the continuation of the guardianship is needed, though in practice these reviews inconsistently occur. Where a court fails to review a guardianship or where a court continues a guardianship after a review—which almost always happens—an individual or someone on behalf of an individual can still informally request the court investigate the guardianship. But when both mechanisms fail, an individual in a guardianship is left with little recourse to regain their rights or even notify the court of abuse or other issues with the guardian or guardianship.

## The Annual Review Requirement Does Not Guarantee an Actual Review

A guardianship takes the rights of the person under guardianship and gives those rights to the guardian who is then obligated to make decisions in the "best interest" of the person under guardianship. To ensure a guardian is not abusing their powers and to determine whether a guardianship is still necessary, the court must annually review a guardian's reports. Unfortunately, many courts fail to comply with the Estates Code to require and then meaningfully review these reports, but even when they do comply, the individual is denied any input regarding the guardianship by design.

## How Annual Reviews Work Under the Estates Code

The court is responsible for the strict oversight of each guardianship under their jurisdiction to ensure the guardian is performing all of the duties required of the guardian.<sup>35</sup> Each year the judge is to determine if the guardianship is to continue, be modified, or terminated.<sup>36</sup> As stated in the Estates Code, the determination may be based on a report prepared by a court investigator, a guardian ad litem, or a court visitor; an annual account prepared by the guardian of the estate; an annual report by the guardian of the person; or evidence from a court hearing.<sup>37</sup> Typically, only the guardian files a report if one is filed at all and hearings are rare unless one of the above individuals asks for one.

For the annual report, the guardian of the person is required to submit to the court a yearly report containing information, such as:

- where the person under guardianship lives and how long they have lived there;
- the most recent visit with the person under guardianship and how frequently they visited during the reporting year;
- whether the person's mental and physical health have improved, deteriorated, or remained unchanged during the past year;
- the types of medical and mental health specialists seen; and
- a description of activities during the past year.<sup>38</sup>

The annual report also includes the *guardian's* opinion of the living arrangements for the person under guardianship, whether the person under guardianship is content or unhappy with their living arrangements, and any unmet needs of the person under guardianship. The report also requires a statement indicating whether the guardian's power should be increased, decreased, or unaltered, including an explanation if a change is recommended and any additional information the *guardian* desires to share with the court regarding the person under guardianship.<sup>39</sup>

What is lacking from the reports is any input of the individual subject to the guardianship. The majority of courts conducting reviews do not have any contact with the person stripped of their rights who is under the control of someone not chosen by the person under guardianship. For years, even decades, individuals under restrictive guardianships are forced to wait for their courts to send a representative to check on their well-being in order to have the opportunity to inform the court of their concerns. Because periodically sending a representative to check on persons under guardianship is not required by the Estates Code, for many, if not most, people under guardianship, they never get this chance to tell a court representative how they feel about their guardian or their continuing need for guardianship.

## Annual Reports Are Ineffective Safeguards If They Are Not Required and Reviewed

Across the U.S. there is a dearth of information about guardianships, making it difficult to monitor and gather data about the types of guardianships that have been ordered, abuse or fraud by guardians, courts' compliance with state statutes, or the efficacy of restoration provisions. While Texas has begun to collect limited information about guardianship oversight, the data is still incomplete since many

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<sup>35</sup> See *id.* § 1201.001.

<sup>36</sup> See *id.* § 1201.052.

<sup>37</sup> See *id.* § 1201.053.

<sup>38</sup> See *id.* § 1163.101.

<sup>39</sup> See *id.* § 1163.101.

topics, like restoration, are not covered, and some courts choose not to participate in the information collection process.<sup>40</sup>

Texas recognized there was a lack of information about guardianships within the state and “on November 1, 2015, at the direction of the Texas Judicial Council, and funded by the Texas Legislature, the Office of Court Administration (OCA) launched the Guardianship Compliance Project (GCP) to audit guardianships in multiple counties to determine the effectiveness of existing safeguards, like annual guardianship reviews, providing protection for the elderly and incapacitated.”<sup>41</sup> The project found and continues to find numerous issues concerning the oversight of guardianships in Texas.<sup>42</sup>

According to the OCA’s Guardianship Abuse, Fraud, and Exploitation Deterrence Program (GAFEDP) 2021 report, 27% of county court and court at law guardianship cases and 12% of statutory probate court cases were missing the annual report of the person under guardianship; though this is an improvement from the astounding 46% of missing reports in 2020.<sup>43</sup> For each case represented in these percentages, “the court was uninformed about the well-being of the individual . . .”<sup>44</sup>

Of course, these numbers reflect only missing reports and do not capture whether courts review the reports that are submitted. According to the GAFEDP, “[i]n most of Texas’ counties, the cases are handled by judges who are not equipped with specialized staff to assist them in the monitoring process.”<sup>45</sup> Further, not all courts are eager to participate in these audits. As of December 21, 2021, the GAFEDP had selected 216 of the 254 counties to participate in the program, but only 146 of the 216 selected Texas counties had responded and had their guardianship cases reviewed or scheduled to be reviewed.<sup>46</sup>

In the GAFEDP 2020 report, there were multiple case summaries exemplifying the inability or unwillingness of courts to scrutinize their current guardianship cases.<sup>47</sup> In one example, a “[g]uardian’s annual reports indicate she has not visited Ward in 15 years while living at a State Supported Living Center. The Court is approving the reports.”<sup>48</sup> In another example, the individual was living with her former guardian who was removed due to neglect and exploitation, yet the current guardian did not place the individual in a safer environment.<sup>49</sup>

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<sup>40</sup> See *infra* text and note 46.

<sup>41</sup> Office of Court Administration, *Texas Guardianships Compliance: Guardianship Abuse, Fraud and Exploitation Deterrence Program Annual Report for Fiscal Year 2021* at 1 (2021) available at [txcourts.gov](https://txcourts.gov) [hereinafter Office of Court Administration, 2021 GAFEDP].

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 4; and Office of Court Administration, *Texas Guardianships Compliance Fiscal Year 2020* at 5 available at [txcourts.gov](https://txcourts.gov) [hereinafter Office of Court Administration, 2020 GAFEDP]. The 46% of cases in 2020 includes county courts, county courts at law, and statutory probate courts. *Id.*

<sup>44</sup> *Toxic Conservatorships: The Need for Reform: Hearing Before the U.S. Senate Subcomm. on the Constitution*, 117th Cong. at 2 (September 28, 2021) (statement of David Slayton, Vice President, Court Consulting Services National Center for State Courts) available at [judiciary.senate.gov](https://judiciary.senate.gov) [hereinafter *Toxic Conservatorships*].

<sup>45</sup> *Id.*

<sup>46</sup> See Office of Court Administration, 2021 GAFEDP, *supra* note 41 at 3.

<sup>47</sup> See Office of Court Administration, 2020 GAFEDP, *supra* note 43 at 7.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

GAFEDP also found numerous cases where abuse or neglect were a concern and thousands of instances where individuals in guardianships had died without the courts' awareness. Of the 14,159 cases reviewed in 2021, 201 guardianships were reported to different courts for concerns about the well-being of the individuals under guardianship, and 36 cases were reported by GAFEDP to different courts for concerns of potential abuse, fraud, and exploitation.<sup>50</sup> Additionally, the GAFEDP uncovered 1,042 deaths in 2021, which is only slightly less than the 1,072 deaths discovered in 2020 of individuals under guardianship whom the courts were not aware had died.<sup>51</sup> As noted by David Slayton, former Administrative Director of the Courts in Texas in his September 2021 testimony to a United States Senate Subcommittee, "[i]n a review of over 55,000 cases, Texas' judiciary found that in 5,621 instances, the individual was deceased without the guardian alerting the judge."<sup>52</sup> In other words, approximately ten percent of individuals in the reviewed counties had died without the court realizing it.

In addition to the issues identified by OCA, several DRTx clients have faced additional hardships when they wound up in guardianships with no competent, live guardian and their courts did not notice. For example, DRTx clients have languished in guardianships that lapsed due to the guardian's death, as in Anna's case; the guardian's own incapacity; the guardian's resignation; the guardian's abandonment of the individual; and even the decertification of a private-professional guardian due to suspected exploitation.<sup>53</sup> If any of the courts had, at minimum, checked to determine whether an annual report had been filed, DRTx's clients would not have been left vulnerable and with no legal ability to consent to or decline medical care, to direct the management of their finances, or to choose their home.

### **Carol's Story: Lack of Court Review**

Carol languished in an unnecessary guardianship for years without a guardian. Carol's guardian was a family friend who, when her husband became ill, decided to resign as Carol's guardian so she could focus on her spouse. The guardian even sent a letter to the court informing it of her decision to stop being Carol's guardian. Despite years of missing annual reports and a letter from the former guardian, the court did not review Carol's case to determine whether it was necessary to continue the guardianship or if a successor should be appointed. As a result, Carol was unable to move out of an institution and into a less restrictive placement in the community that her treating team determined was more appropriate. After years of physical confinement in an institution and civil confinement in a guardian-less guardianship, DRTx was able to assist Carol in fully restoring her rights so that she was able to move to the community and take control of her life.

Though Carol's situation was successfully resolved eventually, it could have been resolved much earlier without DRTx's intervention had the court simply reviewed the case after the guardian missed the first filing deadline for the annual report.

## **Informal Requests for Review Are Limited by Courts' Inaction**

Given the ineffective safeguards of annual reviews, restoration or changes to a guardianship are an unlikely result. Another alternative available for a person who wishes to be restored or make other changes to their guardianship is informally and directly contacting the court. Much like annual reviews,

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<sup>50</sup> See Office of Court Administration, *2021 GAFEDP*, *supra* note 41 at 5.

<sup>51</sup> See Office of Court Administration, *2020 GAFEDP*, *supra* note 43 at 5; and Office of Court Administration, *2021 GAFEDP*, *supra* note 41 at 4.

<sup>52</sup> *Toxic Conservatorships*, *supra* note 44 at 2.

<sup>53</sup> See Office of Court Administration, *2021 GAFEDP* at 5 & 6.



however, this “safeguard” is ineffective when courts refuse to acknowledge the requests or conduct meaningful reviews, even though failure to do so is a violation of the Estates Code.

Informal letters are a vital but underused and under-acknowledged tool in the Estates Code. As noted above, while the annual report informs the court of what the *guardian* wants the court to know, it does not include what the *person* under guardianship actually wants. Does the person under guardianship believe the guardianship should continue, be modified, or terminated? Do they feel their guardian is being abusive or exploiting them? To include other perspectives left out by the one-sided annual guardian’s report, the Estates Code provides that a person under guardianship or any person interested in the welfare of the person under guardianship may file a written application or an informal letter with the court to address restoring or modifying the capacity of the person under guardianship to terminate or modify the authority of the guardian.<sup>54</sup> But again, what is required by the statutes and what happens in reality do not always align.

## Texas’s Procedures for an Informal Request

Typically, a written application for restoration must satisfy multiple statutory requirements, making it virtually impossible for a person under guardianship to access the court in such a formal manner since legal expertise is usually required.<sup>55</sup> As a more accessible alternative, the Texas Estates Code includes the option of an informal letter sent to the court.<sup>56</sup>

Once a court receives the informal letter from the person under guardianship, the Estates Code dictates the court *shall* appoint the court investigator or a guardian ad litem to investigate the circumstances of the person under guardianship, including any circumstances alleged in the letter, to determine whether the person under guardianship is no longer an incapacitated person; or if a modification of the guardianship is necessary.<sup>57</sup> The court *shall* also send a letter to the person within thirty days acknowledging receipt of their letter and advising them of the date on which the court appointed the court investigator or guardian ad litem and of the contact information for the appointee.<sup>58</sup>

After completing the investigation, the court investigator or guardian ad litem *shall* then file with the court and provide to the person a report of the investigator's findings and conclusions.<sup>59</sup> If the court investigator or guardian ad litem determines that it is in the best interest of the person to terminate or modify the guardianship, the court investigator or guardian ad litem *shall* file an application for termination or modification on behalf of the person under guardianship.<sup>60</sup> It should be noted, however, that informal letters cannot result in infinite reviews-- regardless of how many informal letters are sent or written applications filed, an application for restoration can be filed only once annually from the hearing date of the last application unless good cause is shown by the applicant.<sup>61</sup>

Even where restoration is not the goal or a viable option for a client, the “Bill of Rights for Wards” includes the right to complain or raise concerns regarding the guardian or guardianship to the court,

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<sup>54</sup> See TEX. ESTATES CODE §§ 1202.051(a), 1202.054.

<sup>55</sup> See *id.* § 1202.052.

<sup>56</sup> See *id.* § 1202.054(a).

<sup>57</sup> See *id.* § 1202.054(b), (b)(1)-(b)(2). “‘Shall’ imposes a duty” on the subject. TEX. GOV’T CODE § 311.016(2).

<sup>58</sup> See TEX. ESTATES CODE § 1202.054(b-2), (b-2)(1)-(b-2)(2).

<sup>59</sup> See *id.* § 1202.054(c).

<sup>60</sup> See *id.* § 1202.054(c).

<sup>61</sup> See *id.* § 1202.055.

including issues with living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under the Bill of Rights; and to have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the individual subject to guardianship or any person about the guardianship, unless these rights have been specifically limited by the court.<sup>62</sup>

In theory, at least, the formal application and informal letter combined with annual reports would seem to create sufficient oversight to determine if the guardian is fulfilling their responsibilities to the guardianship, if the guardianship should continue, be modified, or terminated. Yet in practice and tragically for many under guardianship, the measures currently in place are grossly inadequate, leaving individuals under guardianship to suffer for years in unnecessary, abusive, or overly restrictive guardianships.

## Where Written Law and Court Procedures Diverge

An individual's right to informally request restoration is protected by the Estates Code, which says any person who knowingly interferes with the transmission of the request to the court may be found guilty of contempt of court.<sup>63</sup> This provision does not, however, address the reality of the numerous informal barriers faced by individuals in transmitting their request, nor does it address the failure of courts to respond to such informal letters.

Writing a letter to a court requires items the person under guardianship may not have access to such as a pen, paper, envelope, stamp, the court address, or a mailbox. Many individuals under guardianship are so restricted they never leave the facility or group home their guardian has placed them in along with strict orders to the staff to restrict every aspect of the individual's life. DRTx staff have spoken with individuals under guardianship that do not know what county their guardianship is currently or originally filed in because they were not included in any of the court proceedings, have moved so much, or the guardian did not transfer the guardianship to the county where the person under guardianship lives. Guardians are also notorious for restricting an individual's use of the phone and internet, leaving them with no way to obtain any information about their guardianship. Where these individuals are unable to access even basic things like stamps or their court's address, the Estates Code's provision of contempt of court is a toothless protection.

Even when an individual under guardianship is able to write a letter to the court, other barriers exist, including courts themselves.<sup>64</sup> Many of DRTx's clients' letters sent to their respective probate courts requesting restoration or termination were ignored or rejected. Some of the reasons expressed to DRTx staff or our clients for rejecting the letters were because the guardian has not agreed to restoration; the individual does not have a certificate of medical examination; the individual does not reside in the same county as the court that ordered the guardianship; the letter was not in the individual's own handwriting; or that the request was untimely even though there had been no guardianship hearing for the individual in years.

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<sup>62</sup> See *id.* § 1151.351(b)(10), (12).

<sup>63</sup> See *id.* § 1202.054.

<sup>64</sup> See Patrick Michels, *Who Guards the Guardians?*, Texas Observer (July 2016) available at [texasobserver.org](http://texasobserver.org). The article tells the story of Rosamond who sent multiple letters to the court pleading for her restoration, none of which the court responded to. *Id.* She was restored only after her case was transferred to a different county. *Id.*

The GAFEDP noted similar issues in its 2021 report, including that an individual “wrote [a] letter to Judge requesting restoration of rights in 2017 with no court follow-thru.”<sup>65</sup> As detailed above, none of these excuses for rejecting or ignoring an individual’s letter are allowed under the Estates Code.<sup>66</sup> Though the Texas legislature has tried to correct at least one of these issues by explicitly stating an individual does not need to have a certificate of medical examination prior to informally requesting a review,<sup>67</sup> there is no oversight to ensure that the courts comply with the requirements of section 1202.054 of the Texas Estates Code.

### **Charlie’s Story: Ignored Request for Restoration**

Charlie faced these challenges when his DRTx attorney assisted him in informally contacting the court for restoration. For several years, Charlie has resided in a Texas State Supported Living Center (SSLC). While at the SSLC, Charlie has worked several jobs in the community, has learned to cook meals independently, and has flown unaccompanied across the state to visit family members. Charlie has articulated for many years that he wants to reside in a community HCS home where he would have supports and services to meet his needs. For the last decade, his team of treating professionals has unanimously agreed that he does not meet criteria for continued commitment to the SSLC and can be served in a less-restrictive setting—like an HCS home where he wants to live.

Despite the team’s unanimous recommendation, his family guardian has consistently refused to consider allowing Charlie to reside anywhere other than the large restrictive institutional setting of the SSLC. The DRTx attorney sent a letter to the investigator of the probate court responsible for Charlie’s guardianship; however, the investigator informed the DRTx attorney that they were not able to cross county lines to investigate the circumstances of the wards in their court. Since the SSLC was not in the same county as the court, they claimed they were unable to investigate whether Charlie’s guardian was violating her duties under the Estates Code or whether Charlie could be restored, partially or fully. Instead, the court continues to allow Charlie to languish in an overly-restrictive guardianship and confined to an overly-restrictive institution.

As before, the court’s reason for not complying with the guardianship statutes is not founded in the Estates Code. Courts can and must find a way to comply with the Estates Code and preserve the individual’s right to access the court for restoration or modification of their guardianship.

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<sup>65</sup> Office of Court Administration, *2021 GAFEDP*, *supra* note 41 at 6.

<sup>66</sup> See TEX. ESTATES CODE § 1202.054 (setting forth mandatory duties the court “shall” complete upon receipt of an informal letter).

<sup>67</sup> See TEX. ESTATES CODE § 1202.054(b1); National Council on Disability, *Beyond the Guardianship*, *supra* note 12 at 112 (noting “there might be many cases in which the person indicates to the court that he or she would like his or her rights back but receives no response; or in which the persons asks his or her guardian for help with the process and is denied”); and Wood et al., *Restoration of Rights in Adult Guardianship*, *supra* note 9 at 42-43 (noting “[w]hile Roundtable discussion generally favored use of such procedures, there is no research showing the frequency or effectiveness of informal communications to court – nor the response of the judge. Anecdotally, at least one judge treated such informal communication from the individual as an impermissible ex parte communication. Even if allowed by state law, there is no indication that individuals under guardianship are aware they can file such informal requests”).

In addition to failing to respond to letters directly from those under guardianships, courts have also failed to review guardianships even at the behest of parties who raise serious concerns with the court. As detailed in a 2016 Texas Observer article, the then-Lubbock County Judge ignored numerous pleas from interested parties and even Adult Protective Services to review the guardianships of individuals who were believed to have been exploited by their private, professional guardian.<sup>68</sup> While these complaints alone should have been enough to spur the court into action, the court should have already been aware of potential abuses because the professional guardian's husband, who had previously run his own private guardianship program, lost his certification due to exploiting the individuals in his care prior to his wife taking over their cases.<sup>69</sup> Yet the court failed to review the guardianships after it transferred them from the original guardian to his wife.<sup>70</sup> With the county judge refusing to act, the only reason the private, professional guardian was stopped from continuing to exploit those under her care was the state guardianship commission's refusal to renew her license after two years of exploitation of those in her care.<sup>71</sup> While the Lubbock case may be an extreme example in the sheer number of complaints ignored by the court, courts elsewhere in the state have ignored an interested party's concerns and left guardianships in place, even when it risks the individual's safety, well-being, and rights.

### **Rose's Story: Denied Due Process**

This happened to Rose, who also resided in an SSLC since childhood. Several years ago, her team of treating professionals determined she no longer met commitment criteria for an SSLC and could safely live in the community with services and programs available to her to support her and to meet her needs. Though Rose's parents were originally her guardians, they moved out of Texas in the early '90s and allowed their guardianship letters to expire in 2003. The court never reviewed Rose's guardianship or questioned why more than a dozen annual reports were missing. Unfortunately, when the guardians learned of the team's determination, they filed documents to be reinstated as her guardians, specifically to halt the process of moving Rose to live in a community home consistent with her rights and needs.

DRTx filed an Application for Removal of Rose's guardianship in June 2021 as an interested party, pointing out that her lapsed guardians had been absent from Texas for almost thirty years (and had not seen Rose once during this time), had failed to comply with provisions of the Estates Code requiring them to file annual accounts and reports with the court to inform the court of Rose's status and well-being, had a long history of failing to file these reports—filing only four annual reports in the last 27 years, and were failing to maintain Rose as liberally as her treating providers recommended. DRTx requested the court appoint its staff as attorneys ad litem for Rose and appoint an eligible successor guardian. The court refused to set a hearing on DRTx's Application and reappointed Rose's parents as her guardian in July 2021 without even holding a hearing, despite the court receiving DRTx's documentation of serious and ongoing concerns about the guardians' violating their duties and Rose's right to live in the least restrictive environment. As a result of the continuation of her parents' guardianship over her, Rose was denied due process and denied the opportunity to live in a less restrictive, more appropriate, home suited to her needs.

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<sup>68</sup> See Michels, *Who Guards the Guardians?* *supra* note 64.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

Restoration rarely happens, whether the request originated by written application or an informal letter. In 2019 the Guardianship Compliance Project team made 21 recommendations for restoration, yet only eight persons under guardianship had their rights reinstated by the court.<sup>72</sup> The review of guardianships in Texas is inadequate at the absolute minimum, restricting the information available to properly monitor guardianships. The Texas Estates Code does not guarantee an actual review and therefore is an ineffective safeguard to oversee guardianships and their continued need. The alternative, an informal letter to the court works in theory alone due to the numerous informal barriers faced by individuals in transmitting their request, and the failure of courts to respond to such informal letters.

While Texas has made tremendous efforts to improve the statutes related to guardianship, recommendations follow to address the two highlighted issues discussed in this report.

## Recommendations

Though the current system is failing many individuals under guardianship and denying them due process, there are ways to ameliorate the problems and protect these persons' rights.

### People in Guardianships Must Be Able to Hire Their Own Attorney

The only way to ensure that a person gets to exercise their constitutional due process right is to ensure that they are able to hire their own attorney.<sup>73</sup> As noted by the National Council on Disabilities, “[l]egal representation should be seen as necessary in all guardianship proceedings—even under the most benevolent and caring circumstances—because guardianship represents a deprivation of liberty, which implicates due process.”<sup>74</sup> Moreover, the person in a guardianship has an ongoing right to due process despite being found incapacitated, and therefore must be able to hire an attorney to exercise their right even if they have previously been found to lack capacity to contract or hire professionals.<sup>75</sup>

### Statutes Must Clearly State That a Person Can Hire Their Own Attorney

To ensure a person's right to an attorney is meaningfully protected and effectively implemented, all statutes must explicitly be read in accord with section 1202.103 of the Texas Estates Code, which unambiguously authorizes an individual in a guardianship the right to hire an attorney to contest a proposed guardianship or to seek full or partial restoration.<sup>76</sup> If the individual does not retain their own attorney, then the court must still appoint a competent attorney ad litem to explicitly represent the

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<sup>72</sup> See Office of Court Administration, *Texas Guardianship Reform: Protecting the Elderly and Incapacitated, Enhancing Protections by Implementing the Guardianship Abuse, Fraud and Exploitation Deterrence Program* at 4 (2019) available at [txcourts.gov](http://txcourts.gov).

<sup>73</sup> See Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 598. “[E]ven those subject to the most drastic plenary guardianships retain certain legal rights guaranteed to them under the Federal Constitution. These retained rights include the right to both procedural and substantive due process under the law as guaranteed by Section 1 of the Fourteenth Amendment, which provides that no state shall ‘deprive any person of life, liberty, or property, without due process of law.’” *Id.*

<sup>74</sup> National Council on Disabilities, *Beyond Guardianship*, *supra* note 12 at 33.

<sup>75</sup> See Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 590-91.

<sup>76</sup> See TEX. ESTATES CODE § 1202.103(a).

individual's *expressed* wishes.<sup>77</sup> This opportunity to hire one's own attorney must be without regard to whether the person has retained or lost their capacity to contract.

It is nationally accepted that people in guardianships should have choices in their legal representation when attempting to restore their rights. For example,

- The 4<sup>th</sup> National Guardianship Summit recommended that in a restoration proceeding, an individual must have "a qualified . . . lawyer *of their own choosing*;"<sup>78</sup>
- The ABA in a 2017 Report "recommended that because of the significant liberty interests at stake, state statutes should provide individuals subject to guardianship with an explicit right to counsel *of the person's choosing* in restoration proceedings;"<sup>79</sup> and
- The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPPA) says "[a]n 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."<sup>80</sup>

Texas courts have also supported the right of an individual contesting a guardianship, explaining that when a person's liberty interests are at stake, as they are in a guardianship, an individual must be allowed to hire their own attorney to defend those rights.<sup>81</sup> This right exists even when the court-appointed attorney is performing adequately.<sup>82</sup> Even in circumstances where a court ultimately finds an individual lacks all or some capacity, it is still beneficial for that person to be able to choose their own counsel, because a court can only make an informed determination "where the interests of the proposed ward are vigorously represented."<sup>83</sup>

## Attorneys are Required to Represent Their Client's Expressed Wishes

Whether appointed or hired, the person's attorney must be an attorney for that person. They cannot be an attorney for the court or guardian's interests, nor can they have any less access to the tools necessary to defend their clients than any other attorney or any other party.

State statutes need to clearly direct lawyers, whether hired or court-appointed attorneys ad litem, to represent the client's expressed wishes in all guardianship proceedings and must explicitly disclaim the attorney's consideration of "best interest," leaving this solely to the purview of a guardian ad litem. Statutes must also explicitly allow an attorney hired by the individual in a guardianship to access the same records that a court-appointed attorney ad litem can access; to get evaluations from experts of the client's and attorney's choosing; and to access their client without having to get an adversarial

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<sup>77</sup> See UGCOPPA, *supra* note 1 at § 319(g). "If the adult is not represented by an attorney, the court shall appoint an attorney." *Id.*

<sup>78</sup> Fourth National Guardianship Summit, *Maximizing Autonomy*, *supra* note 9 at Recommendation 1.3 (emphasis added).

<sup>79</sup> Wood et al., *Restoration of Rights in Adult Guardianship*, *supra* note 9 at 13 (emphasis added).

<sup>80</sup> UGCOPPA, *supra* note 1 at § 319(g) (emphasis added).

<sup>81</sup> See *in re Kelm*, 569 S.W.3d 232, 241 (Tex. App.—Houston [1st Dist.] Nov. 20, 2018, no pet.).

<sup>82</sup> See *id.*; see also Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 604-05 (stating "[s]ome might argue that these due process rights could be adequately protected by providing for a guardian or court to hire an attorney for the person subject to guardianship. However, such provision would render the right to counsel hollow").

<sup>83</sup> *Oldham v. Calderon*, No. 14-95-01426-CV, 1998 WL 104819, at \*3 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998, pet. denied) (not designated for publication).

guardian's consent or approval from the court. The individual's constitutional right to due process and the attorney's professional ethical obligation to their clients demand no less.

As we outlined earlier, some courts and attorneys erroneously presume that an individual in a guardianship cannot hire an attorney or direct their legal counsel if the person has been adjudicated to lack the capacity to contract, or even to specifically hire attorneys. But as was also discussed earlier, guardianships threaten a person's liberty interests, and just because a person is subject to one does not mean they lose their right to due process. In 2017, the ABA's Roundtable on Restoration of Rights "supported and endorsed the concepts that constitutional due process protections provide a right to representation for persons subject to guardianship in challenging the guardianship and seeking restoration of rights, and that contract law should not present barriers to such representation."<sup>84</sup>

The Texas Disciplinary Rules of Professional Conduct also direct attorneys to abide by their client's decisions concerning the objectives and general methods of their representation even if the client exhibits signs of "diminished capacity."<sup>85</sup> In a guardianship proceeding, because the court has already appointed a guardian ad litem, many of the directions in the text and comments for Rule 1.16 concerning taking protective action can be dispensed with, leaving the direction for the attorney ad litem to maintain the normal attorney-client relationship as much as possible, to advocate for expressed interests, and to "be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction."<sup>86</sup> This last direction is particularly relevant to attorneys representing individuals who are contesting a guardianship or requesting restoration, since the Texas Estates Code directs all parties, but specifically attorneys representing individuals, to evaluate "whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian," and if a guardian may be necessary, "the specific powers or duties of the guardian that should be limited if the [individual] receives supports and services" to maintain the individual in the least restrictive manner possible.<sup>87</sup> In other words, when an individual hires an attorney for a termination or modification proceeding, the attorney must represent their client's goals of attaining the least restrictive alternative. Similarly, pursuant to this provision, appointed attorneys ad litem must also advocate for the least restrictions possible, even when their client cannot explicitly direct them.

Ensuring the client's right to effective, zealous counsel is also the safest option for the individual since a "lack of due process guarantees may expose the individual whose capacity is at stake to several possible forms of abuse."<sup>88</sup> Because, "[r]elative to other types of agreements that persons subject to guardianship might attempt to enter into, an attorney-client arrangement is relatively lower risk because there are already a wide range of safeguards to protect clients from exploitative or unfair contracts with attorneys."<sup>89</sup> For example, the Estates Code allows a court to approve compensation for a hired attorney out of the individual's estate "only if the court finds that the attorney had a good faith

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<sup>84</sup> Wood et al., *Restoration of Rights in Adult Guardianship*, *supra* note 9 at 47-48.

<sup>85</sup> See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 & 1.16 available at [texasbar.com](http://texasbar.com).

<sup>86</sup> *Id.* at 1.16.

<sup>87</sup> TEX. ESTATES CODE § 1054.004(a)(4) & (c)(2).

<sup>88</sup> Michael L. Perlin, "Striking for the Guardians and Protectors of the Mind": *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117:4 PENN. ST. L. REV. 1159, 1168 (2013) (quoting U.N. Secretary-General, *Progress of Efforts to Ensure the Full Recognition and Enjoyment of the Human Rights of Persons with Disabilities*, ¶ 15, U.N. Doc. A/58/181 (July 24, 2003)) available at [www.pennstatelawreview.org](http://www.pennstatelawreview.org).

<sup>89</sup> Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 597.

belief that the [individual] had the capacity necessary to retain the attorney's services."<sup>90</sup> Texas Disciplinary Rules of Professional Conduct also bar attorneys from bringing frivolous suits,<sup>91</sup> or charging "unconscionable" fees.<sup>92</sup>

Therefore, "attorneys legally may, and ethically should adopt an expressed interest . . . model of representation when representing persons subject to guardianship who seek or challenge the existence, terms, or conditions of their guardianship, or who seek legal advice about their rights in this regard."<sup>93</sup>

## People Need Meaningful Review of and Input in Their Guardianships

### Annual Reviews Must Meaningfully Evaluate How to Maximize Autonomy

The Texas Estates Code explicitly states that the policy and purpose of creating guardianships in the least restrictive manner possible is to "encourage the development or maintenance of maximum self-reliance and independence" of the individual in the guardianship.<sup>94</sup> Annual reviews by the court are an extension of this purpose to evaluate the effectiveness and continued need of guardianship. However, we know from state audits and DRTx casework that guardianships are not always being reviewed thoroughly or at all.

The first step towards an effective, meaningful review is to ensure courts are monitoring for the timely filing of the guardian's annual reports. If the reports are not timely filed, this must prompt the court to evaluate the appropriateness of the appointed guardian, and evaluate whether a guardianship is even necessary for the individual subject to it.

The second step is ensuring thorough rather than cursory reviews of the submitted reports. These analyses would provide the court with necessary information that it needs to determine whether the guardian is appropriately managing the individual's affairs, or whether the guardianship is needed at all. A study by the ABA revealed that "[t]wo of [their] 13 project case profiles showed examples in which the individual's functioning improved significantly and a scheduled court review resulted in restoration."<sup>95</sup> Closing of unnecessary guardianships and catching issues early would also alleviate courts' burdens, leaving more resources for cases where guardianships continue to be necessary.

Third, the Estates Code should require courts to regularly review information collected by a court investigator or guardian ad litem and document the review. At this time, reports by an investigator or guardian ad litem are discretionary. However, a third party's opinion would help provide the court with more accurate information than a guardian's report alone who may be ill equipped or disinclined to complete a thorough report.

The fourth step to ensuring an effective and meaningful review is for the Estates Code to require annual reports to include information concerning the effectiveness of supports and services available to the individual that may alleviate the need for continued guardianship. The Fourth National Guardianship

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<sup>90</sup> TEX. ESTATES CODE § 1202.103(b).

<sup>91</sup> See TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01.

<sup>92</sup> *Id.* at 1.04.

<sup>93</sup> Kohn, *Lawyers for Legal Ghosts*, *supra* note 7 at 630.

<sup>94</sup> TEX. ESTATES CODE § 1001.001(b).

<sup>95</sup> Wood et al., *Restoration of Rights in Adult Guardianship*, *supra* note 9 at 10-11.



Summit recommended that “[c]ourts institute procedures for periodic review of the need to continue guardianship, which includes an affirmative determination that supported decision-making and other less restrictive alternatives are not feasible.”<sup>96</sup>

## Individuals Must Have Meaningful Input Into Their Lives and Guardianships

The general population has a misconception that all or most individuals subject to guardianships are severely limited in their ability to comprehend the world around them. However, this misconception is another example of the implicit biases that affect people’s understanding of guardianships. In the vast majority of guardianships, the person is able to or has at one point in their life been able to express their likes and dislikes, even if they are not currently able to reason through an issue and come to an informed decision. But once placed in a guardianship, the person is not allowed input into their annual exam, is many times prohibited from attending any hearings, and is at times ignored by the court when they try to directly contact it. Guardianship effectively silences the person and often prohibits them from having any control or input into their daily life, much less any life-altering decisions.

For these reasons, courts must always solicit the input of the individual during the annual review and must not ignore or disregard the requests and concerns of individuals in guardianship or interested third parties who contact the court with concerns. The Estates Code can require the court investigator or guardian ad litem to solicit a statement from the individual when they are completing their periodic review for the court. The Fourth National Guardianship Summit recommended courts to conduct a “meaningful, periodic review . . . inclusive of the perspective of the adult whose rights were restricted, of whether it is necessary to continue to restrict the adult’s rights.”<sup>97</sup>

These reviews would also be an opportune time for the court or its officers to present and review the individual’s Bill of Rights to the individual. Though the Estates Code directs guardians to deliver the information to the individual annually, DRTx is skeptical of the consistency with which this provision is followed considering the number of times both private and professional guardians have expressed their displeasure at having to then address the individual’s requests once the individual has learned more about their rights.

## Conclusion

Guardianships are one of the severest deprivations of an individual’s liberty, even when all parties involved are well-intentioned. Because of the extreme nature of a guardianship’s intervention, it is imperative then that the individual who is in a guardianship or who is being considered for a guardianship be able to participate in the process and defend their rights, as due process dictates. The most effective way to do this is to ensure an individual, whether already found incapacitated or not, has access to the tools they need in order to hire a competent attorney who will zealously advocate for what the individual wants. Likewise, an individual at any point in a guardianship must be able to participate in their guardianship, which becomes their entire life. They must be able to have a voice during their hearings and annual reviews, whether in person or remotely, and must also be able to expect their court to comply with Texas statutes by investigating their guardianship when the individual requests restoration, modification, or raises other concerns with the guardian. People in guardianships must still be able to protect themselves and their rights even when they are in guardianships.

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<sup>96</sup> Fourth National Guardianship Summit, *Maximizing Autonomy*, *supra* note 9 at Recommendation 2.3.

<sup>97</sup> *Id.* at Recommendation 1.3.

